IX. August 1992 Draft - Revised Uniform Partnership Act (RUPA).

A. Edited transcript of the final reading of the March 3, 1992 draft of RUPA by NCCUSL at its meeting in San Francisco, California, July 31-August 6, 1992. Topics addressed by the Commissioners and pages where the discussions are found are as follows:

<table>
<thead>
<tr>
<th>Topics</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statement of the Review Committee</td>
<td>1</td>
</tr>
<tr>
<td>Discussion of policy issue statement – five basic decisions: (i)</td>
<td>1-7</td>
</tr>
<tr>
<td>Section 103 (a) RUPA gives default provisions, except for mandatory rules</td>
<td>2</td>
</tr>
<tr>
<td>(ii) entity theory of partnership</td>
<td>2-3</td>
</tr>
<tr>
<td>(iii) statement of partnership authority</td>
<td>3-4</td>
</tr>
<tr>
<td>(iv) expanded treatment of fiduciary duty of partners</td>
<td>4-5</td>
</tr>
<tr>
<td>(v) revised rules for partnership breakups</td>
<td>5-7</td>
</tr>
<tr>
<td>Note possible need for conversion and merger of partnerships</td>
<td>7</td>
</tr>
<tr>
<td>SECTION 101 DEFINITIONS - question whether “debtor in possession” versus limited to Chapter 11 phrasing about distributions to partner qua partner, whether dissociation is triggered by Chapter 11 or Chapter 13 filings of a partner LLC’s as “persons”</td>
<td>7-16</td>
</tr>
<tr>
<td>SECTION 102 KNOWLEDGE AND NOTICE - whether filing of a statement of partnership authority gives constructive notice, clarification of which partner has knowledge</td>
<td>16-23</td>
</tr>
<tr>
<td>SECTION 103 EFFECT OF PARTNERSHIP AGREEMENT; NONWAIVERABLE PROVISIONS – what “in writing” means for notice of withdrawal; partnership agreement implied in fact, ability to alter consequences of withdrawal</td>
<td>23-28</td>
</tr>
<tr>
<td>SECTION 104 SUPPLEMENTAL PRINCIPALS OF LAW</td>
<td>28</td>
</tr>
<tr>
<td>SECTION 105 EXECUTOR, FILING AND RECORDING STATEMENTS, including amendment and statement of denial; filing fees; need for certified copy to those named in previously filed documents; effect of failure to send copy; need for two partner signing;</td>
<td>28-35</td>
</tr>
<tr>
<td>SECTION 106 LAW GOVERNING INTERNAL AFFAIRS</td>
<td>35</td>
</tr>
<tr>
<td>SECTION 107 PARTNERSHIP SUBJECT TO AMENDMENT OR REPEAL</td>
<td>35-36</td>
</tr>
<tr>
<td>SECTION 201 PARTNERSHIP AS ENTITY, explanation of decision; effect on existing partnership</td>
<td>36-40</td>
</tr>
<tr>
<td>SECTION 202 CREATION OF PARTNERSHIP, including non-statutory associations; gross returns review profits</td>
<td>40-45</td>
</tr>
<tr>
<td>SECTION 203 PARTNERSHIP PROPERTY – scope of rebuttable presumptions; whether use of term partner vests title in the partnership</td>
<td>45-49</td>
</tr>
<tr>
<td>Section</td>
<td>Description</td>
</tr>
<tr>
<td>---------</td>
<td>-------------</td>
</tr>
<tr>
<td>301</td>
<td>Partner as Agent – actual versus inquiry notice; actual authority trumps apparent authority; ratification of authority</td>
</tr>
<tr>
<td>302</td>
<td>Transfer of Partnership Property – writing versus document or instrument</td>
</tr>
<tr>
<td>303</td>
<td>Statement of Authority – whether limitations on authority in the statement cause a limitation even without notice; duration of partnership authority; effect of filed statement on personal property; filed statement on personal property; filed versus executed and effectiveness of incomplete statement; impact of ancient records act; filed statements of real estate authority as constructive notice; impact of subsequent statements and of cancelling a statement</td>
</tr>
<tr>
<td>304</td>
<td>Statement of Denial – ability of agent to maintain a list of partners</td>
</tr>
<tr>
<td>305</td>
<td>Partnership Liable for Partner’s Actionable Conduct</td>
</tr>
<tr>
<td>306</td>
<td>Partnership Liability - jointly and severally</td>
</tr>
<tr>
<td>307</td>
<td>Action against Partnership and Partners – diversity of citizenship even with partnership as entity</td>
</tr>
<tr>
<td>308</td>
<td>Purported Partner – “words or conduct” versus “spoken or written”; ratified action; persons who give credit versus persons who transact business generally with the partnership; source of representation of partner status</td>
</tr>
<tr>
<td>309</td>
<td>Liability of Incoming Partner - liability for preadmission debt limited to partnership property</td>
</tr>
<tr>
<td>401</td>
<td>Partnership Rights and Duties</td>
</tr>
<tr>
<td>402</td>
<td>Distributions in Kind</td>
</tr>
<tr>
<td>403</td>
<td>Partner’s Right to Information – ability to waive rights as to former partners, potential partner can bargain for right to inspect</td>
</tr>
<tr>
<td>404</td>
<td>Standards for Partner Conduct – whether good faith is fiduciary duty versus contractual duty and whether the duty of loyalty includes fair dealing; ability of former partner to compete with the partnership; no duty of ordinary care; “informed” consent; ordinary negligence versus willful misconduct; scope of duty of loyalty</td>
</tr>
</tbody>
</table>

**Fifth Session – Saturday, August 1, 1992**

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>404</td>
<td>“Standards of Partner Conduct” – Additional Session</td>
<td>134-136</td>
</tr>
<tr>
<td>405</td>
<td>Partner’s Liability to Partnership – discussions of impact of ability to waive Sections 405 and 406 by</td>
<td>136-142</td>
</tr>
</tbody>
</table>
agreement on purported non-waivable affect of Section 404 and also under Section 103; discussion of whether Section 103 is a mistake; discussion of whether a partner’s wrongful conduct against a third party could give rise to that partner’s liability to the partnership if the third party sues the partnership, leading to revised language of Section 405

SECTION 406 REMEDIES OF PARTNERSHIP AND PARTNERS – accept parallel revised text akin to Section 405; use of phrase “and any time limitation on” might be read as not including laches, which is defense to accounting and other equitable matters; a clarifying comment will be added; it was noted that derivative suits or class action are governed by other law, not Section 406

SECTION 407 CONTINUATION OF PARTNERSHIP BEYOND DEFINITE TERM ON PARTICULAR UNDERTAKING - question raised as to meaning of “prima facie evidence” in Section 407

SECTION 501 PARTNER’S INTEREST IN PARTNERSHIP NOT TRANSFERABLE

SECTION 502 TRANSFER OF PARTNER’S TRANSFERRABLE INTEREST IN PARTNERSHIP

SECTION 503 TRANSFER OF PARTNER’S TRANSFERRABLE INTEREST – change “has” to “retains” in subsection (b) to clarify rights do not arise out of transfer; discuss comment allowing barring pledging of partnership interests by provision in partnership agreement as the default rule and affect on third party lender.

SECTION 504 PARTNER’S TRANSFERRABLE INTEREST SUBJECT TO CHANGING ORDER – Section is not intended to preclude pre-judgment attachment; discuss implied priority of claims, a clarifying comment will be added; discussions regarding exclusivity of changing order remedy

SECTION 601 EVENTS CAUSING PARTNER’S DISSOCIATION – Discuss whether loss of qualification to do business in jurisdiction by foreign corporations should be basis for dissociation; discuss ability to impose 30 day advance notice of withdrawal in partnership agreement and whether that provision could be enforced; discuss dissociation due to bankruptcy provision where Bankruptcy Code trumps state law; motion to require that provision to be in the partnership agreement to be effective defeated; discuss whether arbitration award (not judicial decree) can cause dissociation, Reporter argues award is within (or confirmed by) “judicial decree”, agreement to define judicial decree” to include arbitration and address finality of judgment
| SECTION 602 PARTNER’S WRONGFUL DISSOCIATION - | 178-186 |
| Question if dissociation which is wrongful under the Act, but not under partnership agreement (including the absence of a written agreement); “dissociation” not “disassociation”, decide section needs clarifying revisions; partner’s acts cause other partners unanimity to expel him under Section 601 are not “wrongful dissociation” under Section 603 but still may give rise to liability for misconduct; |
| SECTION 603 EFFECT OF PARTNER’S DISSOCIATION - | 186 |
| discuss consequences if partner dissociates due to bankruptcy and trustee becomes economic interest holder, including any partnership agreement provision giving the remaining partners the ability to acquire the interest at a bargain price. |
| SECTION 701 PURCHASE OF DISSOCIATED PARTNER’S INTEREST – | 192-211 |
| discuss “statement of partnership assets” as less formal than a balance sheet; discuss that good faith relates to the buyout price and not to expulsion; discuss ability to transfer interest in professional partnership (e.g. law firm) to a layman; discuss obligation to pay accrued interest on amounts due; motion to make “obligation” in Section 701 and “liability” in Section 309 the same word, drafting Committee to consider; discuss the effect of netting the buy out price against amounts owing from the dissociated partner when considering obligations to a third party and that such computations would not be undone by the indemnification provision in Section 701(d); question concerning possible application of Section 103 (non-waviable provisions) and common law on unconscionability and good faith and fair dealing on partnership agreement buyout formula provision, noting that Section 104 would bring in the supplemental principals, consider express mention in comment; questions raising investor protection concerns such as different standards for promoter, look to Section 104 supplemental principals and other law such as Federal and State securities law; discuss indemnification for dissociated partner for post-dissociation claim based on pre-dissociation occurrence; the indemnification would not apply if the claim was unknown at dissociation; question regarding buyout obligation when a partner is rightfully expelled |
| SECTION 702 – DISSOCIATED PARTNER’S POWER TO BIND PARTNERSHIP | 211-212 |
| SECTION 703 – DISSOCIATED PARTNER’S LIABILITY TO OTHER PARTNERS – | 212-215 |
| discuss ability to recover against dissociated partner who binds partnership post-dissociation; clarification of who is not affected if he does not have notice of dissociation; note that partnership agreement may not lessen (but may increase) the ability of a dissociating partner. |
| SECTION 704 – STATEMENT OF DISSOCIATION – note that | 215-222 |
the third parties deemed to have notice of dissociation 90 days after filing Statement of Dissociation; address effect of filing Statement on lenders who have made loan especially revolving commitments and agree to add clarification in the comment to this Section, the statement of dissociation is a limitation on partnership authority to transfer real property and, if recorded, is effective to give notice; discuss difference between filing and recording:

| SECTION 705 CONTINUED USE OF PARTNERSHIP NAME | 223 |
| ARTICLE 8 Overview – Continuation of Partnership Not Dissolution is the preferred policy while interests of partners are also protected (as with the buyout provisions) and allowing individual partners the right to force winding-up of the partnership after a “cooling off” period of 90 days. | 223-226 |

| SECTION 801 EVENTS CAUSING DISSOLUTION AND WINDING UP OF PARTNERSHIP BUSINESS – note prior comment regarding judicial decree in Section 601 also applicable here; | 226-228 |

| SECTION 802 DISSOLUTION DEFERRED 90 DAYS – discussion of difference between Section 801(1), right of partner to give notice of desire to liquidate in a partnership at will, and Section 801(2)(i) which allows other partners 90 days to try dissuade him; strong criticism of 90 day waiting period as not effective (citing Vermont marriage law); motion to strike Section 802, the drafting committee notes a partner can choose to dissociate immediately or demand the dissolution of the partnership where he may be required to want 90 days and that Section 802 may be overcome by a partnership agreement, concern expressed about effect of the duty of loyalty under Section 404 during 90 day period, also concern about possible loan default if partner demands dissolution; motion defeated, discussion of non-participation for withdrawing partner during winding up; note 90 days (as opposed to different time periods) id policy decisions; effect of withdrawal notice – dissociation or demand for dissolution; retroactive effect of RUPA on existing partnership | 229-258; 262-265; 269-270; and 450-545 |

| SECTION 803 PARTNERSHIP CONTINUES AFTER DISSOLUTION | 258 |

| SECTION 804 RIGHT TO WIND UP PARTNERSHIP BUSINESS – dissociated partner, even if wrongful, may petition court for judicial supervision of winding up, comment will so state; suggest language clarification regarding last “surviving” partner, concern that Section 802 contemplates partnership survival even though one partner of two person partnership withdraws so no need for 90 day delay; request for clarification that it is half others partners not interest, agree to amend Section 802(a) to apply to a partnership of more than two persons subsequent motion to add a new subsection insulating the partner | 258-262 |
giving notice of withdrawal from liability to third parties in tort during 90 day period; issue to rejoined when Section is again before NCCUSL;

| SECTION 805 PARTNERS POWER TO BIND PARTNERSHIP AFTER DISSOLUTION | 265 |
| SECTION 806 STATEMENT OF DISSOLUTION – discuss right of not wrongfully dissociated partner to file Statement of Dissolution and note need to include that in Section 603 Effects of Partner’s Dissociation, also change language regarding Section 303 akin to Section 704 so Statement of Dissolution is a limitation on authority | 265-268 |
| SECTION 807 PARTNER’S LIABILITY TO OTHER PARTNER’S AFTER DISSOLUTION | 268 |
| SECTION 808 SETTLEMENT OF ACCOUNTS AMONG PARTNERS – agree that comment that court could exercise equity power to subordinate partner claims to creditor claims; explain decision not to have priority claim provision (e.g. taxes, secured, etc.); discuss timing of account valuations, on withdrawal or at end of 90 days; | 270-276 |
| SECTION 901 CONVERSION OF PARTNERSHIP TO LIMITED PARTNERSHIP – question regarding providing for inter entity mergers, citing Delaware and Mississippi which allow them, drafting committee note reluctance to address all the consequences and the need to amend other entity organic statute; discuss whether can designate other jurisdiction law to govern internal affairs and whether there needs to be a reasonable relationship; discuss whether conversion from general partnership to limited partnership will trigger a transfer tax; | 276-284 |
| SECTION 902 CONVERSION OF LIMITED PARTNERSHIP TO PARTNERSHIP – discuss phrase “obligation incurred” in subsection (e) and the timing of liability exposure for a limited partner to a general partner | 284-287 |
| SECTION 903 EFFECT OF CONVERSION ; ENTITY UNCHANGED | 288 |
| SECTION 904 MERGER OF PARTNERSHIPS – discuss whether a partnership or limited partnership organized under the law of a jurisdiction without RUPA can merge under the RUPA provisions, so intended by the drafting committee; drafting committee concurs with need for a comment warning need to dissolve disappearing partnership or limited partnership and to use land transfer documentation; discuss time of effectiveness when approved by all parties and agreed to clarifying word change; | 288-293 |
| SECTION 905 EFFECT OF MERGER | 293-295 |
| SECTION 906 STATEMENT OF MERGER | 296-297 |
| SECTION 907 NONEXCLUSIVE | 297 |
| ARTICLE 10, only Section 1006 to be read | 297 |
SECTION 1006 APPLICATION TO EXISTING PARTNERSHIP
– discuss constitutional issue of RUPA affecting existing
partnership agreements; drafting committee to consider RUPA
only applies to contracts entered into after the effective date of
RUPA; discuss language changes; “does not” to “shall not” and
need to address whether a common law partnership is “formed”,
drafting committee to review whether phrase “impair the
obligation of contract” is needed given Federal and State
constitutional protections; request for comments explaining need
for retroactivity of RUPA, noting that in the Uniform Common
Interest Ownership Act there is an opt-in provision for existing
condominiums;

Monday, August 3, 1992
Ninth Session RUPA

Introduction of Committee, reporters and advisors - 307-309
Explanation of process – inform meeting of changes non-changes
article by article; thanks for secretarial support;

SECTION 101 - revise reference to federal or state law insolvency
proceedings; no change to definition of partnership agreement but
comment to note impact of course dealing or performance;
comment to clarify “judicial decree” includes arbitration and
whether judgment has to be final (a state law matter), “person”
includes LLC’s per comment; “writing” per comment will include
new technologies; move to change “in” to “on account of” to
clarify distribution to partner is personally not as agent for
partnership, defected

SECTION 102 – revised to “one who received the notice”, did not
change anything regarding filed statement as constructive notice,
that clarification is in Section 303(f)

SECTION 103 – new language added regarding excluding
fiduciary duties from the partnership agreement by clarifying non-
waivable duties, see full impact in Section 404; discuss adding to
non-waivable liability for gross negligence or recklessness,
reporter suggest non-waivable include liability of a partner under
Section 404(d), propose delay vote on that until reach 404;

SECTION 105 – expand what may be recorded to what other use
is permitted,

ARTICLE 2, SECTION 202 “predecessor statute” changed to
“predecessor statute” changed to “predecessor law” to pick up
common law; leave reference to “prima facie evidence”
unchanged; add new subsection (e) to clarify Section deals with
general partnerships and general partners; discussion that
predecessor law includes comparable law of other jurisdiction,
accepted as change
<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>301</td>
<td>Style change “all of” is struck</td>
</tr>
<tr>
<td>302</td>
<td>Delete “even”, but decide not to limit cross references to Section 303 to subsections (d) and (e) and decide not to so limit the reference; discuss whether property is “held in the name of the partnership” and Section 302 only apply if Partnership name not indicated.</td>
</tr>
<tr>
<td>303</td>
<td>Some clarifying revisions adopted, new subscription (f) added – a filing is not constructive notice except a statement of dissociation or a statement of dissolution, and the only to extent set out in Sections 704 and 806, <em>i.e.</em> only effective after 90 days; added in comment that “gives value” includes entering into binding commitment to give value; decide to leave 5 year effective period for statement of partnership authority to parallel UCC financing statements; add that a statement of partnership authority must included names and mailing addresses of all partners or of an agent appointed and maintained; confirm that a person with actual knowledge of a filed statement is bound by what her or she knows; discuss effect of willful ignorance; drafting committee says actual knowledge by or proof of actual delivery to a third party is required for effective notice (except dissociation and dissolution; the commitment will be expanded regarding actual knowledge; discuss whether comment about “gives value” includes binding commitment to give value, citing Oliver Cromwell; further discussion of constructive notice and adding clarifying text (white avoiding the term “constructive notice”).</td>
</tr>
<tr>
<td>304</td>
<td>Language change;</td>
</tr>
<tr>
<td>307</td>
<td>Language change in title and some text, and change to bankruptcy reference;</td>
</tr>
<tr>
<td>308</td>
<td>Comment will note writing includes new technology, “gives credit” changed to “enters into a transaction”; other style changes;</td>
</tr>
<tr>
<td>309</td>
<td>Decide not to rewrite liability of incoming partner, follow old UPA structure and case law</td>
</tr>
<tr>
<td>403</td>
<td>Dissociated partner, per comment, is a partner not a former partner for purposes of Section 403</td>
</tr>
</tbody>
</table>
| 404     | Note relation to Section 103 (waivable and not waivable duties), some language changed, “or appropriation” added; clarify that duty not to compete does not apply during winding up; change “not breaches” to not violate duty”; rewrite duty of care (there is no duty not to be negligent) and can waive gross negligence and recklessness, but not intentional misconduct or knowing violation of law; must exercise rights “fairly” and “in good faith”; motion to add positive duty of care *a la* Model Business Corporation Act; drafting committee note that MBCA formulation is in effect a gross negligence standard (first a prudent
man standard, but no liability unless it constitutes gross negligence or worse.) Also note problem of agency costs in corporation different in partnership where each partner has unlimited personal liability, discuss ordinary v gross negligence the optional default standard not the automatic default standard, noted that no state law imposes the business judgment rule on partnerships and few court cases, discussion of NCCUSL not necessarily following the ABA’s lead and clarifying comment that its an ABA committee not the Association’s position; motion defeated; discuss whether absence of affirmative duty of care inhibits power to expel partner for consistent negligence, drafting committee notes it in Section 601(5), revised motion defeated; additional motion to state expressly that a partner when becoming a partner assumes the risk of ordinary negligence; discuss whether under Section 103 the duty of care is waivable, at least to a willful misconduct standard as part of a deferred motion to amend Section 103 so that the duty of ordinary care is non-waivable, the motion is adopted 52 to 49; motion to amend Section 404 to state that it sets forth the duty of care unless a higher standard is agreed to, agree to make that clear in comments to Sections 103 and 404, motion withdrawn; discuss anti-compete provision and professional obligations during 90 period, clarity that a partner who dissociates is free to compete; discuss adding “fair dealing”, “fairness” or “fairly” to good faith; drafting committee note case law and Restatement of Contracts use “good faith and fair dealing”; motion to add limit on ability to adjust duty of loyalty so the limit not manifestly unreasonable is adopted; suggest revision to impose burden of proof of modification of duty of loyalty on person claiming modification, noting ability to modify “specific types or categories”, drafting committee oppose, proponed argue need for warning; motion defeated;

SECTION 405 – amendments respond to floor comment 411
SECTION 406 – some changes due to floor comments, decide not need to address issue of laches 411
SECTION 503 – a style change 411
SECTION 504 – drafting committee decide not to address priorities in charging orders 469
SECTION 601 – add comment that 30 day notice requirement is not a limit on the power to withdraw (failure to give notice may be a breach of the partnership agreement; 412
SECTION 602 – drafting committee note that partner who is treated wrongfully by other partners has remedies under Section 406, Section 602 does not cover that issue; discuss difference between Section 405 (partner liability to partnership for breach of partnership agreement or violation of duty) versus Section 602(b) liability for damages caused by wrongful dissociation 412-415
<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>603</td>
<td>Revisions to clarify what happens to partner’s duties after dissociation, duties of loyalty and care continue only regarding pre-dissociation matters and duty not to compete terminates;</td>
</tr>
<tr>
<td>702</td>
<td>Add punctuation and clarifying language regarding dissociated partner liability for exceeding authority after dissociation; discuss liability as indemnity (to emphasize that other partners do not share); agree to cross reference Section 303(e) as to when a person not a partner is deemed to have notice; will consider expanding comment to clarify that dissociated partner who exceeds authority indemnifies for any net loss (not gross loss); discuss whether indemnification covers additional costs (e.g., legal fees, court costs, etc.), drafting committee agree to change “shall indemnify” to “shall be liable to the partnership for any loss caused”;</td>
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<td>703</td>
<td>Changes respond to floor concerns regarding liability of dissociated partner after dissociation (contract only, not tort), and also will add cross reference to Section 303(e) regarding constructive notice akin to change agreed to in Section 702; discuss “obligation” in the case of tort liability, agree to clarify in comment that it is tort related;</td>
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<td>704</td>
<td>Style change</td>
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<tr>
<td>802</td>
<td>Agree it applies to partnerships of more than two partners and add clarifying language concerning dissociated partner during 90 day period, namely liability under Section 702(b) and 703(b), profits during 90 day period and losses only to extent of profits, discuss what “profits” are included and agree to revise draft; discuss indemnification of dissociated partner for new partnership liabilities, note that actual notice protects dissociated partner but concern regarding claims from third parties without actual notice (this does not affect obligations in connection with winding up), drafting committee revises the placement of “with respect to transactions during the period” to clarify that profits are from transaction during the 90 day post-dissociation period against which losses incurred during the period are netted, noting that a kind of quasi accrual accounting is involved with respect to pre-dissociation profits, further agree to drop the word, “transactions” and use “profits and losses incurred during the period”;</td>
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<tr>
<td>804</td>
<td>Style changes</td>
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<tr>
<td>806</td>
<td>Style changes</td>
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<tr>
<td>807</td>
<td>Style change and change “obligation” to “liability” consistent with changes to Section 702(b), discuss whether Section 802 and 90 day period applies to existing oral partnerships, unless they contract out with a written agreement; suggest if Section 802 is to require a mandatory opt in that issue be addressed in Section 1006, motion to require opt in is adopted;</td>
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</tbody>
</table>
SECTION 601 – Proposed revising language regarding expelling partner, drafting committee note it used the language from the UPA that “it is not reasonably practicable to carry on with that partner the partnership business”, motion to delete “with that partner” defeated; discussion on change from UPA right to cause dissolution by withdrawal to RUPA right to dissociate, with 90 day waiting period and special sections on liabilities and rights; drafting committee subcommittee to review Section 601 and 801; drafting committee report on resolving Section 601 expulsion and Section 801 dissociation by deleting “or to terminate the partnership” so that the two Sections parallel each other

SECTION 904 – Changes responsive to floor comments

SECTION 1006 – the floor has voted to make Section 802 subject to the mandatory opt in for preexisting partnerships; “law “ replaces “statute” to pick up common law; ; subsection (b) rewritten to change no impairment of contract to no impairment of obligations under a contract that predates RUPA, motion to restore original language, as in UPA, drafting committee accepts change

Tenth Session – RUPA
Tuesday, August 4, 1992

SECTION 103(B)(4) – move to reconsider Conference action in amending 103(b)(4) accepted; floor amendment barred limit on liability of partner under Section 404(d) for breach of duty care from gross negligence, recklessness, intentional misconduct or knowing violation of law, now to be revised to bar on unreasonably reducing the duty of care, supported by drafting committee (and agreement to revisit issue concerning RULPA)

Overview of language changes in response to Conference actions at the Ninth Session on Monday, August 3, 1992

1. August 1992 Draft with comments – RUPA

Announcement that the Uniform Law Commissioners approved the Revised Uniform Partnership Act at the 101st annual meeting.

They discussed the history of RUPA and some of the more significant changes in the revision. They distinguished the entity and aggregate theory and mentioned the rights of both a partner and the partnership.
4. September 12, 1992: August 1992 Draft without prefatory note and comments styled by the Committee on Style.


   An article which described and referred important aspects of the NCCUSL approved Revised Partnership Act.
FOR APPROVAL

UNIFORM PARTNERSHIP ACT (1992)

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM LAWS:

MEETING IN ITS ONE-HUNDRED-AND-FIRST YEAR
SAN FRANCISCO, CALIFORNIA
JULY 30 - AUGUST 6, 1992

UNIFORM PARTNERSHIP ACT (1992)
ARTICLE 1
GENERAL PROVISIONS

SECTION 101. DEFINITIONS. In this [Act]:

(1) "Business" includes every trade, occupation, and profession.

(2) "Debtor in bankruptcy" means a person who is the subject of:

   (i) an order for relief under Title 11 of the United States Code or a comparable order under a successor statute of general application; or
   
   (ii) a comparable order under federal or state law governing insolvency.

(3) "Distribution" means a transfer of cash or other property from a partnership to a partner in the partner's capacity as a partner, or to the partner's transferee.

(4) "Partnership agreement" means an agreement, written or oral, among the partners concerning the partnership.

(5) "Partnership at will" means a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking.
(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) "Property" means all property, real, personal, or mixed, tangible or intangible, or any interest therein.

(8) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

(9) "Statement" means a statement of partnership authority under Section 303, a statement of denial under Section 304, a statement of dissociation under Section 704, a statement of dissolution under Section 806, a statement of merger under Section 906, or an amendment or cancellation of any of the foregoing.

(10) "Transfer" includes an assignment, conveyance, lease, mortgage, deed, and encumbrance.

SECTION 102. KNOWLEDGE AND NOTICE.

(a) A person knows a fact if the person has knowledge of it.

(b) A person has notice of a fact if the person:

(1) knows of it;
(2) has received a notice of it; or
(3) has reason to know it exists from all of the facts known to that person at the time in question.

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

(d) A person is notified or receives a notice of a fact when:

(1) the existence of the fact comes to the person's attention; or

(2) the notice is duly delivered at the person's place of business or at any other place held out by the person as a place for receiving communications.

(e) Except as provided in subsection (f), notice received by a person who is not an individual, including a partnership, is effective for a particular transaction when the notice is brought to the attention of the individual conducting the transaction, or in any event when the notice would have been brought to that individual's attention if the person had exercised due diligence. Such a person 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 person 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.

(f) Receipt of notice by a partner of a matter relating to the partnership is effective immediately as notice to the partnership, but is not effective in the case of fraud on the partnership committed by or with the consent of the partner who received the notice.

SECTION 103. EFFECT OF PARTNERSHIP AGREEMENT; NONWAIVABLE PROVISIONS.

(a) Except as provided in subsection (b), a partnership agreement governs relations among the partners and between the partners and the partnership. To the extent the partnership agreement does not otherwise provide, this [Act] governs relations among the partners and between the partners and the partnership.

(b) A partnership agreement may not:

(1) vary the rights and duties under Section 105 except to eliminate the duty to provide copies of statements to all the partners;
(2) unreasonably restrict a partner's right of access to books and records under Section 403(b);
(3) eliminate the duty of loyalty under Section 404(b);
(4) unreasonably reduce the duty of care under Section 404(d);
(5) eliminate the obligation of good faith and fair dealing under Section 404(e);
(6) vary the power to withdraw as a partner under Section 601(1), except to require the notice to be in writing;
(7) vary the right to expulsion of a partner by a court in the events specified in Section 601(5);
(8) vary the requirement to wind up the partnership business in cases specified in Section 801(4), (5), or (6); or
(9) restrict rights of third parties under this [Act].

SECTION 104. SUPPLEMENTAL PRINCIPLES OF LAW.

(a) Unless displaced by particular provisions of this [Act], the principles of law and equity supplement this [Act].

(b) If an obligation to pay interest arises under this [Act] and the rate is not specified, the rate is that specified in [applicable statute].
SECTION 105. EXECUTION, FILING, AND RECORDING OF STATEMENTS.

(a) A statement may be filed in the office of [the Secretary of State]. A certified copy of a statement that is filed in an office in another state may be filed in the office of [the Secretary of State]. Either filing has the effect provided in this [Act] with respect to partnership property located in or transactions that occur in this State.

(b) A certified copy of a statement that has been filed in the office of the [Secretary of State] that is recorded in the office for recording transfers of real property shall have the effect provided for recorded statements in this [Act]. A recorded statement that is not a certified copy of a statement filed in the office of the [Secretary of State] shall not have the effect provided for recorded statements in this [Act].

(c) A statement filed by a partnership must be executed by at least two partners. Other statements must be executed by a partner or other person authorized by this [Act]. An individual who executes a statement as, or on behalf of, a partner or other person named as a partner in a statement must personally declare under penalty of perjury that the contents of the statement are accurate.
(d) A person authorized by this [Act] to file a statement may amend or cancel the statement by filing an amendment or cancellation that names the partnership, identifies the statement, and states the substance of the amendment or cancellation.

(e) A person who files a statement pursuant to this section shall promptly send a copy of the statement to every partner, and to any other person named as a partner in the statement. Failure to send a copy of a statement to a partner or other person does not limit the effectiveness of the statement as to a person not a partner.

(f) The [Secretary of State] may collect a fee for filing or providing a certified copy of a statement. The [officers responsible for] recording transfers of real property may collect a fee for recording a statement.

SECTION 106. LAW GOVERNING INTERNAL AFFAIRS. Laws of the state in which a partnership has its chief executive office govern the partnership's internal affairs.

SECTION 107. PARTNERSHIP SUBJECT TO AMENDMENT OR REPEAL OF [ACT]. A partnership governed by this [Act] is subject to any amendment or repeal of this [Act].
ARTICLE 2
NATURE OF PARTNERSHIP

SECTION 201. PARTNERSHIP AS ENTITY. A partnership is an entity.

SECTION 202. CREATION OF PARTNERSHIP.

(a) Except as provided in subsection (b), the association of two or more persons to carry on as co-owners a business for profit creates a partnership, whether or not the persons intend to create a partnership.

(b) An association created under a statute other than this [Act], any predecessor law, or comparable law of another jurisdiction is not a partnership.

(c) In determining whether a partnership is created, the following rules apply:

(1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

(2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.
(3) The receipt by a person of a share of the profits of a business is prima facie evidence that the person is a partner in the business, but that inference may not be drawn if the profits were received in payment:

(i) of a debt by installments or otherwise;
(ii) for services as an independent contractor, or of wages or other compensation to an employee;
(iii) of rent;
(iv) of an annuity or other retirement or health benefit to a beneficiary, representative, or designee of a deceased or retired partner;
(v) of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral; or
(vi) of consideration for the sale of the goodwill of a business or other property by installments or otherwise.

(d) Except as provided by Section 308, persons who are not partners as to each other are not partners as to other persons.
(e) A partnership created under this [Act] is a general partnership, and the partners are general partners of the partnership.

SECTION 203. PARTNERSHIP PROPERTY. Property transferred to or otherwise acquired by a partnership is property of the partnership and not of the partners individually.

SECTION 204. WHEN PROPERTY IS PARTNERSHIP PROPERTY.

(a) Property is partnership property if acquired:

(1) in the name of the partnership; or

(2) in the name of one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership, but without an indication of the name of the partnership.

(b) Property is acquired in the name of the partnership by a transfer to:

(1) the partnership in its name; or

(2) one or more partners in their capacity as partners in the partnership, if the name of the partnership is indicated in the instrument transferring title to the property.

(c) Property is presumed to be partnership property if purchased with partnership assets, even if
not acquired in the name of the partnership or of one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership.

(d) Property acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and without use of partnership assets, is presumed to be separate property, even if used for partnership purposes.
SECTION 301. PARTNER AGENT OF PARTNERSHIP. Subject to the effect of a statement of partnership authority pursuant to Section 303:

(1) Each partner is an agent of the partnership for the purpose of its business. Any act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the usual way the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner has no authority to act for the partnership in the particular matter and the person with whom the partner is dealing knows or has received a notice that the partner lacks authority.

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

SECTION 302. TRANSFER OF PARTNERSHIP PROPERTY.

(a) Subject to the effect of a statement of partnership authority pursuant to Section 303:
(1) Partnership property held in the name of the partnership may be transferred by an instrument of transfer executed by any partner in the partnership name.

(2) Partnership property held in the name of one or more partners with an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, but without an indication of the name of the partnership, may be transferred by an instrument of transfer executed by the persons in whose name the property is held.

(3) A partnership may recover property transferred under this subsection if it proves that execution of the instrument of transfer did not bind the partnership under Section 301, unless the property was transferred by the initial transferee or a person claiming through the initial transferee to a subsequent transferee who gave value without having notice that the person who executed the instrument of initial transfer lacked authority to bind the partnership.

(b) Partnership property held in the name of one or more persons other than the partnership, without an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, may be transferred free of
any claims of the partnership or the partners by the persons in whose name the property is held to a transferee who gives value without having notice that it is partnership property.

(c) If a person holds all of the partners' interests in the partnership, all of the partnership property vests in that person. That person may execute documents in the name of the partnership to evidence vesting of the property in that person and may file or record those documents.

SECTION 303. STATEMENT OF PARTNERSHIP AUTHORITY.

(a) A partnership may file a statement of partnership authority, which:

(1) must include:

(i) the name of the partnership;

(ii) the street address of its chief executive office and of an office in this State, if any;

(iii) the names and mailing addresses of all the partners or of an agent appointed and maintained by the partnership for the purpose of subsection (b); and

(iv) a statement specifying the names of the partners authorized to execute an instrument transferring real property held in the name of the partnership; and
(2) may include a statement of the authority, or of limitations on the authority, of some or all of the partners to enter into other transactions on behalf of the partnership and any other matter.

(b) If a statement of partnership authority names an agent, the agent shall maintain a list of the names and mailing addresses of all of the partners and make it available to any person on request for good cause shown.

(c) If a filed statement of partnership authority is executed pursuant to Section 105(c) and states the name of the partnership but does not contain all of the other information required by subsection (a), the statement nevertheless operates with respect to a person not a partner as provided in subsections (d) and (e).

(d) Except as provided in subsections (e), (f), and (g), a filed statement of partnership authority supplements the authority of a partner to enter into transactions on behalf of the partnership as follows:

1. Except for transfers of real property, a grant of authority contained in a filed statement of partnership authority is conclusive, in favor of a person who gives value without knowledge to the contrary, so long as and to the extent that a limitation on that authority is not then contained in another filed statement. A filed cancellation of a limitation on authority revives the previous grant of authority.
(2) A grant of authority to transfer real property held in the name of the partnership contained in a certified copy of a filed statement of partnership authority recorded in the office for recording transfers of that real property is conclusive, in favor of a person who gives value without knowledge to the contrary, so long as and to the extent that a certified copy of a filed statement containing a limitation on that authority is not then recorded in the office for recording transfers of that real property. The recording in the office for recording transfers of that real property of a certified copy of a filed cancellation of a limitation on authority revives the previous grant of authority.

(e) A person not a partner is deemed to know of a limitation on the authority of a partner to transfer real property held in the name of the partnership if a certified copy of the filed statement containing the limitation on authority is recorded in the office for recording transfers of that real property.

(f) Except as provided in subsection (e) and Sections 704 and 806, a person not a partner is not deemed to know of a limitation on the authority of a partner merely because the limitation is contained in a filed statement.
(g) Unless earlier cancelled, a filed statement of partnership authority is cancelled by operation of law five years after the date on which the statement, or the most recent amendment, was filed with the [Secretary of State].

SECTION 304. STATEMENT OF DENIAL. A partner or other person named as a partner in a filed statement of partnership authority or in a list maintained by an agent pursuant to Section 303(b) may file a statement of denial stating the name of the partnership and the fact that is being denied, which may include denial of a person's authority or status as a partner. A statement of denial is a limitation on authority to the extent provided in Section 303(d) and (e).

SECTION 305. PARTNERSHIP LIABLE FOR PARTNER'S ACTIONABLE CONDUCT.

(a) A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with the authority of the partnership.

(b) If, in the course of its business, a partnership receives money or property of a person not a
partner which is misapplied by a partner while it is in the custody of the partnership, the partnership is liable for the loss.

SECTION 306. PARTNER'S LIABILITY. All partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.

SECTION 307. ACTIONS BY AND AGAINST PARTNERSHIP AND PARTNERS.

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

(b) An action may be brought against the partnership and any or all of the partners in the same action or in separate actions.

(c) A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is a judgment against the partner.

(d) A judgment creditor of a partner may not levy execution against the assets of the partner to satisfy a judgment based on a claim against the partnership unless:

(1) a judgment based on the same claim has been obtained against the partnership and a writ of execution
on the judgment has been returned unsatisfied in whole or in part;

(2) an involuntary case under Title 11 of the United States Code has been commenced against the partnership and has not been dismissed within 60 days after commencement, or the partnership has commenced a voluntary case under Title 11 of the United States Code and the case has not been dismissed;

(3) the partner has agreed that the creditor need not exhaust partnership assets;

(4) a court grants permission to the judgment creditor to levy execution against the assets of a partner based on a finding that partnership assets subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of partnership assets is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's equitable powers; or

(5) liability is imposed on the partner by law or contract independent of the existence of the partnership.

(e) This section applies to any partnership liability or obligation resulting from a representation by a partner or purported partner under Section 308(a) or (b).
SECTION 308. PURPORTED PARTNER.

(a) If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, the purported partner is liable to a person to whom the representation is made and who, relying on the representation, enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported partner's consent, is made in a public manner, the purported partner is liable to a person who relies upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable as if the purported partner were a partner. If no partnership liability results, the purported partner is liable jointly and severally with any other person consenting to the representation.

(b) If a person is thus represented to be a partner in an existing partnership, or with one or more persons not partners, the purported partner is an agent of persons consenting to the representation to bind them to the same extent and in the same manner as if the purported partner were a partner, with respect to persons who enter into transactions in reliance upon the
representation. If all the partners of the existing partnership consent to the representation, a partnership act or obligation results. If fewer than all the partners of the existing partnership consent to the representation, the person acting and the partners consenting to the representation are jointly and severally liable.

(c) A person is not a partner in a partnership solely because the person is named by another in a statement of partnership authority.

(d) A person does not continue to be a partner solely because of a failure to file a statement of dissociation or to amend a statement of partnership authority to indicate the partner's dissociation from the partnership.

SECTION 309. LIABILITY OF INCOMING PARTNER. A person admitted as a partner into a partnership is liable for all obligations of the partnership arising before the person's admission as if the person had been a partner when the obligations were incurred, but this liability may be satisfied only out of partnership property.
ARTICLE 4

RELATIONS OF PARTNERS TO EACH OTHER AND TO PARTNERSHIP

SECTION 401. PARTNER'S RIGHTS AND DUTIES.

(a) A partnership shall establish an account for each partner which must be credited with an amount equal to the cash plus the value of any other property, net of the amount of any liabilities, the partner contributes to the partnership and the partner's share of the partnership profits. Each partner's account must be charged with an amount equal to the cash plus the value of any other property, net of the amount of any liabilities, distributed by the partnership to the partner and the partner's share of the partnership losses.

(b) A partnership shall credit each partner's account with an equal share of the partnership profits and shall charge each partner with a share of the partnership losses, whether capital or operating, in proportion to the partner's share of the profits.

(c) A partnership shall indemnify each partner for payments reasonably made and liabilities reasonably incurred by the partner in the ordinary and proper conduct of the business of the partnership or for the preservation of its business or property.
(d) A partnership shall repay a partner who, in aid of the partnership, makes a payment or advance beyond the amount of capital the partner agreed to contribute.

(e) A payment made by a partner which gives rise to a partnership obligation under subsection (c) or (d) constitutes a loan to the partnership. Interest accrues from the date of the payment or advance.

(f) Each partner has equal rights in the management and conduct of the partnership business.

(g) A partner may use or possess partnership property only on behalf of the partnership.

(h) A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership.

(i) A person may become a partner only with the consent of all the partners.

(j) A difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners. An act outside the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the consent of all the partners.

(k) This section does not affect the obligations of a partnership to other persons under Section 301.
SECTION 402. DISTRIBUTIONS IN KIND. A partner has no right to receive, and may not be required to accept, a distribution in kind.

SECTION 403. PARTNER'S RIGHT TO INFORMATION.

(a) A partnership shall keep its books and records, if any, at its chief executive office.

(b) A partnership shall provide partners and their agents and attorneys access to its books and records. It shall provide former partners and their agents and attorneys access to books and records pertaining to the period during which they were partners. The right of access provides 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.

(c) Each partner and the partnership, on demand, shall furnish to a partner, and the legal representative of a deceased partner or partner under legal disability, to the extent just and reasonable, complete and accurate information concerning the partnership.
SECTION 404. GENERAL STANDARDS OF PARTNER'S CONDUCT.

(a) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in this section.

(b) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(1) to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner, without the consent of the other partners, in the conduct and winding up of the partnership business or from a use or appropriation by the partner of partnership property or opportunity;

(2) to refrain from dealing with the partnership in the conduct or winding up of the partnership business, as or on behalf of a party having an interest adverse to the partnership without the consent of the other partners; and

(3) to refrain from competing with the partnership in the conduct of the partnership business without the consent of the other partners before the dissolution of the partnership.

(c) A partner's duty of loyalty may not be eliminated by agreement, but the partners may by agreement identify specific types or categories of
activities that do not violate the duty of loyalty, if not manifestly unreasonable.

(d) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(e) A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement, and exercise any rights, consistent with the obligation of good faith and fair dealing. The obligation of good faith and fair dealing may not be eliminated by agreement, but the partners may by agreement determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable.

(f) A partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the partner's conduct furthers the partner's own interest. A partner may lend money to and transact other business with the partnership. The rights and obligations of a partner who lends money to or transacts business with the partnership are the same as those of a person who is not a partner, subject to other applicable law.
(g) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.

SECTION 405. PARTNER'S LIABILITY TO PARTNERSHIP. A partner is liable to the partnership for a breach of the partnership agreement, or for the violation of any duty to the partnership, causing harm to the partnership.

SECTION 406. REMEDIES OF PARTNERSHIP AND PARTNERS.

(a) A partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of any duty to the partnership, causing harm to the partnership.

(b) A partner may maintain an action against the partnership or another partner for legal or equitable relief, including an accounting as to partnership business, to:

(1) enforce a right under the partnership agreement;

(2) enforce a right under this [Act], including:

(i) the partner's rights under Sections 401, 403, and 404;
(ii) the partner's right on dissociation to have the partner's interest in the partnership purchased pursuant to Section 701 or enforce any other right under Article 6 or 7; or

(iii) the partner's right to compel a dissolution and winding up of the partnership business under Section 801 or enforce any other right under Article 8; or

(3) enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.

(c) The accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law.

SECTION 407. CONTINUATION OF PARTNERSHIP BEYOND DEFINITE TERM OR PARTICULAR UNDERTAKING.

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

(b) A continuation of the business by the partners or those of them who habitually acted in the business during the term or undertaking, without any settlement or liquidation of the partnership business, is prima facie evidence of an agreement that the business will not be wound up.
ARTICLE 5
TRANSFEREES AND CREDITORS OF PARTNER

SECTION 501. PARTNER'S INTEREST IN PARTNERSHIP
PROPERTY NOT TRANSFERABLE. A partner is not a co-owner
of partnership property and has no interest that can be
transferred, either voluntarily or involuntarily, in
partnership property.

SECTION 502. PARTNER'S TRANSFERABLE INTEREST IN
PARTNERSHIP.

(a) The only transferable interest of a partner
in the partnership is the partner's interest in
distributions. The interest is personal property.

(b) A transferee of a partner's transferable
interest in the partnership has the right to cause a
winding up of the partnership business as provided in
Section 801(6).

SECTION 503. TRANSFER OF PARTNER'S TRANSFERABLE
INTEREST.

(a) A transfer, in whole or in part, of a
partner's transferable interest in the partnership:

(1) is permissible;

(2) does not by itself cause a winding up of
the partnership business; and
(3) does not, as against the other partners or the partnership, entitle the transferee, during the continuance of the partnership, to participate in the management or conduct of the partnership business, to require access to information concerning or an account of partnership transactions, or to inspect or copy the partnership books or records.

(b) A transferee of a partner's transferable interest in the partnership is entitled to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled. Upon transfer, the transferor retains the rights and duties of a partner other than the interest in distributions transferred.

(c) If an event causes a dissolution and winding up of the partnership business under Section 801, a transferee is entitled to receive, in accordance with the transfer, the net amount otherwise distributable to the transferor. In a dissolution and winding up, a transferee may require an accounting only from the date of the last account agreed to by all of the partners.

(d) Until receipt of notice of a transfer, a partnership has no duty to give effect to the transferee's rights under this section.
SECTION 504. PARTNER'S TRANSFERABLE INTEREST SUBJECT TO CHARGING ORDER.

(a) On application by a judgment creditor of a partner or partner's transferee, a court having jurisdiction may charge the transferable interest of the debtor partner or transferee to satisfy the judgment. The court may appoint a receiver of the debtor's share of the distributions due or to become 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) A charging order constitutes a lien on the judgment debtor's transferable interest in the partnership. The court may order a foreclosure of the interest subject to the charging order at any time and upon conditions it considers appropriate. The purchaser at the foreclosure sale has the rights of a transferee.

(c) At any time before foreclosure, an interest charged may be redeemed:

(1) by the judgment debtor;

(2) with property other than partnership property, by one or more of the other partners; or

(3) with partnership property, by one or more of the other partners with the consent of all the partners whose interests are not so charged.
(d) This [Act] does not deprive a partner of a right under exemption laws with respect to the partner's interest in the partnership.

(e) This section provides the exclusive remedy by which a judgment creditor of a partner or partner's transferee may satisfy a judgment out of the judgment debtor's transferable interest in the partnership.
ARTICLE 6
PARTNER'S DISSOCIATION

SECTION 601. EVENTS CAUSING PARTNER'S DISSOCIATION.
A partner is dissociated from a partnership upon:

(1) receipt by the partnership of notice of the partner's express will to withdraw as a partner or upon any later date specified in the notice;

(2) an event agreed to in the partnership agreement as causing the partner's dissociation;

(3) the partner's expulsion pursuant to the partnership agreement;

(4) the partner's expulsion by the unanimous vote of the other partners if:

   (i) it is unlawful to carry on the partnership business with that partner;

   (ii) there has been a transfer of all or substantially all of that partner's transferable interest in the partnership, other than a transfer for security purposes, or a court order charging the partner's interest, which has not been foreclosed;

   (iii) within 90 days after the partnership notifies a corporate partner that it will be expelled because it has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business has been suspended by the
jurisdiction of its incorporation, there is no revocation of the certificate of dissolution or no reinstatement of its charter or its right to conduct business; or

(iv) a partnership that is a partner has been dissolved and its business is being wound up;

(5) on application by the partnership or another partner, the partner's expulsion by judicial decree because:

(i) the partner engaged in wrongful conduct that adversely and materially affected the partnership business;

(ii) the partner willfully or persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners under Section 404; or

(iii) the partner engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with that partner;

(6) the partner's:

(i) becoming a debtor in bankruptcy;

(ii) executing an assignment for the benefit of creditors;

(iii) seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of
that partner or of all or substantially all of that partner's property; or

(iv) failing, within 90 days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the partner or of all or substantially all of the partner's property obtained without the partner's consent or acquiescence, or failing within 90 days after the expiration of a stay to have the appointment vacated;

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

(i) the partner's death;

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

(iii) a judicial determination that the partner has otherwise become incapable of performing the partner's duties under the partnership agreement;

(8) 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, distribution of the trust's entire transferable interest in the partnership, but not merely the substitution of a successor trustee;

(9) 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, distribution of the estate's entire transferable interest in the
partnership, but not merely the substitution of a successor personal representative; or

(10) termination of a partner who is not an individual, partnership, corporation, trust, or estate.

SECTION 602. PARTNER'S WRONGFUL DISSOCIATION.

(a) A partner's dissociation is wrongful only if:

(1) it is in breach of an express provision of the partnership agreement; or

(2) in the case of a partnership for a definite term or particular undertaking, before the expiration of the term or the completion of the undertaking:

   (i) the partner withdraws by express will, unless the withdrawal follows the dissociation of another partner and results in a right to dissolve the partnership under Section 801(2)(i);

   (ii) the partner is expelled by judicial decree under Section 601(5); or

   (iii) in the case of a partner who is not an individual, trust other than a business trust, or estate, the partner is expelled or otherwise dissociated because it willfully dissolved or terminated.

(b) A partner who wrongfully dissociates is liable to the partnership and to the other partners for damages caused by the dissociation. That liability is
in addition to any other liability of the partner to the partnership or to the other partners.

SECTION 603. EFFECT OF PARTNER'S DISSOCIATION.

(a) A dissociated partner's interest in the partnership must be purchased pursuant to Article 7 unless the partner's dissociation results in a dissolution and winding up of the partnership business under Article 8.

(b) Upon a partner's dissociation, that partner's right to participate in the management and conduct of the partnership business is terminated, except as provided in Section 804, and that partner's duties (i) under Section 404(b)(1) and (2) and (d) continue only with regard to matters or events that occurred before the dissociation, and (ii) under Section 404(b)(3) terminate.
SECTION 701. PURCHASE OF DISSOCIATED PARTNER'S INTEREST.

(a) If a partner is dissociated from a partnership without resulting in a dissolution and winding up of the partnership business under Section 801, the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b).

(b) The buyout price of a dissociated partner's interest is the amount that would have been distributable to the dissociating partner under Section 808(b) if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership were wound up as of that date. In either case, the sale price of the partnership assets must be determined on the basis of the amount that would be paid by a willing buyer to a willing seller, neither being under any compulsion to buy or sell, and with knowledge of all relevant facts.
Interest must be paid from the date of dissociation to the date of payment.

(c) Damages for wrongful dissociation under Section 602(b), and all other amounts owing, whether or not presently due, from the dissociated partner to the partnership, must be offset against the buyout price. Interest must be paid from the date the amount owed becomes due to the date of payment.

(d) A partnership shall indemnify a dissociated partner against all partnership liabilities incurred before the dissociation, except liabilities then unknown to the partnership, and against all partnership liabilities incurred after the dissociation, except liabilities incurred by an act of the dissociated partner under Section 702. For purposes of this subsection, a liability not known to a partner other than the dissociated partner is not known to the partnership.

(e) If no agreement for the purchase of a dissociated partner's interest is reached within 120 days after a written demand for payment, the partnership shall pay, or cause to be paid, in cash to the dissociated partner the amount the partnership estimates to be the buyout price and accrued interest, reduced by any offsets and accrued interest under subsection (c).
(f) If a deferred payment is authorized under subsection (h), the partnership may tender a written offer to pay the amount it estimates to be the buyout price and accrued interest, reduced by any offsets under subsection (c), stating the time of payment, the amount and type of security for payment, and the other terms and conditions of the obligation.

(g) The payment or tender required by subsections (e) or (f) must be accompanied by the following:

1. A statement of partnership assets and liabilities as of the date of dissociation;
2. The latest available partnership balance sheet and income statement, if any;
3. An explanation of how the estimated amount of the payment was calculated; and
4. Written notice that the payment is in full satisfaction of the obligation to purchase unless, within 120 days after the written notice, the dissociated partner commences an action to determine the buyout price, any offsets under subsection (c), or other terms of the purchase obligation.

(h) A partner who wrongfully dissociates before the expiration of a definite term or the completion of a particular undertaking is not entitled to payment of any portion of the buyout price until the expiration of the term or completion of the undertaking, unless the
partner establishes to the satisfaction of the court that earlier payment will not cause undue hardship to the business of the partnership. A deferred payment must be adequately secured and bear interest.

(i) A dissociated partner may maintain an action against the partnership, pursuant to Section 406(b)(2)(ii), to determine the buyout price of that partner's interest, any offsets under subsection (c), or other terms of the purchase obligation. The action must be commenced within 120 days after the partnership has tendered payment or an offer to pay or within one year after written demand for payment if no payment or offer to pay is tendered. The court shall determine the buyout price of the dissociated partner's interest, any offset due under subsection (c), and accrued interest, and enter judgment for any additional payment or refund. If deferred payment is authorized under subsection (h), the court shall also determine the security for payment and other terms of the obligation to purchase. The court may assess reasonable attorney's fees and the fees and expenses of appraisers or other experts for a party to the action, in amounts the court finds equitable, against any other party, if the court finds that the other party acted arbitrarily, vexatiously, or not in good faith, including the partnership's failure to
tender payment or an offer to pay or to comply with the requirements of subsection (g).

SECTION 702. DISSOCIATED PARTNER'S POWER TO BIND AND LIABILITY TO PARTNERSHIP.

(a) For two years after a partner dissociates without resulting in a dissolution and winding up of the partnership business, the partnership, including a surviving partnership under Article 9, is bound by an act of the dissociated partner that would have bound the partnership under Section 301 before dissociation only if the other party to the transaction:

(i) reasonably believes when entering the transaction that the dissociated partner is a partner at that time;

(ii) does not have notice of the partner's dissociation; and

(iii) is not deemed to have notice under Section 303(e) or Section 704.

(b) A dissociated partner is liable to the partnership for any loss caused to the partnership arising from an obligation incurred by the dissociated partner after dissociation, for which the partnership is liable under subsection (a).
SECTION 703. DISSOCIATED PARTNER'S LIABILITY TO OTHER PERSONS.

(a) A partner's dissociation does not of itself discharge the partner's liability for a partnership obligation incurred before dissociation. A dissociated partner is not liable for a partnership obligation incurred after dissociation except as provided in subsection (b).

(b) A partner who dissociates without resulting in a dissolution and winding up of the partnership business is liable as a partner to the other party in a transaction entered into by the partnership, or a surviving partnership under Article 9, within two years after the partner's dissociation, only if the other party to the transaction:

(i) reasonably believes when entering the transaction that the dissociated partner is a partner at that time;

(ii) does not have notice of the partner's dissociation; and

(iii) is not deemed to have notice under Section 303(e) or Section 704.

(c) By agreement with the partnership creditor and the partners continuing the business, a dissociated partner may be released from liability for a partnership obligation.
(d) A dissociated partner is released from liability for a partnership obligation if a partnership creditor, with notice of the partner's dissociation but without the partner's consent, agrees to a material alteration in the nature or time of payment of a partnership obligation.

SECTION 704. STATEMENT OF DISSOCIATION.

(a) A dissociated partner or the partnership may file a statement of dissociation stating the name of the partnership and that the partner is dissociated from the partnership. A statement of dissociation is a limitation on the authority of a dissociated partner for the purposes of Section 303(d) and (e).

(b) For the purposes of Sections 702 and 703(b), a person not a partner is deemed to have notice of the dissociation 90 days after the statement of dissociation is filed.

SECTION 705. CONTINUED USE OF PARTNERSHIP NAME.

Continued use of a partnership name, or a dissociated partner's name as part thereof, by the partners continuing the business does not of itself make the dissociated partner liable for an obligation of the partners or the partnership continuing the business.
ARTICLE 8
WINDING UP PARTNERSHIP BUSINESS

SECTION 801. EVENTS CAUSING DISSOLUTION AND WINDING UP OF PARTNERSHIP BUSINESS. A partnership is dissolved, and its business must be wound up, only upon:

(1) except as provided in section 802, receipt by a partnership at will of notice from a partner, other than a partner who is dissociated under Section 601(2) to (10), of that partner's express will to withdraw as a partner, or upon any later date specified in the notice;

(2) in a partnership for a definite term or particular undertaking:

   (i) except as provided in Section 802, within 90 days after a partner's wrongful dissociation under Section 602 or a partner's dissociation by death or otherwise under Section 601(6) to (10), receipt by the partnership of notice from another partner of that partner's express will to withdraw as a partner;

   (ii) the express will of all the partners; or

   (iii) the expiration of the term or the completion of the undertaking, unless all the partners agree to continue the business, in which case the partnership agreement is deemed amended retroactively to provide that the expiration or completion does not
result in the dissolution and winding up of the partnership business;

(3) an event agreed to in the partnership agreement resulting in the winding up of the partnership business, unless all the partners agree to continue the business, in which case the partnership agreement is deemed amended retroactively to provide that the event does not result in the dissolution and winding up of the partnership business;

(4) an event that makes it unlawful for all or substantially all of the business of the partnership to be continued, but any cure of illegality within 90 days after notice to the partnership of the event is effective retroactively to the date of the event for purposes of this section;

(5) on application by a partner, a judicial decree that:

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

(ii) another partner has engaged in conduct relating to the partnership business that makes it not reasonably practicable to carry on the business in partnership with that partner; or

(iii) it is not otherwise reasonably practicable to carry on the partnership business in conformity with the partnership agreement; or
(6) on application by a transferee of a partner's transferable interest, a judicial decree that it is equitable to wind up the partnership business:

(i) if the partnership was for a definite term or particular undertaking at the time of the transfer or entry of the charging order that gave rise to the transfer, after the expiration of the term or completion of the undertaking; or

(ii) if the partnership was a partnership at will at the time of the transfer or entry of the charging order that gave rise to the transfer, at any time.

SECTION 802. DISSOLUTION DEFERRED 90 DAYS.

(a) Except as provided in subsection (b), a partnership of more than two persons is not dissolved until 90 days after receipt by the partnership of notice from a partner under Section 801(1) or (2)(i), and its business may be continued until that date as if no notice were received. Before that date, the partner who gave the notice may waive the right to have the partnership business wound up. If there is no waiver before that date, the partnership is dissolved and its business must be wound up.
(b) A partnership may be dissolved at any time during the 90-day period, and its business wound up, by the express will of at least half of the other partners.

(c) After receipt by the partnership of notice from a partner under Section 801(1) or (2)(i), the partner who gave the notice:

(1) has no rights in the management and conduct of the partnership business if it is continued under subsection (a), but may participate in winding up the business under Section 804 if the partnership is dissolved on or before the expiration of the 90-day period pursuant to subsection (a) or (b);

(2) is liable for obligations incurred during the period only to the extent a dissociated partner would be liable under Section 702(b) or Section 703(b), but is not liable for contributions for, and must be indemnified by the other partners against, any partnership liability incurred by another partner to the extent the liability is not appropriate for winding up the partnership business; and

(3) with respect to profits or losses incurred during the period, shall be credited with a share of any profits but shall be charged with a share of any losses only to the extent of profits credited for the period.
SECTION 803. PARTNERSHIP CONTINUES AFTER DISSOLUTION. A partnership continues after dissolution until the winding up of its business is completed, at which time the partnership is terminated.

SECTION 804. RIGHT TO WIND UP PARTNERSHIP BUSINESS.

(a) After dissolution, a partner who has not wrongfully dissociated has a right to participate in winding up the partnership's business, but on application of any partner, partner's legal representative, or transferee, the [designate the appropriate court], for good cause, may order judicial supervision of the winding up.

(b) The legal representative of the last surviving partner may wind up a partnership's business.

(c) A person winding up a partnership's business may preserve the partnership business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, settle and close the partnership's business, dispose of and transfer the partnership's property, discharge the partnership's liabilities, distribute the assets of the partnership pursuant to Section 808, and perform other necessary acts, including settlement of disputes by mediation or arbitration.
SECTION 805. PARTNER'S POWER TO BIND PARTNERSHIP AFTER DISSOLUTION. Subject to Section 806, a partnership is bound by a partner's act after dissolution that:

(1) is appropriate for winding up the partnership business; or

(2) would have bound the partnership under Section 301 before dissolution, if the other party to the transaction does not have notice of the dissolution.

SECTION 806. STATEMENT OF DISSOLUTION.

(a) After dissolution, a partner who has not wrongfully dissociated may file a statement of dissolution stating the name of the partnership and that the partnership has dissolved and is winding up its business.

(b) A statement of dissolution cancels a filed statement of partnership authority for the purposes of Section 303(d) and is a limitation on authority for the purposes of Section 303(e).

(c) For the purposes of Sections 301 and 805, a person not a partner is deemed to have notice of the dissolution and the limitation on the partners' authority as a result of the statement of dissolution 90 days after it is filed.
(d) After filing and, where appropriate, recording a statement of dissolution, the dissolved partnership may file and, where appropriate, record a statement of partnership authority which will operate with respect to a person not a partner as provided in Section 303(d) and (e) in any transaction, whether or not the transaction is appropriate for winding up the partnership business.

SECTION 807. PARTNER'S LIABILITY TO OTHER PARTNERS AFTER DISSOLUTION.

(a) Except as provided in subsection (b) and Section 802(c)(2), after dissolution a partner is liable to the other partners for the partner's share of any partnership liability incurred under Section 805.

(b) A partner who, with knowledge of the winding up, incurs a partnership liability under Section 805(2) by an act that is not appropriate for winding up the partnership business is liable to the partnership for any loss caused to the partnership arising from that liability.

SECTION 808. SETTLEMENT OF ACCOUNTS AMONG PARTNERS.

(a) In winding up the partnership business, the assets of the partnership must be applied to discharge its obligations to creditors, including partners who are
creditors. Any surplus must be applied to pay in cash the net amount distributable to partners in accordance with their right to distributions pursuant to subsection (b).

(b) Each partner is entitled to a settlement of all partnership accounts upon winding up the partnership business. In settling accounts among the partners, the profits and losses that result from the liquidation of the partnership assets must be credited and charged to the partners' accounts. The partnership shall make a distribution to a partner in an amount equal to that partner's positive balance. A partner shall contribute to the partnership an amount equal to that partner's negative balance.

(c) To the extent not taken into account in settling the accounts among partners pursuant to subsection (b), each partner shall contribute, in the proportion in which the partner shares partnership losses, the amount necessary to satisfy partnership obligations. If a partner fails to contribute, the other partners shall contribute, in the proportions in which the partners share partnership losses, the additional amount necessary to satisfy the partnership obligations. A partner or partner's legal representative may recover from the other partners any contributions the partner makes to the extent the amount
contributed exceeds that partner's share of the partnership obligations.

(d) The estate of a deceased partner is liable for the partner's obligation to contribute to the partnership.

(e) An assignee for the benefit of creditors of a partnership or a partner, or a person appointed by a court to represent creditors of a partnership or a partner, may enforce a partner's obligation to contribute to the partnership.
ARTICLE 9
CONVERSIONS AND MERGERS

SECTION 901. CONVERSION OF PARTNERSHIP TO LIMITED PARTNERSHIP.

(a) A partnership may be converted to a limited partnership pursuant to this section.

(b) The terms and conditions of a conversion of a partnership to a limited partnership must be approved by all the partners or by a number or percentage specified for conversion in the partnership agreement.

(c) After the conversion is approved by the partners, the partnership shall file a certificate of limited partnership which satisfies the requirements of [Section _____ of the State Limited Partnership Act] and includes:

(1) a statement that the partnership was converted to a limited partnership from a partnership;

(2) its former name; and

(3) a statement of the number of votes cast by the partners for and against the conversion and, if the vote is less than unanimous, the number or percentage required to approve the conversion under the partnership agreement.
(d) The conversion takes effect when the certificate of limited partnership is filed or at any later date specified in the certificate.

(e) A partner who becomes a limited partner as a result of the conversion remains liable as a partner for an obligation incurred by the partnership before the conversion takes effect. If the other party to a transaction with the limited partnership reasonably believes when entering the transaction that the limited partner is a general partner, the partner is liable for an obligation incurred by the limited partnership within 90 days after the conversion takes effect. The partner's liability for all other obligations of the limited partnership incurred after the conversion takes effect is that of a limited partner as provided in the [State Limited Partnership Act].

SECTION 902. CONVERSION OF LIMITED PARTNERSHIP TO PARTNERSHIP.

(a) A limited partnership may be converted to a partnership pursuant to this section.

(b) Notwithstanding a provision to the contrary in a limited partnership agreement, the terms and conditions of a conversion of a limited partnership to a partnership must be approved by all the partners.
(c) After the conversion is approved by the partners, the limited partnership shall cancel its certificate of limited partnership pursuant to [Section ___ of the State Limited Partnership Act].

(d) The conversion takes effect when the certificate of limited partnership is cancelled.

(e) A limited partner who becomes a partner as a result of the conversion remains liable only as a limited partner for an obligation incurred by the limited partnership before the conversion takes effect. The limited partner is liable as a partner for an obligation of the partnership incurred after the conversion takes effect.

SECTION 903. EFFECT OF CONVERSION; ENTITY UNCHANGED.

(a) A partnership or limited partnership that has been converted pursuant to this article is for all purposes the same entity that existed before the conversion.

(b) When a conversion takes effect:

(1) all property owned by the converting partnership or limited partnership remains vested in the converted entity;

(2) all obligations of the converting partnership or limited partnership continue as obligations of the converted entity; and
(3) an action or proceeding pending against the converting partnership or limited partnership may be continued as if the conversion had not occurred.

SECTION 904. MERGER OF PARTNERSHIPS.

(a) Pursuant to a plan of merger approved as provided in subsection (c), a partnership may be merged with one or more partnerships or limited partnerships.

(b) The plan of merger must set forth:

(1) the name of each partnership or limited partnership that is a party to the merger;

(2) the name of the surviving entity into which the other partnerships or limited partnerships will merge;

(3) whether the surviving entity is a partnership or a limited partnership and the status of each partner;

(4) the terms and conditions of the merger;

(5) the manner and basis of converting the interests of each party to the merger into interests or obligations of the surviving entity, or into cash or other property in whole or part; and

(6) the street address of the surviving entity's chief executive office.

(c) The plan of merger must be approved:
(1) in the case of a partnership that is a party to the merger, by all the partners, or a number or percentage specified for merger in the partnership agreement; and

(2) in the case of a limited partnership that is a party to the merger, by the vote required for approval of a merger by the law of the state or foreign jurisdiction in which the limited partnership is organized and, in the absence of such specifically applicable law, by all the partners, notwithstanding a provision to the contrary in the partnership agreement.

(d) After a plan of merger is approved and before the merger takes effect, the plan may be amended or abandoned as provided in the plan.

(e) The merger takes effect on the later of:

(1) the approval of the plan of merger by all parties to the merger, as provided in subsection (c);

(2) the filing of all documents required by law to be filed as a condition to the effectiveness of the merger; or

(3) any effective date specified in the plan of merger.
SECTION 905. EFFECT OF MERGER.

(a) When a merger takes effect:

(1) every partnership or limited partnership that is a party to the merger other than the surviving entity ceases to exist;

(2) all property owned by each of the merged partnerships or limited partnerships vests in the surviving entity;

(3) all obligations of every partnership or limited partnership that is a party to the merger become the obligations of the surviving entity; and

(4) an action or proceeding pending against a partnership or limited partnership that is a party to the merger may be continued as if the merger had not occurred or the surviving entity may be substituted as a party to the action or proceeding.

(b) The [Secretary of State] of this State is the agent for service of process in an action or proceeding against a surviving foreign partnership or limited partnership to enforce an obligation of a domestic partnership or limited partnership that is a party to a merger. The surviving entity shall promptly notify the [Secretary of State] of the mailing address of its chief executive office and of any change of address. Upon receipt of process, the [Secretary of State] shall mail
a copy of the process to the surviving foreign partnership or limited partnership.

(c) A partner of the surviving partnership or limited partnership is liable for:

(1) all obligations of a party to the merger for which the partner was personally liable before the merger;

(2) all other obligations of the surviving entity incurred before the merger by a party to the merger, but those obligations may be satisfied only out of property of that entity; and

(3) all obligations of the surviving entity incurred after the merger takes effect.

(d) If the obligations incurred before the merger by a party to the merger are not satisfied out of the property of the surviving partnership or limited partnership, the partners of that party immediately before the effective date of the merger shall contribute the amount necessary to satisfy that party's obligations to the surviving entity, in the manner provided in Section 808(c) as if the merged party were dissolved.

(e) A partner of a party to a merger who does not become a partner of the surviving partnership or limited partnership is dissociated from the entity, of which that partner was a partner, as of the date the merger takes effect. The surviving entity shall cause the
partner's interest in the entity to be purchased under Section 701. The surviving entity is bound under Section 702 by an act of a partner dissociated under this subsection, and the partner is liable under Section 703 for transactions entered into by the surviving entity after the merger takes effect.

SECTION 906. STATEMENT OF MERGER.

(a) After a merger, the surviving partnership or limited partnership may file a statement that one or more partnerships or limited partnerships have merged into the surviving entity.

(b) A statement of merger must contain:

(1) the name of each partnership or limited partnership that is a party to the merger;

(2) the name of the surviving entity into which the other partnerships or limited partnership were merged;

(3) the street address of the surviving entity's chief executive office and of an office in this State, if any; and

(4) whether the surviving entity is a partnership or limited partnership.

(c) Except as provided in subsection (d), for the purposes of Section 302, property of the surviving partnership or limited partnership which before the
merger was held in the name of another party to the merger is property held in the name of the surviving entity upon filing a statement of merger.

(d) For the purposes of Section 302, real property of the surviving partnership or limited partnership which before the merger was held in the name of another party to the merger is property held in the name of the surviving entity upon recording a certified copy of the statement of merger in the office for recording transfers of that real property.

(e) A filed and, where appropriate, recorded statement of merger, executed and declared to be accurate pursuant to Section 105(c), stating the name of a partnership or limited partnership that is a party to the merger in whose name property was held before the merger and the name of the surviving entity, but not containing all of the other information required by subsection (b), operates with respect to the partnerships or limited partnerships named to the extent provided in subsections (c) and (d).

SECTION 907. NONEXCLUSIVE. This article is not exclusive. Partnerships or limited partnerships may be converted or merged in any other manner provided by law.
ARTICLE 10
MISCELLANEOUS PROVISIONS

SECTION 1001. 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.

SECTION 1002. SHORT TITLE. This [Act] may be cited as the Uniform Partnership Act (1992).

SECTION 1003. SEVERABILITY. 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.

SECTION 1004. EFFECTIVE DATE. This [Act] takes effect . . . . . . . . . . .

SECTION 1005. REPEALS. The following acts and parts of acts are repealed: [the State Partnership Act as
amended and in effect immediately prior to the adoption of this [Act]).

SECTION 1006. APPLICATION TO EXISTING RELATIONSHIPS.

(a) Except as otherwise provided in this section, this [Act] applies to all partnerships in existence on its effective date that were formed under the [State] Partnership Act or any predecessor law providing for the formation, operation, and liquidation of partnerships.

(b) Section 802 does not apply to a partnership in existence on the effective date of this [Act] unless the partners agree otherwise.

(c) This [Act] does not impair the obligations of a contract existing when the [Act] takes effect or affect an action or proceeding begun or right accrued before this [Act] takes effect.

(d) A judgment against a partnership or a partner in an action commenced before the effective date of this [Act] may be enforced in the same manner as a judgment rendered before the effective date of this [Act].
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

UNIFORM PARTNERSHIP ACT

July 31 – August 6, 1992
Ritz-Carlton Hotel
San Francisco, California

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UNIFORM PARTNERSHIP ACT  
Friday, July 31, 1992

Friday, July 31, 1992

Fourth Session.................................... 1

Saturday, August 1, 1992

Fifth Session.....................................129

Monday, August 3, 1992

Ninth Session.....................................357

Ninth Session (Continued)..........................506

Tuesday, August 4, 1992

Ten Session.........................................586
FOURTH SESSION

UNIFORM PARTNERSHIP ACT

FRIDAY, JULY 31, 1992

Mr. Michael Franck of Michigan, presiding.

CHAIRMAN FRANCK: Thank you, Mr. President. Before introducing the Drafting Committee and hearing whatever statement the chair of that committee cares to make before we start reading the act, I’d like to call upon the chair of the Review Committee, John Fox Arnold of Missouri to provide us that committee’s report.

COMMISSIONER JOHN FOX ARNOLD (Missouri): Mr. Chairman, the Review Committee has had available for its discussions a March 3 draft of the act, a March 6 outline of policy issues, and the June 1st policy issue statement.

The Review Committee believes that the policy issues underlying the revisions to the act are I adequately framed for understanding by members of the Conference. The scope of the draft conforms to the assignment to the Committee and that the draft of the act is ready for consideration by the Committee of the Whole.

....

MR. DONALD J. WEIDNER (Reporter): We have made available to you a policy issue statement, and that statement
reveals that there are five basic policy decisions in the act we’re about to discuss.

No. 1 is reflected in Section 103(a), and it states that the partnership agreement in almost all cases determines the rights and duties of the partners as among themselves. Stated somewhat differently, the bulk of the provisions in the act that govern the relations among partners are merely default rules. They apply only by default that is, they apply only if the partnership agreement fails to contain a contrary provision.

On the other hand, there is a handful of rules governing the relations among partners that the partners may not draft away. These rules they cannot contract out of. These mandatory rules are listed in Section 103(b). For example, a partner’s obligation of good faith under Section 404(d) may not be eliminated. For further example, the partnership agreement may not unreasonably restrict a partner’s right of access to books and records, and now reflected in the handout that I think you all received this morning, our latest version of Section 404 says that the partnership agreement may not unreasonably excuse me may not eliminate the duty of loyalty under Section 404.

The second basic policy decision in the act is that we’ve adopted an entity theory because of comments from the floor, during our meeting in Milwaukee. The group moved two years ago to explicitly state in the act that the partnership is
an entity. We got there not by deciding on the concept at the
beginning, but by crafting a series of solutions to problems.
The short of it is, when we put together the solutions, that
resulted in No.1, simplicity in the law, and No. 2, the
stability of partnerships, we come up with the entity theory,
and we did it over and over and over again, and you folks said:
Well, you’ve done it. Why actually have left it in there. The
policy issue statement lists a whole series of specific rules
that embrace the entity theory.

The third, basic policy decision in the act is that
we’ve provided for filing of a statement of partnership
authority. Again, for the past couple of years, this Conference
has watched us evolve our provision which we now think is
cooked. And the short of it is that Section 303 provides for
filing a statement of partnership authority. The statement,
which is voluntary, must be filed at the state level. The basic
purpose of this filing of a statement of partnership authority
is to facilitate the transfer of real property held in the name
of the partnership. However, the statement may also contain
extraordinary grants of authority to certain partners too enter
into other kinds of transactions on behalf of the partnership. A
grant of extraordinary authority binds the partnership to a
person who gives value without knowledge that there is no
authority.
However, we have provided that in order for a grant of extraordinary authority to transfer real property to be binding, that special grant must also be filed locally with the real property records.

Finally, we’ve also provided for a restriction in authority to transfer real property that can also be filed locally with the real property records.

Fourth, the act, which we have been referring to as RUPA, RUPA contains an expanded treatment of the fiduciary duties of partners.

There are really three purposes, I think, our expanded treatment No. 1, we wanted to identify clearly the fiduciary duties of partners, or as clearly as possible.

No. 2, we. wanted to make clear that a partner will not be held to the same standard as a disinterested trustee. On the latter point, Section 404(f) provides that a partner does not violate his duty simply because his conduct furthers his own interests.

Third, Section 404 attempts to confine the exercise of judicial discretion to use vague notions of fiduciary duties to overturn the provisions that the partners have put in their partnership agreements.

Hence, Section 404(a) states that the only fiduciary duties of a partner are the duty of loyalty and the duty of
care, as described in Section 404, and 404 in turn 404(b) states that a partner’s duty of loyalty, is limited to three specific rules.

The first is that a partner must account to the partnership for any benefit derived without consent.

The second is that a partner must refrain from dealing with the partnership as or on behalf of an adverse interest without consent.

The third is that a partner must refrain from competing with the partnership without consent.

Now, as of the change in 404 made yesterday that you received this morning, the duty of loyalty may not be eliminated in the partnership agreement, but the partners may, by agreement, exempt specific types or categories of activity from being breaches of the duty of loyalty.

404 further limits the duty of care of a partner, to his or her other partners, to the avoidance of gross negligence or willful misconduct. 404(d) of that rule states that a partner shall discharge her duties and exercise any rights in good faith, and the obligation of good faith may not be eliminated by agreement, but the parties may determine performance standards for the obligation.

Fifth is that RUPA contains a complete rewrite of the rules on partnership breakups, and we think that our rewriting
of these rules contain two major contributions. No. 1, we now make it much more clear than ever before the detailed rules that apply to partnership breakups. And No. 2, those detailed rules have been crafted to give the partnership entity much greater stability.

And so, at bottom, under our act, the departure of a partner need not have any effect on the continuation of the entity or its relations to third parties. Stated differently, a partnership, no longer dissolves every time someone leaves.

The breakup rules are divided into three articles: Article 6 concerns dissociations, which are withdrawals and other departures, and 601, Section 601 lists all the ways in which a partner dissociates. Section 603 is then a switchboard, and it says that all of Gaul is divided into two parts. When a partner dissociates, he must be ought out under Article 7, unless his dissociation results in a dissolution and winding up of the partnership under Article 8. So, when you dissociate under Article 6, then you go to 7 or 8 -- either 7 or 8 to determine what happens.

Article 7 we feel is an advance because it states with some detail what rules govern the buy-out of a partner. Article 8 is the article that lists the dissolution and winding up of a partnership. Section 801 lists all the situations that result in a dissolution and winding up of the partnership.
We have retained the UPA rule that gives a partner in a partnership at will the right to compel winding up of the partnership business. But Section 802 postpones the winding up for 90 days to give the remaining partners an opportunity to dissuade the dissociating partner to accept a buy out rather than force a liquidation.

And finally, John and I, have agreed that if we were rewriting this major policy issue section today, we'd add a new sixth entry and we would in that entry refer to the fact that we now have, since our Naples meeting, the addition of a new article, Article which addresses the conversion and merger of partnerships.

....

CHAIRMAN FRANCK: Article 1, Sections 101 to 107 will be read by Commissioner Buxton, and we'll start by reading Section 101.

COMMISSIONER GEORGE H. BUXTON, III (Tennessee): First we have decided to delete No. (4), (11) the definition of partnership, in its entirety, felt that its substance was covered in Sections 202(a) and 1006.

....

COMMISSIONER BUXTON: "SECTION 101. DEFINITIONS. In this [Act]:
“(1) ‘Business’ includes every trade, occupation, and profession.

“(2) ‘Debtor in bankruptcy’ means a person who is the subject of:

“(i) an order for relief under Title 11 of the United States Code or a comparable order under a successor statute of general application; or

“(ii) a comparable order under state law governing insolvency.

“(3) ‘Distribution’ means a transfer of cash or other property from a partnership to a partner in the partner’s capacity as a partner, or to the partner’s transferee.

“(5) ‘Partnership agreement’ means an agreement, written or oral, among the partners concerning the partnership.

“(6) ‘Partnership at will’ means a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking;

“(7) ‘Person’ means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other. legal or commercial entity.

“(8) ‘Property’ means all property, real, personal, or mixed, tangible or, intangible, or any interest therein.
“(9) ‘State’ means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

“(10) ‘Statement’ means a statement of partnership authority under Section 303, a statement of denial under Section 304, a statement of dissociation under Section 704, a statement of dissolution under Section 806, a statement of merger under Section 906, or an amendment or cancellation of the foregoing.

“(11) ‘Transfer’ includes an assignment, conveyance, lease, mortgage, deed, or encumbrance.”

CHAIRMAN FRANCK: Comments on Section 101.

Commissioner.

COMMISSIONER RANDAL C. PICKER (Illinois): Is the intention in the definition of debtor in bankruptcy to embrace all federal insolvency schemes or just those embraced by Title 11? Title 11, of course, excludes certain entities from being eligible to file under Section 109. They’re eligible under other federal substitutes. And the question is, do we need to embrace those here?

CHAIRMAN FRANCK: Response from the committee?

COMMISSIONER BUXTON: We intended to include all.

....
COMMISSIONER PATRICIA FRY (North Dakota): Yes. In subsection (3), I don’t understand the use of the phrase “in the partner’s capacity as a partner” in your definition of distribution.

When I read the sections that the comment refers to, it appears that you’re transferring to the partner in that partner’s individual capacity or, nonpartner -- or -- not as partnership property.

CHAIRMAN FRANCK: Response?

MR. DONALD J. WEIDNER (Reporter): Distribution is defined to include transfers in a partner’s capacity as a partner, and so that if the partner had a nonpartner capacity, such as that of a lender or a landlord, that payments made to a partner in his capacity as a third party landlord would not be treated as distributions within the meaning of our rule.

COMMISSIONER FRY: That’s what I thought you meant, but I think perhaps the phrasing might be altered to make that more clear.

For example, you’ll see in various statutes ADAMS that an administrator, executor, or so on, that property will be transferred to them in their capacity as executor. And then they hold for the beneficiary.

I don’t think that was the intention here.
So, perhaps some different phrasing would be helpful to make that clear.

MR. WEIDNER: Okay. Thank you.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER NEAL OSSEN (Connecticut): I wonder if the committee would consider stating in Line 1114, “In order for relief under Chapter 7 of Title 11 of the United States Code”? And I’m probably going to address my questions to Morris here. But it seems to me that a Chapter 13 wage earner proceeding which at the end of the three or five years puts the debtor back where he is, or a Chapter 11, where there is a successful reorganization, should not be the filing or an order under 11 or 13. should not in and of itself start the disassociation of a partnership because of the partner’s filing or perhaps an even winding up.

It makes sense when you have a Chapter 7 liquidation. I’m not so sure you want a reorganization I proceeding to have the effect of creating this disassociation or the winding up.

An example. Suppose, Morris, you’re a partner, and you go in under Chapter 11 or Chapter 13. Why should you be -- your interest in your partnership disappear or possibly disappear?

CHAIRMAN FRANCK: Let’s get a response from the committee as to your suggestion.
COMMISSIONER MORRIS W. MACEY (Georgia): We considered the issues. The development of the treatment of partnerships in Chapter 11’s and Chapter 13’s is still developing. No matter what we wrote into this act, the bankruptcy code is going to be paramount.

We decided to go with the law as it had been historically, which was to write into the act that the commencement of the proceeding under Title 11 of the Bankruptcy Code without would have the effect it has previously, would result in a dissolution, whether or not -- I personally think that in view of cases like Cardinal, that, it will be like ipso facto clauses, the bankruptcy courts will not recognize it. But we thought we’d be pioneering at this stage to start writing in, treatment of partnerships in bankruptcy different than what it had been historically.

CHAIRMAN FRANCK: Excuse me, Commissioner. I gather the answer means that the committee is not willing to accept your suggestion. Let’s take it from there.

COMMISSIONER OSSEN: All right. I’ll try a motion. I move that on Line 14, it’s to be read: order for relief under Chapter 7 of Title 11 of the United States Code.

CHAIRMAN FRANCK: The motion is to insert at Line 14 on Page 1, after the words “under” and’ before the, word “title”
the words “Chapter 7 of,” so that it reads: An order for relief under Chapter 7 of Title 11 of the United States Code.

Response from the committee to the motion. Do you have anything to add?

COMMISSIONER HOWARD J. SWIBEL (Illinois): First of all, your question really raises a policy question that will be addressed under Section 601. I think it is difficult for the Committee of the Whole to consider the definition in isolation.

The question that you raise, Commissioner Ossen, is, what is, the consequence of using this definition? It comes up, in Section 601, where a partner becoming a debtor in bankruptcy triggers his dissociation.

COMMISSIONER OSSEN: I’m aware of it, and I don’t think that’s right. That’s why I made the motion.

COMMISSIONER SWIBEL: I understand that. I’m saying --

COMMISSIONER OSSEN: You’re saying I should withdraw this motion, when we get to Section 601, bring it up again.

COMMISSIONER MACEY: Commissioner, the issue about whether, or not the filing -- the issue about whether or not the filing of a Chapter 11 proceeding should result in a dissolution, of a partnership has lots of consequences.

For example, suppose that the partnership was one involving financial investments and the general partner in charge of the financial investment should file a Chapter 11.
It was generally believed that that partnership ought to be terminated, at least in various discussions. And we’re not -- at least I believe I speak for the committee -- are not prepared at this juncture of the development of the law to have a provision here that partnerships continue without effect even though the partnership may have filed Chapter 11 under the Bankruptcy Code or a Chapter 13 or a Chapter 12. That’s a policy decision.

I should say that there is an ad hoc committee of the American Bar Association, of which I’m chairman, which is addressing problems of partnership in bankruptcy, with a view eventually toward recommending amendments to the Bankruptcy Code to deal with these types of problems. But it was our view that we should not attempt to write a mini Bankruptcy code relating to partnerships in this act.

CHAIRMAN FRANCK: Commissioner, do you want to close on your motion?

COMMISSIONER OSSEN: No.

CHAIRMAN FRANCK: All right. You’ve heard the motion. I’ll repeat it. Line 14, insert after the words “under” and before the word “title” the phrase “Chapter 7 of” so that the line reads: In order for relief under Chapter 7 of Title 11 of the United States Code.
As many as are in favor of the motion, please say “aye.”

Those opposed, please say “nay.”

The “nays” appear to have it. The “nays” have it. The motion is defeated.

Comments on Section 101.

....

Commissioner.

COMMISSIONER EDWARD I. CUTLER (Florida) I guess I am premature. We have had a lot of definitions of “person” in all the uniform laws, but Item 7 is like most of our other definitions of “person.”

I wanted to call your attention to the fact and some of the *embers: of your committee are actively involved now in a new entity, I suppose it is, called limited liability companies. The question is whether or not that should now be inserted in the definition of “person” when we adopt uniform acts.

The problem is whether or not it is embraced within the words “legal or commercial entity.” I’m not urging that the definition be changed -- if the committee is interested in doing it -- it wouldn’t bother me. But at the very least, please make a comment about this new animal of limited liability companies which have already been created in many, many states.
CHAIRMAN FRANCK: The reporter appears to be nodding his head rather gently, but that kind of indicates he will put such a comment in the act.

COMMISSIONER, PETER J. DYKMAN (Wisconsin): Are you talking about putting it only in the comment?

CHAIRMAN FRANCK: That is where we are at the moment.

COMMISSIONER DYKMAN: Okay. Not in the statute.

MR. JOHN W. LARSON (Reporter): We had it in and the Style Committee took it out, and we think the entity has brought enough to include it.

CHAIRMAN FRANCK: They, put it in,, but the Style Committee made them take it out.

....

COMMISSIONER GEORGE H. BUXTON, III (Tennessee):

"SECTION 102. KNOWLEDGE AND NOTICE.

"(a) A person knows a fact if the person has knowledge of it.

"(b) A person has notice of a fact if the person:

"(1) knows of it;

"(2) has received an notice of it; or

"(3) has reason to know it exists from all of the facts known to that person at the time in question.

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

“(d) A person is notified or receives a notice of a fact when:

“(1) the existence of the fact comes to the person’s attention; or

“(2) the notice is duly delivered at the person’s place of business or at any other place held out by the person as a place of receiving communications.

“(e) Except as provided in subsection (f), notice received by a person who is not an individual, including a partnership, is effective for a particular transaction when the notice is brought to the attention of the individual conducting, the transaction, or in any event when the notice would have been brought to that individual’s attention if the person had exercised due diligence. Such a person 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 person 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.
“(f) Receipt of notice by a partner of a matter relating to the partnership is effective immediately as notice to the partnership, but is not effective in the case of fraud on the partnership committed by or with the consent of the partner.”

....

COMMISSIONER SANDRA S. STERN (New York): I would like to ask whether the notice referred to here is a constructive notice provided by the filing of statement or whether that is left to the footnote which appears in Section -- to the comment which appears in Section 303.

For example, if someone has heard that the partners, are not getting along and knows, of the existence of a record and a way of checking that out on a filing, is that constructives notice, if the person doesn’t actually look?

CHAIRMAN FRANCK: Response from the committee.

MR. ED MERRILL (ABA): I believe that the answer -
....

MR. MERRILL: I’m sorry. This is Doc Merrill from the California State Bar.

Except in the case of real property filings. If the notice restricting authority is duly recorded in the real property records, it provides constructive notice of the lack of authority. If it is merely filed with the Secretary of State, it
does not provide constructive transaction constructive notice for other than real estate transactions.

Two other exceptions are the notice of dissociation and dissolution, which do have, constructive notice effect after, they have been filed for more than 90 days.

COMMISSIONER STERN: Yes. That was my inference from reading this. And I would like. to make a motion that the provision be rewritten so as to specify that this is not constructive notice unless provided elsewhere in the act.

CHAIRMAN FRANCK: The motion, as I understand it, is a sense of the house motion, that this would not be constructive noticet as that term is used in other portions of the act.

The committee tells me it’s not used in the act. Would you want to rephrase your motion?

COMMISSIONER STERN: Simply that this is not constructive notice, period. Simply that this is not constructive notice.

MR. MERRILL: One of the problems we ran into --

CHAIRMAN FRANCK: Excuse me. Let’s get clear one thing clear. When you say “this,” what are you referring to?

COMMISSIONER STERN: That the filing of a statement is not constructive notice as to one who has no actual knowledge of its contents.

....
MR. ED MERRILL (ABA): One of the problems that we ran into in attempting to draft these sections was apparently a long-standing conflict of the Real Estate Section and the Style Committee about whether constructive notice is, in fact, a defined term.

And for those reasons -- and our understanding of the historic use of notice in other uniform acts, that particular phraseology was avoided. What is intended is that result, and a comment could say that. But constructive notice as a term is not used anywhere in the partnership act.

COMMISSIONER JAMES C. MCKAY, JR. (District of Columbia): I think a good compromise would be to put it in the comments. I don’t think it’s necessary to amend the text of the act, but maybe the mover of the motion would be satisfied if a comment would explain her point.

CHAIRMAN FRANCK: Commissioner, would you accept the statement in the, comment to that effect?

COMMISSIONER STERN: Actually, I think that the statements are referred to so frequently in the act and are a matter of such importance to lenders and others who want to know what the rules are --

CHAIRMAN FRANCK: You want it in the black letter.

COMMISSIONER STERN: Yes, I would.

....
COMMISSIONER ROBERT H. CORNELL (California): Yes. Looking at the section, you described a fact situation in which a person might know there’s a difference between constructive notice and a person knowing so much that they might that they know that there’s been a problem with the partnership. They seem to be breaking up. They know papers have been filed.

That’s not constructive notice. You’re creating a fact situation which comes under knows or should have known situation. I don’t think that your amendment changes that. We still have the question of what if you have enough facts to create actual notice or that where a person should know and they can’t just close their eyes and I think those are two different issues.

What we have done is, on the sections on statements, we have limited their effect specifically so that they do not give constructive notice.

CHAIRMAN FRANCK: Commissioner, do you want to close on your motion?

COMMISSIONER STERN: Yes. I think that you’re right. You can parse that out from the comments and elsewhere. And, of course, the example you’ve just given has risen to the level of knowledge, I would say.
But I still feel that it’s important enough to give some, if nothing else, to give some indication here that what appears on the record is or is not notice.

CHAIRMAN FRANCK: All right. Thank you, Commissioner. We have before us a sense of the house motion that the section be rewritten so that the filing of the statement does not constitute constructive notice to one who does not have actual notice.

....

CHAIRMAN FRANCK: As many as are in favor of the motion, say “aye.”

As many that are opposed, please say “nay.” The “noes” have it. The motion is defeated.

Further comment on Section 102.

COMMISSIONER CARLYLE C. RING, JR. (Virginia): On Page 5, subsection (f), at the end of the third line, you say the consent of the partner. I assume you mean there the consent of the partner that received the notice.

CHAIRMAN FRANCK: Line 3, Page 5, last phrase.

COMMISSIONER RING: I’ll leave it to you on style, but I think you ought to make that plain by either saying “such partner or the partner that received the notice.”

CHAIRMAN FRANCK: Committee. Response from the committee. That’s not a motion. Will you consider that?
MR. DONALD J. WEIDNER (Reporter): Yes.

....

CHAIRMAN FRANCK: You insert a new (3) under subsection (b) that reads Eliminate the duty of loyalty under Section 404(b). And, of course, you renumber the subsequent sections.

COMMISSIONER BUXTON: I stand corrected. That’s the only change.

COMMISSIONER BUXTON: “SECTION 103. EFFECT OF PARTNERSHIP AGREEMENT; NONWAIVABLE PROVISIONS.

“(a) Except as provided in subsection (b), partnership agreement governs relations among the partners and between the partners and the partnership. To the extent the partnership agreement does not otherwise provide, this [Act] governs relations among the partners and between the partners and the partnership.

“(b) A partnership agreement may not;

“(1) Vary the rights and duties under Section 105 except to eliminate the duty to provide copies of statements to all the partners;

“(2) unreasonably restrict a partner’s right of access to books and records under Section 403(b);

“(3) eliminate the duty of loyalty under Section 404(b);
“(3) eliminate the obligation of good faith under Section 404(d);

“(4) vary the power to withdraw as a partner under Section 601(1), except to require the notice to be in writing;

“(5) vary the right to expulsion of a partner by a court in the event specified in Section 601(5);

“(6) vary the requirement to wind up the partnership business in cases specified in Section 801(4), (5), or (6), or

“(7) restrict rights, of third parties under this [Act].”

COMMISSIONER PATRICIA FRY (North Dakota): In subsection (4), the reference -- am I correct in assuming that the right to require that the notice of withdrawal be in writing is so that there be some sort of permanent memorial tangible form?

The term “writing” is not defined in the statute. I don’t believe in any other place it might make a difference. But I think you perhaps can achieve your goal without tying something to pen and paper as closely as this does, by some different phrasing, either that the notice not be oral or perhaps that the notice be communicated in a form that may be indefinitely stored, permitting in other words, communication in
various technological forms as they may be developed, but nothing as mutable as an oral statement would be.

COMMISSIONER CURTIS R. REITZ (Pennsylvania): Perhaps I should have raised this when we were doing the definitions, but I am a little concerned about 103(a).

The partnership agreement has to be shown, as I understand it, by evidence that is oral or written. That excludes, in my mind any evidence that would tend to show the nature of an agreement from course of prior dealing or any other of the typical ways of showing agreement implied in fact from some source other than an express form.

Am I correct -- and perhaps I should understand this from -- remember this from the past but am I correct that you’re intending that a partner vis-a-vis other partners cannot establish a partnership agreement or a term of a partnership agreement by implication from facts that are neither oral nor written?

MR. DONALD J. WEIDNER (Reporter): I do not think we intended that, and we’ll take a look at that language.

COMMISSIONER REITZ: If you don’t intend that, I suggest the easiest way to correct is in the definition -- the standard definitions of an agreement, including express terms and those typically implied in fact.
COMMISSIONER RANDAL C. PICKER (Illinois): Yes. I just have a question. Which consequences of dissociation are not subject to being overridden in the partnership agreement? I take it that 603 is subject to being overridden, subject -- Section sub 704 is subject. Is there anything that is not subject to being overridden?

COMMISSIONER PICKER: I am referring to subsection (b)(4) with regard to the power to withdraw under 601(1).

Typically if you withdraw, as I understand Article 6 and 7, these are consequences associated with it, and I take it all of those can be modified by the partnership agreement. Is that right? That’s my question.

COMMISSIONER PICKER: Well, if I can verify if I, can alter all of the consequences, what is left of the right to withdraw, is my question.

COMMISSIONER ROBERT H. CORNELL (California): What happens here is, in a partnership, you have the power to withdraw. And you can’t prevent that But you can make it wrong to withdraw. And so there’s no problem with that. What we’re talking about is the power withdraw, and the one restriction on that power to withdraw that they can vary by agreement is if you
withdraw, you have to do it in writing. You could agree to that, in which case the withdrawal would require a written document. But the power to withdraw is -- cannot be varied by agreement.

....

MR. ED MERRILL (ABA): The other aspect of that is that the agreement can vary the consequences only between the partners. They cannot vary the consequence of withdrawing as to third party creditors.

So, assuming the other notice provisions and the like are followed, the withdrawing partner is able to affect his relationship with third party creditors. And that cannot be taken away.

....

COMMISSIONER PICKER: I take it they could enhance -- I mean, these are obviously; hypotheticals. They can’t restrict the rights as to creditors. I take it that could enhance the nights as against creditors. For example, if they wanted to strip away the power of the partner to give notice of dissolution, which obviously has consequences for the creditors, I take it the partnership agreement could allow that.

CHAIRMAN FRANCK: Response from the committee?

COMMISSIONER PICKER: Because that would not restrict, would enhance.
MR. MERRILL: That specific thing was not discussed on the committee. My view is that it was not intended, that the rights of third parties could be affected, and I believe that’s what the nonmodification -- it says “restrict.”

....

COMMISSIONER GEORGE H. BUXTON, III (Tennessee):

“SECTION 104. SUPPLEMENTAL PRINCIPLES OF LAW.

“(a) Unless displaced by particular provisions of this [Act], the principles of law and equity supplement this [Act].

“(b) If an obligation to pay interest arises, under this [Act] and the rate is not specified, the rate is that specified in [applicable statute].”

“SECTION 105. EXECUTION, FILING, AND RECORDING OF STATEMENTS.

“(a) A statement may be filed in the office of [the Secretary of State]. A certified copy of a statement that is filed in an office in another state may be filed in the office of [the Secretary of State]. Either filing has the effect provided in this [Act] with respect to partnership property located in or transactions that occur in this State.

“(b) Only a certified copy of a statement that has been filed in the office of the [Secretary of State] may be recorded in an office for recording transfers of real property.
“(c) A statement filed by a partnership must be executed by at least two partners. Other statements must be executed by a partner or other person authorized by this [Act]. An individual who executes a statement as, or on behalf of, a partnership or other person named as a partner in a statement must personally declare under penalty of perjury that the contents of the statement are accurate.

“(d) A person authorized by this [Act] to file a statement may amend or cancel the statement by filing an amendment or cancellation that names the partnership, identifies the statement, and states the substance of the amendment or cancellation.

“(e) A person who files a statement pursuant to this section shall promptly send a copy of the statement to every partner and any other person named as a partner. Failure to send a copy of a statement to a partner or other person does not limit the effectiveness of the statement as to a person not a partner.”

“(f) The [Secretary of State] may collect a fee for filing or providing a certified copy of a statement. The [officers responsible for] recording transfers of real property may collect a fee for recording this statement.”

....

COMMISSIONER RANDAL C. PICKER (Illinois):
Yes. Just a question. I didn't see any provisions analogous to 9-402(7) or 9-402(8) of the UCC dealing with changing in information after a filing or mistakes in a filing. Is that something that you considered and rejected, or just not necessary here?

CHAIRMAN FRANCK: Response from the committee.

MR. JOHN W. LARSON (Reporter): We provide in 105(d) for amendment and cancellation. And to some extent, it is not quite your question, but there are -- there's also something called a statement of denial that gives somebody else the opportunity to say what was filed the first time it was inaccurate.

MR. ED MERRILL (ABA): It was discussed, and there was a substantive decision not to require and put a burden or a penalty on a partner for failing to amend the statement. It was felt that the consequences of failing to amend the statement would provide sufficient incentive, combined with the ability of any single partner to cancel the effectiveness of the statement, that that penalty was not required.

....

COMMISSIONER JOHN SPANGLER (Kentucky): Is it the intent of the Commission in paragraph (f) to leave filing fees discretionary with the Secretary of State? Why the use of “may”? Why not “shall” and leave a bracketed amount for insertion?
CHAIRMAN FRANCK: Response from the committee.

MR. DONALD L. WEIDNER (Florida): Commissioner Buxton of Tennessee says we just did it. Mr. Weidner says we were just afraid if we didn't authorize it that it might cause some people to be less enthusiastic about the statute.

....

COMMISSIONER BRUCE A. COGGESHALL (Maine): In Section B, subsection (b), you prohibit the filing of anything but a certified copy of a statement.

My guess is that the registrar of deeds isn't going to look to this statute to determine what he can and cannot take in over the counter. And it would seem to me to be preferable to say that it's not effective under this act unless it's a certified copy from the Secretary of State.

CHAIRMAN FRANCK: The committee will look at that. The committee is going to look at that.

Do you have another point?

COMMISSIONER COGGESHALL: I do, Mr. Chairman. In subsection (e), Line 4, where it's required that you send a copy to everybody named as a partner. Named where?

MR. ED MERRILL (ABA): In a previously filed statement.

COMMISSIONER COGGESHALL: Well, in a previously filed statement of what?
MR. MERRILL: Primarily a statement of partnership authority.

COMMISSIONER COGGESHALL: This says that anybody that files a statement of any kind, any one of the types of statement, which may be a statement of authority, it may be a statement of dissociation, it may be a number of different things, is it the people who are previously -- whose names are on record as partners?

MR. MERRILL: Yes. And the reason that it's worded that way is that there was a specific intention to avoid a statutory presumption that if -- because only two partners can file it -- that if you are named in a statement of partnership authority as a partner, that you are, in the phraseology of the statute, a partner.

It is possible that someone would be named who would claim not to be a partner and would file a statement of denial. But that person still should be entitled to further filings to know what's going on because they have been named to the public in a statement that indicates they may be a partner. That's the reason for the tricky ---

COMMISSIONER COGGESHALL: I don't think it's altogether clear who the people are that you're supposed to send that notice to. I think you might take another look at it.

....
COMMISSIONER COGGESHALL: Finally, on subsection (e), what is the effect of the failure to send that copy to the partners?

....

MR. MERRILL: It may produce liability between the partners from the partner who did not send a copy to the others if they are damaged by it.

....

COMMISSIONER COGGESHALL: Okay. Does it limit the effectiveness?

MR. MERRILL: It does not limit the effectiveness whatsoever.

COMMISSIONER COGGESHALL: Then why do we limit this last sentence to people not a partner?

MR. MERRILL: It's intended to do exactly that, so there will be -- first of all, by filing a statement, you cannot affect the rights of the partners inner-say. The statements are purely to provide a clarification of the authority rules between the partnership and third parties. It is not an amendment of the partnership agreement. It does not affect the rules of the partners -- the relationship of the partners inner-say.

So, that is the reason for the restriction on the effectiveness between the partnership and third parties.
COMMISSIONER COGGESHALL: I just heard you say that it doesn't -- the failure to send a copy to a partner doesn't limit the effectiveness as between the partners.

MR. MERRILL: No. As between the partnership and third parties. It has no effect between the partners unless it creates damages to a partner because it has changed the relationship of the partnership to third parties which damages the partner who did not receive a copy of the notice.

....

COMMISSIONER EDWARD I. CUTLER (Florida): In subsection (e) is it the intention of the committee that if there is an amendment or cancellation, a copy of that should also be sent to the partners or other persons named as partners?

MR. JOHN W. LARSON (Reporter): Yes. I think the intention is --

COMMISSIONER PHILLIP CARROLL (Arkansas): Lines 18 through 20 on Page 9. A statement filed by a partnership must be executed by at least two partners.

....

That covers the world, doesn't it? What does the second sentence mean? Other statements that are not filed? What does that have reference to? If it has to be executed by two partners, then how can you have another statement executed by only one partner and someone else?
CHAIRMAN FRANCK: Response from the committee.

MR. DONALD J. WEIDNER (Reporter): The first sentence refers to statements that must be -- that may be filed by a partnership, such as statements of partnership authority.

And what we're saying is that a statement of partnership authority which is filed by a partnership rather than by an individual partner effective to bind the partnership must be signed by at least two partners.

On the other hand, the second sentence refers to other statements -- that is, those statements that are filed by an individual partner, for example, denying the prior recorded statement of the partnership. And what it says is an individual partner could throw down the red flag on the record by filing a denial without getting anybody else to come along for the ride.

MR. ED MERRILL (ABA): A statement of dissociation would be another example of a statement that's filed only by an individual and not by a partnership.

....

COMMISSIONER GEORGE H. BUXTON, III (Tennessee): “SECTION 106. LAW GOVERNING INTERNAL AFFAIRS. Laws of the state in which a partnership has its chief executive office govern the partnership's internal affairs.”

COMMISSIONER BUXTON: “SECTION 107.
PARTNERSHIP SUBJECT TO AMENDMENT OR REPEAL OF [ACT]. A partnership governed by this [Act] is subject to any amendment or repeal of this [Act]."

....

"SECTION 201. PARTNERSHIP AS ENTITY. A partnership is an entity."

....

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER CUTLER: Well, as the committee knows, I've been asking what is the reason for calling a partnership an entity or even needing to say anything about it.

I know there are other provisions in the act that will provide that partnerships can sue and be sued and there are other provisions that say that title to land may be taken and conveyed in the name of the partnership.

Frankly, I don't see any reason -- I'd like to hear reasons why it's desirable to say that a partnership is an entity. I'm concerned about the consequences of it being an entity in any other unforeseen situation. ...

....

MR. DONALD J. WEIDNER (Reporter): ... I think the essential vision was that the entity model tends to cut towards simplicity. We didn't start out with the idea that we would be relentless with an entity model. Every time we came to drafting
a section, we found that an entity approach cut towards simplicity.

The second thing it cut toward was stability. We wanted to cut out the situation in -- which every time someone left a partnership under the UPA, the old partnership was dissolved. We wanted to say: Let the entity continue. Case law came down and said if you had ten people in a partnership and one person leaves, then your insurance policy lapses because it's no longer the same partnership, it's a different partnership -- even if the old partnership conveyed all its assets to the new partnership.

So, we said that just offends everyone, and let's say it's the same partnership. So, the particular purpose, I think, was to give stability to the partnerships. It is linked to our rules on breakups. We just say it just doesn't dissolve every time someone leaves.

.....

COMMISSIONER CUTLER: But haven't you already said that? In dealing with breakups, don't you say exactly that? Is there any need to call it an entity when you said in the chapter dealing with breakups those very things?

.....

COMMISSIONER ROBERT H. CORNELL (California): Also, this comes because we're dealing with a lot of history here.
There was such a tension between the aggregate theory and the entity theory for so many years, it affects the way title companies look at it. We had a lot of input from the real estate sections and the title lawyers on that. We went along with the Committee of the Whole's suggestion. We thought it was helpful. The committee does support the language.

...  

COMMISSIONER BUXTON: Buxton of Tennessee. Another reason we wanted to do this is because you have to bear in mind we drew this statute with the idea that it primarily affects the small partnership whose provisions are not necessarily covered by this act, and from time to time they come in for the services of a back-woods Southern Lawyer who will be appearing before a back-woods Southern judge, and it is handy just to look down and see it is an entity and it removes that doubt. If it is that, we believe in calling it that.

...

COMMISSIONER JUSTIN L. VIGDOR (New York): If a state adopts this RUPA, does that convert all existing partnerships in the state to the entity theory ipso facto?

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER HARRY J. HAYNSWORTH, IV (Illinois): The answer to that is “yes.” To the extent that it constitutes any
significant change, in fact, from many respects, existing partnerships today are entities.

COMMISSIONER VIGDOR: My only reason for the question is, I think there may be some ambiguity in that regard. And if there are any existing partnerships that prefer to have elected the other concept, I don't think it's absolutely plain that this automatically would convert them. Maybe it should be.

COMMISSIONER HAYNSWORTH: If I might say, that's a question we can take up again when we get to Article, I believe it's 10, that deals with the effectiveness of the act as to existing partnerships.

....

COMMISSIONER HAYNSWORTH: That is correct. CHAIRMAN FRANCK: So the question in later sections would only be, have you effectively done what you intend to do?

....

COMMISSIONER MACEY: This is Commissioner Macey of Georgia.

The history of the Uniform Partnership Act in the early 1900's, as it was being developed prior to its enactment by this group in 1916, showed ambivalence between to whether it should be an entity theory or an aggregate theory. And that's why it developed as a hybrid. But as the years have gone by,
partnerships have been looked at as an entity rather than just an aggregate of the partners. We have moved in the direction of the entity. In this act, for example, there's a provision that debts of the partnership have to be satisfied first from the assets of the partnership before one can go against the assets of the individual. That's a further ultimate strengthening of the entity theory. And we adopted the entity theory in every situation endeavoring to move in that direction and finally said: Well, let's just say pursuant to the direction we got at the last Conference, that a partnership is an entity, and that's what we did.

....

COMMISSIONER CORNELL:

"SECTION 202. CREATION OF PARTNERSHIP.

“(a) Except as provided in subsection (b), the association of two or more persons to carry on as co-owners a business for profit creates a partnership whether or not the persons intend to create a partnership.

“(b) An association created under a statute under this [Act], a predecessor" --

CHAIRMAN FRANCK: Excuse me. “under a statute other than this [Act].”
COMMISSIONER CORNELL: -- "a statute other than this [Act], a predecessor statute, or a comparable statute of another jurisdiction is not a partnership.

“(c) In determining whether a partnership is created, the following rules apply:

“(i) Joint tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership even if the co-owners share profits made by the use of the property.

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

“(3) The receipt by a person of a share of the profits of a business is prima facie evidence that the person is a partner in the business, but that inference may not be drawn if the profits were received in payment:

“(i) of a debt by installments or otherwise;

“(ii) for services as an independent contractor, or of wages or other compensation to an employee;

“(iii) of rent;

“(iv) of an annuity or other retirement or health benefit to a beneficiary, representative, or a designee of a deceased or a retired partner;"
“(v) of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights of income, proceeds, or increase in value derived from the collateral; or

“(6) of consideration for the sale of the goodwill of a business or other property by installments or otherwise.

“(d) Except as provided by Section 308, persons who are not partners as to each other are not partners as to other persons.”

COMMISSIONER EDWARD I. CUTLER (Florida): Please look at subparagraph (b), or subsection (b), with regard to associations. The reference there is only associations created under statutes.

Mr. Vigdor raised the point about partnerships that were created many years ago, perhaps with the concept that they would be entities and they -- would not be entities, but they would be aggregates. And more than that, perhaps under the common law -- Florida did not adopt its Uniform Partnership Act until much later than it had adopted the Uniform Limited Partnership Act. So, would it not be more accurate to include associations created under the common law, which were created as
partners, since the committee evidently does intend that this act will cover preexisting partnerships?

.....

COMMISSIONER CUTLER: ... It was raised in another earlier reading today in another statute, and those are the words “prima facie” on Line 10. Is there a good reason to include them?

CHAIRMAN FRANCK: Line 10, Page 15.

COMMISSIONER CUTLER: Or should we delete it? Is there intended to be a difference between that and the presumptions that are later referred to in the act?

.....

MR. WEIDNER: No, but we had -- the committee had earlier changed this language and indeed had introduced language of presumptions into Section 202 and had significantly rewritten the entire provision defining a partnership. And basically we received extensive criticism for doing that. A lot of people said that, but for the change we were making in (3)(v), we really weren't intending to change present law and we were asked to minimize our tinkering with this section, which we did, and the wave of criticism receded.

.....

COMMISSIONER FISHER: ... It seems a little confusing in subparagraph (c)(1), (2), and (3), where you're using the
term “co-owner share profits,” the next one gross returns, and interchangeably you hear of gross profits, and then again you have, in the next one, profits.

I'm just wondering if there is going to be confusion here without some type of definition.

CHAIRMAN FRANCK: Response from the committee.

COMMISSION HOWARD J. SWIBEL (Illinois): Swibel of Illinois. Commissioner Fisher, the answer is similar to the one that was just given to Commissioner Cutler. The current Uniform Partnership Act in Section 7 contains the same terminology -- gross returns in one section, profits in another.

Our advisers did not bring to our attention any problems or confusion that had been developed in the last 70 years, so we just decided to carry forward this same language here.

....

COMMISSIONER HARVEY S. PERLMAN (Nebraska): I think I understand what you mean by (b), but I'm not sure the language is very clear.

I take it what you mean is that an entity under, created under a statute other than this act or a predecessor of a statute created other than this act or a statute comparable to something other than this act, is that right? Because the way -

....
COMMISSIONER ROBERT H. CORNELL (California): Yes.

...

COMMISSIONER ROBERT H. CORNELL (California): Okay.

"SECTION 203. PARTNERSHIP PROPERTY. Property transferred to or otherwise acquired by a partnership is property of the partnership and not of the partners individually."

...

"(d) Property acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and without use of partnership assets, is presumed to be separate property, even if used for partnership purposes."

...

COMMISSIONER EDWARD I. CUTLER (Florida): I notice here you do use presumptions and don't refer to prima facie evidence, and I assume you had no problem with anybody on that score.

But I do notice that the text doesn't say the extent to which the presumption can or cannot be rebutted. The comment does say each of those two presumptions is rebuttable.

...

MR. DONALD J. WEIDNER (Reporter): We had it in and the Style Committee took it out. ...
CHAIRMAN FRANCK: The motion is a sense of the house motion that we indicate in the black letter that the presumptions are rebuttable. All right?

COMMISSIONER EUGENE BURDICK (North Dakota): Under the Uniform Rules of Evidence, all presumptions are rebuttable. It is totally redundant to add the word "rebuttable." If we put the word "rebuttable" in here, it's going to leave a host of other statutes in doubt as to what we mean by a presumption.

It would be very unfortunate for the Conference, as a Conference to insert that word "rebuttable," because they're all rebuttable.

CHAIRMAN FRANCK: Commissioner Langbein.

COMMISSION JOHN H. LANGBEIN (Connecticut): The fact that the Uniform Evidence Act may take this position with respect to all presumptions being rebuttable doesn't mean that that concept is present to the mind of users of a specialized statute of this character. I think it adds real clarity on occasion to go ahead and spell out something which you could find in another act if you were -- if you had the time to go find it.

I think Commissioner Cutler's motion ought to be supported.
COMMISSIONER JAMES C. McKAY, JR. (District of Columbia): I am speaking in opposition. I think it could be just as well solved by putting something in the comment saying that they are rebuttable. I don't think we have to amend the text of the act and create all sorts of problems. The comments would serve the purpose fine.

COMMISSIONER EDWARD I. CUTLER (Florida):

Quite correct, of course, the comment does indeed say that it's rebuttable. I'm not sure that that circuit judge in Tampa is going to read this act in a state where we haven't adopted the rules of evidence in the same form as Judge Burdick refers to it and is going to say it's presumed, period.

I don't think we would hurt -- maybe we would hurt some other acts, I doubt it, but I'd certainly like to see the word "rebuttably" in here.

CHAIRMAN FRANCK: All right. This motion before you is a sense of the house motion that we'll put in the black letter Section 204 where there is reference to presumption the concept that they are rebuttable.

As many as are in favor of the motion, please say "aye."

Those opposed say "nay."
The “noes” have it. The motion is defeated. ...

COMMISSIONER ARTHUR E. BONFIELD (Iowa): I have a question about (a)(2), the language “or existence of a partnership.” I'm not quite clear what that means. It seems to suggest that if a person took title to property and somehow in the document there was -- the existence of a partnership was mentioned, even though it wasn't necessarily indicated that the person was to take the title as a partner, so it's John Doe who happens to be a partner, or John Doe, a partner? Does that necessarily mean that in all cases when there's any indication the person has any partnership interest, whether or not the intention is to transfer it to them as a partner, that the title would vest in the partnership?

CHAIRMAN FRANCK: Response from the committee. Please state your name.

MR. ED MERRILL (ABA): This is not the section that deals with title. This is the section which characterizes the property as partnership property as between the partners. The sections that deal with the title to the property and clarification of the conveyancing rules are in Section 3.

COMMISSIONER BONFIELD: But it says property is partnership property if acquired in the name of one or more of the partners -- that, I understand -- but with an indication in
the instrument the person's capacity as a partner or the existence of a partnership.

And I'm simply wondering about a person who buys a house and there's some indication in the thing that this person who is buying a house happens to be a partner in something. This says property is partnership property so long as there's an indication --

COMMISSIONER BONFIELD: -- of the existence of a partnership.

MR. MERRILL: When we discussed this, we had difficulty conceiving why anyone put the existence of a partnership into conveyancing a deed or instrument unless they somehow intended the partnership to be involved in the title. That was our presumption in considering it and the reason for the rule as stated.

....

Section 301.

COMMISSIONER' ROBERT H. CORNELL (California): "SECTION 301. PARTNER AGENT OF PARTNERSHIP. Subject to the effect of statement of partnership authority pursuant to. Section 303:

"(1) Each partner is an agent of the partnership for the purpose of its business. Any act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the usual way the partnership business
or business of the kind carried on by the partnership binds the partnership, unless the partner has no authority to act for the partnership in the particular matter and the person with whom the partner is dealing knows or has received a notice that the partner lacks authority.

“(2) An act of an partner which is not apparently for carrying on in the usual way of the partnership business or business of the kind carried on by the partnership does not bind the partnership unless authorized by all of the other partners.”

COMMISSIONER SANDRA S. STERN (New York): I am wondering why you used the words “a notice” there rather than “notice.”

COMMISSIONER CORNELL: Yes. We gave notice a special meaning in the definitional section, and we meant here received a notice -- actually, a document or something that puts a person on notice at the time, which is a little bit different. We wanted to create more certainty and not require inquiry.

MR. ED MERRILL (ABA): Commissioner, this is the implementation, really, of the question you asked early. By the difference between notice and a notice is, in fact, it eliminates has reason to know from all of the facts in time. The intent here was to require the person to have cognitive
awareness or have received a notice to punch a hole in the authority. This was an intendment generally in favor of creditors as opposed to protection amongst the partners.

COMMISSIONER SANDRA S. STERN (New York): Yes, but in Section 102, the word "notice" includes that the third party knows of it.

MR. MERRILL: I think the operative ones that are intended by the committee of this language are, (a), knows of a fact, and (d), a person is notified or receives a notice when the existence comes to the person's attention or it's duly delivered to the person's place of business. And that was the intention of the committee in the crafting of the notice section in 301.

....

COMMISSIONER LANGROCK: 301(2). I take it that you could have a situation where a partnership was a -- a partner did something on behalf of a partnership which was not in the usual course, which was actually authorized by a majority of the partners, and the partnership agreement would provide for a majority control, but yet that would not bind the other partners?

CHAIRMAN FRANCK: Response from the committee.

MR. DONALD J. WEIDNER (Reporter): I think it's a good point. We had taken that section out. After we took it out, the
reaction was that its removal had obscured the notion that a partner can bind his or her partnership by actual authority even if there is no apparent authority. And that's the notion that is in that section. So, the answer to your specific hypothetical is "yes."

CHAIRMAN FRANCK: Well, the question that's being raised, as I understand it, is whether that should be all of the partner's requirement, if the partnership documents permit the partnership to be authorized to act by a vote of the majority of the partners. Is that your question?

COMMISSIONER LANGROCK: Yes. The way I read this is that you could have a situation, an unusual business situation, where a partner enters into it. A majority of the partners approve. The partnership agreement says a majority shall be enough to approve this business, and yet it does not bind all the partners?

MR. WEIDNER: No. The majority approval does bind the partners in that situation even to a third party even if there is not otherwise any apparent authority to the third party at all.

COMMISSIONER LANGROCK: Actual authority would override the apparent.

MR. WEIDNER: Exactly.
COMMISSIONER LANGROCK: I don't think (2) says that. That's my problem.

MR. MERRILL: Well, the agreement always controls, and if it's the agreement of the partners, they override the authority section.

CHAIRMAN FRANCK: Does the committee want to look at this language when they go back?

COMMISSIONER HARRY J. HAYNSWORTH, IV (Illinois): Well, the language is exactly that of the existing partnership act in Section 9, subsection (2).

....

COMMISSIONER HARVEY S. PERLMAN (Nebraska): Do you need authorized or ratified? Can you ratify an act that a partner has taken and then make it binding on the partnership? But you wouldn't do it in agreement because, you know . . .

CHAIRMAN FRANCK: Response from the committee. MR. DONALD J. WEIDNER (Reporter): I would think that would be a friendly amendment.

COMMISSIONER PERLMAN: All my suggestions are friendly.

CHAIRMAN FRANCK: We're a friendly group, yes.

MR. WEIDNER: That's also received with friendliness.

CHAIRMAN FRANCK: Does that mean the committee is going to accept adding to Line 24 “ratified”? 
COMMISSIONER ROBERT H. CORNELL (California): The committee will take a look at (2) to make sure that we're covering both actual authority and ratification.

...-

COMMISSIONER CORNELL: "SECTION 302. TRANSFER OF PARTNERSHIP PROPERTY.

"(a) Subject to the effect of a statement of partnership authority pursuant to Section 303:

"(1) Partnership property held in the name of the partnership may be transferred by an instrument of transfer executed by any partner in the partnership name.

"(2) Partnership property held in the name of one or more partners with an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, even if the name of the partnership is not indicated, may be transferred by an instrument of transfer executed by the persons in whose name the property is held.

"(3) A partnership may recover property transferred under this subsection if it proves that the execution of the instrument of transfer did not bind the partnership under Section 301, unless the property was transferred by the initial transferee or a person claiming through the initial transferee to a subsequent transferee who gave value without having notice
that the person who executed the instrument or initial transfer lacked authority to bind the partnership.

“(b) Partnership property held in the name of one or more persons other than the partnership, without an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, may be transferred free of any claims of the partnership or the partners by the persons in whose name the property is--held to a transferee who gives value without having notice that it is partnership property.

“(c) If a person holds all of the partner's interest in the partnership, all of the partnership property vests in that person. That person may execute documents in the name of the partnership to evidence vesting of the property in that person and may file or record those documents.”

CHAIRMAN FRANCK: Comments on Section 302?

Commissioner.

COMMISSIONER PATRICIA FRY (North Dakota): I made a comment earlier concerning writings. Both the words “instruments” and “documents” are used in this section. It might be construed by some people necessarily to mean something in writing. And I would suggest the comments say -- make provision for potentially nonpaper types of things. I'm thinking particularly of the investment security act we have coming
before us that suggests that many of the transfers of investment securities, for example, are not done in writing any more.

....

MR. DONALD J. WEIDNER (Reporter): I think that's a good comment. I think we will look at that.

....

COMMISSIONER BRUCE A. COGGESHALL (Maine): In the situation described in subparagraph (2), where the property is held in the name of somebody with the indication that he's holding it as a partner, does that person -- is that person the person to sign the deed? Or can anybody in the partnership sign it?

MR. ED MERRILL (ABA): The person's in whose name the property is held.

....

COMMISSIONER COGGESHALL: It's held by John Smith as partner of XYZ partnership. Does John Smith have to sign the deed?

MR. MERRILL: Yes.

COMMISSIONER COGGESHALL: Well, you say “yes,” but if you look at the definition over in Section 204, by definition, that property is in the partnership's name.

CHAIRMAN FRANCK: Response from the committee.

....
COMMISSIONER COGGESHALL: I think the situation that you describe in paragraph (2) is a situation where under Section 204, property is in the partnership name. So, I think that that section really ought to be deleted because it's covered by Section 1.

MR. DONALD J. WEIDNER (Reporter): My quick reaction is that you're right.

....

MR. WEIDNER: But we'll look at that, I guess.

....

COMMISSIONER ROBERT H. CORNELL (California): "SECTION 303. STATEMENT' OF PARTNERSHIP AUTHORITY.

“(a) A partnership may file a statement of partnership authority, which:

“(1) must include:

“(i) the name of the partnership;

“(ii) the street address of its chief executive office and of an office in this State, if any;

“(iii) the names and mailing addresses of all of the partners or of an agent appointed and maintained by the partnership for the purpose of subdivision (b); and

“(iv) a statement specifying the names of the partners authorized to execute an instrument transferring real property held in the name of the partnership; and
“(2) may include a statement of the authority or of limitations on the authority, of some or all of the partners to enter into other transactions on behalf of the partnership and any other matter.

“(b) If a statement of partnership authority names an agent, the agent shall maintain a list of all of the names and mailing addresses of all of the partners and make it available to any person on request for good cause shown.

“(c) If a filed statement of partnership authority is executed pursuant to Section 105(e) and states the name of the partnership but does not contain all of the other information required by subsection

“(a) the statement operates with respect to a person not a partner as provided in subsections (d) and (e).

“(d) Except as provided in subsection (e) and (f), a filed statement of partnership authority supplements the authority of a partner to enter into transactions on behalf of the partnership as follows:

“(1) Except for transfers of real property, a grant of authority contained in a filed statement of the partnership authority is conclusive, in favor of a person who gives value without knowledge to the contrary, so long as and to the extent that a limitation on that authority is not then contained in
another filed statement. A filed cancellation of a limitation on authority revives the previous' grant of authority.

“(2) A grant of authority to transfer real property held in the name of the partnership contained in a certified copy of a filed statement of partnership authority recorded in the office for recording transfers of that real property is conclusive, in favor of a person who gives value without knowledge to the contrary, so long as and to the extent that a certified copy of a filed statement containing a limitation on that authority is not then recorded in the office for recording transfers of that real property. The recording in the office for recording transfers of that real property of a certified copy of a filed cancellation of a limitation on authority revives the previous grant of authority.

“(e) A person not a partner is deemed to know of a limitation on the authority of a partner to transfer real property held in the name of the partnership if a certified copy of the filed statement containing the limitation on authority is recorded in the office for recording transfers of that real property.

“(f) Unless earlier canceled, a filed statement of partnership authority is canceled by operation of law five years after the date on which the statement or the most recent amendment was filed with the [Secretary of State].”
COMMISSIONER STANLEY PLETTMAN (Texas): The problem I'd like to raise arises out of the interrelationship between Section 303 on the one hand and 301 and also 302 on the other hand.

In our state, and I suspect in perhaps others, the official publication of statutes does not include the comments on uniform law acts, with the sole exception of the Uniform Commercial Code. ... So, the problem is this: I don't see where Section 303 addresses the issue of whether or not in a non-real estate transaction a limitation of a partner's authority on a filed statement of authority would be effective as to third parties who do not have notice of that limitation.

Now, the reason why I believe that there's uncertainty arises out of the lead-in section or sentence of Section 301, same on 302. 301 has a lead-in: Subject to the effect of a statement of partnership authority pursuant to Section 303. So, that says everything that follows is going to be subject to the effect of a 303 statement.

That same qualification then would apply, I believe, or at least arguably apply, and I'd like to see the uncertainty clarified. In Lines 19 through 21 on Page 23, Section 301(1) does say: Unless the party has no authority to act for the
partnership in the particular matter and the person to whom the partner is dealing knows or has received a notice that the partner lacks authority.

Now, that “unless” provision would solve my problem but for the fact that it's all subject to the lead-in provision which says, “subject to the effect of a statement of partnership authority” filed under 303.

I think the same problem exists in 302 because it has the same lead-in of subject to filing under 303.

....

COMMISSIONER PLETTMAN: The filing of a statement as provided for in Section 105 does not provide notice to a person who is not a partner of any limitation on a partner's authority which is set forth in the filed statement. That's it. Of course, that's what you have said in your comment, but that's the end of it.

CHAIRMAN FRANCK: Response from the committee.

MR. ED MERRILL (ABA): Commissioner, if I may. The reason that we did not include such a clarification, apart from style discussions, is that 303 by its terms serves to supplement authority. So, (d) is not operative except to supplement authority. When the limitation is filed, it cancels the supplementation so there is nothing to rely upon as a grant of
supplementary authority, so you are thrown purely back into Section 301 to determine partnership authority.

COMMISSIONER PLETTMAN: I hear you and I understand what you've said. However, it seemed to read otherwise to me, and I'd like you to clarify why this isn't so.

303(a)(2) says that a statement -- may include a statement of the authority or of limitations on the authority of some or all of the partners to enter into other transactions on behalf of the partnership.

Now, I read -- I thought that meant that a statement. could contain a limitation on authority. For example, it could say a partner cannot transfer -- forget about real property. I understand that's exclusively spoken to. But it could say partnership property cannot be transferred except by the act of two partners.

MR. MERRILL: That is correct. It could contain that. But if you look to the effect in (d) and (e), the effect sections-supply only supplementation. So, in order for a limitation in a statement to be effective, it must either pro -- it must be known of by the creditor or have been provided to him to have the limitation effects under Section 301.

MR. DONALD J. WEIDNER (Reporter): His point is that he agrees with that substantive outcome, but that we have in our
introductory clause to 301 suggested a 303 override to the rule that you're pointing to at the bottom of 303(1). I think it's --

COMMISSIONER PLETTMAN: That's correct. And it wasn't clear to me that (d) and (e) were the only --

CHAIRMAN FRANCK: The committee will look at that, Commissioner.

COMMISSIONER JAMES C. McKAY, JR. (District of Columbia): ... Subsection (f).

You have a statement of partnership authority automatically expiring after five years. No. 1, can this be changed by the agreement? Or -- because that's not in the list, I don't think.

....

COMMISSIONER CORNELL: The partnership agreement can't affect third party rights, and so this -- this is a third party arrangement. In other words, this is how you give notice to third parties, and it has an affect, and partnership agreement -- that would be like a partnership agreement stating that the four-year statute of limitations is two years. it would have no effect on third parties.

COMMISSIONER McKay: All right. In that case, I think that, No. 1, it ought to be longer. No. 2, it ought to be in brackets. Because, I mean, you can have all sorts of inadvertent
expirations of partnership authorities, and five years isn't that long a time.

COMMISSIONER CORNELL: This statement is really a pretty permissive thing, and normally it's used at the time of a transaction -- at the time of a mortgage being issued, of a major chattel loan or a major real estate transaction. And it's to satisfy the people requiring evidence of the authority without all the signatures.

Our feeling was that these things tend to be filed and then forgotten about, and it would be better to have a fairly short twilight period. If the partnership doesn't do it, they're going to have to go out and get all the signatures, or do whatever else they need for all the authority. They can extend it only by renewing it and amending it.

So, we think that the policy should be set in black letter and not a bracket.

....

COMMISSIONER MARK H. RAMSEY (Oklahoma): The statement was made earlier with regard to Section 105 that there is a danger of creating a filing requirement that the Secretary of State may not understand. It seems to me that 303(a) does the same thing. You're essentially creating magical contents, and if you don't have those magical contents, then you run into
problems. The same problems arises with you look when you search the title to personal property.

COMMISSIONER ROBERT H. CORNELL (California): That was a policy decision, that in a real estate transaction, people are going to look to the records. And that's why we have them look in the records where there's recordation.

In the case of personal property, there might be a limitation on what would be apparent authority, and the average person transacting business with that partnership would not normally in every transaction run down and do a check to see if there was some limitation of authority. It's not the normal procedure, and so we felt that it was not proper to give constructive notice in that case. That was a purpose policy decision.

COMMISSIONER COGGESHALL: I'm not sure that it's not the normal course to check the personal property records before you buy a piece of personal property. It's common to check them -- to check the liens.

MR. ED MERRILL (ABA): We were primarily focusing on trade creditors here who do daily business with the partnership in the ordinary course. We thought that it would be a trap for them, but that in significant transactions, say, in a computer leasing or acknowledgments and that sort of thing.

....
MR. WEIDNER: We did try to have a bit of a savings clause on Page 32, Lines 3 and 4.

Essentially what we do is provide an opportunity for a partnership to file a statement and then impose a disclosure tax on the exercise of that opportunity, and then we say in 3 and 4, even if they don't pay the disclosure tax, the statement is still effective as to third parties.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER BRUCE A. COGGESHALL (Maine): I've got a number of questions and one comment on this section, if I may.

First of all, the comment -- you provide in subsection (e) that a registry filing is constructive notice with respect to real estate transfers.

Why shouldn't a Secretary of State filing be constructive notice with respect to personal property transfers? If there is a limitation on a partner's authority to transfer personal property and that limitation is filed with the Secretary of State, why shouldn't that be constructive notice? That's where a major personal equipment transaction, that in order to satisfy themselves, the creditor or the vendor would look to -- would be seeking out an affirmative statement of partnership authority and therefore would look in the Secretary of State to get the affirmative statement and would therefore pick up the limitation.
MR. ED MERRILL (ABA): So, we were very concerned about creating a trap for trade creditors dealing with smaller partnerships.

COMMISSIONER COGGESHALL: Okay. I understand.

In subsection (c) on Line 2, first, the reference to 105(e), I think, should be to 105(c). And then I have a question that --

CHAIRMAN FRANCK: Let's have the reporter check on that point first before you go on. Should the reference to 105(e) be to 105(c)? That's the suggestion. It's the reference on Page 32, Line 2 to 105(e). He is suggesting that it should have been to 105(c).

They tell me that you're correct, and we will change to 105(c).

COMMISSIONER COGGESHALL: Thank you. The language at the end of that line, Line 2, when it says, “but does not contain all of the information,” I don't know what that means. What happens if it does contain all the information?

MR. DONALD J. WEIDNER (Reporter): Excuse me.

MR. ED MERRILL (ABA): What was the question?

COMMISSIONER COGGESHALL: Well, the sentence says: If the statement of authority is executed but does not contain the other information, the statement operates with respect to a person as provided in subsection (e).
First of all, I think that it ought to be -- in looking at that, it ought to be recorded rather than executed, in which case the reference to 105(e) is correct. But it says that if the statement doesn't contain all of the information, then it's effective -- has the effect provided in (e) and (f).

MR. WEIDNER: Yes. I think I see your point. What we really mean to say is, it's effective -- that even if --

COMMISSIONER COGGESHALL: It nevertheless operates --


COMMISSIONER COGGESHALL: Would you also take a look whether it ought to be -- we ought to make reference to it being filed rather than executed?

MR. WEIDNER: Yes. Good point.

CHAIRMAN FRANCK: They're willing to look at that too.

COMMISSIONER COGGESHALL: And then, finally, in subsection (f), you make a distinction throughout this section between something being filed and something being recorded. Were you intentionally leaving out the recorded statement in subsection (f)?

CHAIRMAN FRANCK: Response of the committee.

MR. ED MERRILL (ABA): I think the intent was to have the reference to filing merely refer to the date, and that the cancellation was of the entire statement, whether recorded or
filed. But the five-year period would measure from the filing in the Secretary of State's office.

COMMISSIONER COGGESHALL: Okay. This refers to a filed statement, and earlier on you referred to a filed statement or a recorded statement.

MR. MERRILL: But only -- remember, that only a certified copy of the filed statement may be recorded.

COMMISSIONER COGGESHALL: Okay. That becomes something that's recorded.

Now, I don't know how you get something off the records in the registry of deeds. I think what -- I think as I read it initially that it applied only to the Secretary of State -- is probably correct. But I-don't know how something becomes ineffective that has once become noticed at the registry of deeds.

MR. MERRILL: There are, at least in most states, ancient records acts which have the effect of nullifying -- like options. and other documents that have been on the record for a certain period of time and have not taken effect, and presumably this would be treated as that same kind of legislation by a title company.

COMMISSIONER COGGESHALL: Okay.

....
COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut):

Briefly, earlier, Commissioner Coggeshall and I spoke with Commissioner Haynsworth about this notion of the duplicative requirement of filing certified copies or recording certified copies on the land records.

In (e), you suggest that a nonpartner is deemed to know of the facts that are stated in the certificate only if it's certified -- is a curious notion. Because if it's recorded, whatever notice one might have it seems to me to exist whether or not you --complied with certification requirements.

I'm trying to understand the policy that underlies the notion that they're deemed to know of this limitation only if it's certified, when, in fact, the knowledge that might be imparted would be the same in either circumstance.

CHAIRMAN FRANCK: Response of the committee.

MR. ED MERRILL (ABA): The reason was that the certification requirement is not the critical item, but it's the recording to give the constructive notice. The certification arises as an incident of another policy, which was to avoid inconsistent records and to have a complete record at the Secretary of State's office.

The implementation of that policy requires that only a certified copy of what is filed in the Secretary of State may be recorded. But it is the recordation which gives the constructive
notice. And the policy behind the committee's decision was that real property transactions are of sufficient import that it is all right to put a duty upon the purchaser to search the record to look for limitations.

COMMISSIONER BREETZ: I understand that. I guess rather than debate the underlying basic policy, that if, in fact, on reflection, the committee decides to change this notion of requiring certification, that you come back to this section and track whatever outcome you have here. I'll leave it at that rather than debate it.

....

COMMISSIONER JOHN P. BURTON (New Mexico): Am I right in understanding that you're thinking of this statement as more like a corporate resolution that is of short duration than, say, corporate bylaws?

MR. DONALD J. WEIDNER (Reporter): Yes.

CHAIRMAN FRANCK: Response from the committee.

MR. WEIDNER: Yes. The anticipation was that in many of these transactions the statement will be filed at the insistence of a lender.

....

COMMISSIONER BURTON: So, a prudent lender or other person doing business with the partnership would be advised to get one of these statements each time. All right.
I have problems in trying to fit this in with some of the other provisions in this statute or in this same section. You say that you -- if something is of record, if one of these things is of record that conflicts with another one that's of record, then you can't rely on it. You go get a third one, put that of record, now you've got three of them that are conflicting of record. What do you do?

CHAIRMAN FRANCK: Response from the committee.

MR. ED MERRILL (ABA): If the policy we've intended to express is that if there is a conflict in the record, you cannot rely on a battle of the forms. You must otherwise verify the authority under 301 or by some other means.

COMMISSIONER BURTON: All I'm suggesting is, I think you may have done more than you intended to do. Because every time you have one of these things of record, it's going to -- it's likely to be slightly different, and therefore in conflict. I would suggest that you might want to take a look at that and provide some way for perhaps relying upon the most recent one.

MR. MERRILL: The intention is that if two statements of partnership are filed, that the second one would be treated as an amendment of the first statement of partnership and you would look at the later of the statement of partnership. It is only where there are conflicting forms, like a denial, a notice
of dissociation, or other limiting factor where you have what would be characterized as a battle of the forms.

COMMISSIONER BURTON: All right. You might just want to take a look at that and make sure that intention was clear. It wasn't clear to me when I read it.

Another point I would like to make is that you have a provision here that says if you cancel one of these statements of partnership, you automatically revert to the next previous one.

Do I understand that correctly?

MR. MERRILL: It is on limitations that that operates. And the reason, for that was that we envision, in order to protect dissident partners, any one of them has the right to file a statement of denial, which has the effect of canceling the statement. We wanted to allow a mechanism for a prompt negotiation and to allow the dissident to withdraw his notice of dissent and allow the original statement to go forward.

COMMISSIONER BURTON: Again. I just suggest you take a look at that and make sure that you're satisfied you have limited it in the way you state it. Thank you.

....

COMMISSIONER THOMAS L. JONES (Alabama): “SECTION 304. STATEMENT OF DENIAL. A partner or other person named as a partner in a filed statement of partnership authority may file a
statement of denial stating the name of the partnership and the fact that is being denied, which may include denial of a person's authority, or status as a partner. A statement of denial is a limitation on authority to the extent provided in section 303(d) and (e)."

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER BRUCE A. COGGESHALL (Maine): In Line 31, after the word "authority," I would suggest that we add the words "or in a list maintained by an agent under Section 303(b)."

CHAIRMAN FRANCK: Response from the committee. Everybody is nodding, but they will look at it.

COMMISSIONER JONES: "SECTION 305.
PARTNERSHIP LIABLE FOR PARTNER'S ACTIONABLE CONDUCT.

"(a) A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with the authority of the partnership.

"(b) If, in the course of its business, a partnership receives money or property of a person not a partner which is misapplied by a partner while it is in the custody of the partnership, the partnership is liable for the loss."
COMMISSIONER JONES: "SECTION 306. PARTNER'S LIABILITY."

All partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER PATRICIA FRY (North Dakota): Am I correct in assuming that it is intended this section deal with the exposure to third parties? I could conceive of a situation where the partners in the agreement would specify that their liability amongst themselves would not be joint and several.

Certainly I think this is correct as, to other -- others dealing with the partnership. But how it -- you know -- this has some potential interaction back to, I guess, 103, it was.

....

MR. DONALD J. WEIDNER (Reporter): Our intent here is to simply change the UPA rule which says that the partners are liable joint and severally in tort but only jointly in contract to a rule that says they're jointly and severally liable to third parties in both -- for both tort and contract.

COMMISSIONER FRY: But am I correct in assuming the committee would agree with me that amongst themselves, the partners could agree that they would allocate their
responsibility amongst themselves in a different manner, however, that could not have any impact on a third party?

CHAIRMAN FRANCK: The committee nods their head and they agree with that.

....

COMMISSIONER JONES: “SECTION 307. ACTION AGAINST PARTNERSHIP AND PARTNERS.

“(a) A partnership may sue and be sued in the name of the partnership.

“(b) An action may be brought against the partnership and any or all of the partners in the same action or in separate actions.

“(c) A judgment against a partnership is not by itself a judgment against the partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is a judgment against the partner.

“(d) A judgment creditor of a partner may not levy execution against the assets of the partner to satisfy a judgment based on a claim against the partnership unless

“(1) a judgment based on the same claim has been obtained against the partnership and a writ of execution on the judgment has been returned unsatisfied in whole or in part;

“(2) an involuntary case under Title 11 of the United States Code has been commenced against the partnership and has
not been dismissed within 60 days after commencement, or the partnership has commenced a voluntary case under Title 11 of the United States Code and the case has not been dismissed;

“(3) the partner has agreed that a creditor need not exhaust partnership assets;

“(4) a court grants permission to the judgment creditor to levy execution against the assets of a partner based on a finding that partnership assets subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of partnership assets is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's inherent equitable powers; or

“(5) liability is imposed on the partner by law or contract independent of the existence of the partnership.

“(e) This section applies to any partnership liability or obligation resulting from a representation by a partner or purported partner under Section 308(a) or (b).”

....

COMMISSIONER EDWARD I. CUTLER (Florida): Would you mind changing the caption of this to action by and against partnerships and partners? I know that the very first words are that a partnership may sue and be sued, so it would be more reflective of the content to change the title.

CHAIRMAN FRANCK: They're going to look at that.
COMMISSIONER CUTLER: The second point I have is, perhaps something ought to be discussed in the comment, and that's the question of whether the partnership being an entity is subject to the same diversity of citizenship rules in being a party in federal court and whether the citizenship of each of the partners is to be considered.

I think I've seen the authorities. The reporter has been good enough to show them to me. And I believe that you still have to have diversity of citizenship of all of the partners even if it is a separate legal entity. I think it would be helpful if that were stated in a comment.

....

COMMISSIONER WINDSOR DEAN CALKINS (Oregon): In my state and, I assume, several others, many of these issues are handled in the rules of civil procedure for naming the partnership, the partners, and in the judgment sections. And I'm wondering whether this should be bracketed as to be used as a possible rule of civil procedure or else some sort of comment alerting those states adopting it that they are going to have to look at the rules of civil procedure.

CHAIRMAN FRANCK: Response from the committee.

MR. DONALD J. WEIDNER (Reporter): We struggled with how much to put in the statute, and we’ll think about how to
flag it. For example, we struggled with how much to put in about collateral estoppel and decided to leave that out.

CHAIRMAN FRANCK: They’ll take a look at that, Commissioner.

....

COMMISSIONER THOMAS. L. JONES (Alabama): “SECTION 308 PURPORTED PARTNER.

“(a) If a person, by words spoken or written or by conduct, purports to be a “partner, or consents to being represented by another as a partner, in a partnership with or one or more persons not partners, the purported partner is liable to a person to whom the representation is made and who, relying on the representation, gives credit to the actual or purported partnership. If the representation, either by the purported partner or by a person with a purported partner’s consent, is made in a public manner, the purported partner is liable to a person who gives credit and reliance upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If the partnership liability results, the purported partner is liable as if the purported partner were a partner. If no partnership liability results, a purported partner is liable jointly and severally with any other person consenting to the representation.”
“(b) If a person is represented to be a partner in an existing partnership, or with one or more persons not, partners, the purported partner is an agent of persons consenting to the representation to bind them to the same extent and in the same manner as if the purported partner were a partner, with respect to persons who give credit in reliance upon the representation. If all of the partners of the existing partnership consent to the representation, a partnership act or obligation results. If fewer than all of the partners of the existing partnership consent to the representation, the person acting and the partners consenting to the representation are jointly and severally liable.

“(c) A person is not a partner in a partnership solely because a person is named by another in a statement of partnership authority.

“(d) A person does not continue to be a partner solely because of a failure to file a statement of dissociation or to amend a statement of partnership Authority to reflect the partner’s dissociation from the partnership.”

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER PATRICIA FRY (North Dakota): I’d suggest, ask the committee to consider, at least, that the words “spoken or written” be deleted, on the first line of subsection (a).
I think it is sufficient to say if a person by words or by conduct. And I’ll get back to my technology again. Spoken or written excludes some other possibilities, but I doubt ____. I assume you didn’t want to exclude.

CHAIRMAN FRANCK: They’ll look at that, I assume.

COMMISSIONER FRY: All right. Secondly, in subsection (b), I’ve got the draft that was sent to our offices, so I don’t have the line. You refer to consent to the representation. I assume you mean consent or ratify. Or you’d like you would want to make

CHAIRMAN FRANCK: It’s in Lines 21 and 22.

COMMISSIONER FRY: I assume you would want to make it clear there could be a ratification after the act.

Finally, and I’m sorry -- I beg everyone’s indulgence.

CHAIRMAN FRANCK: They’re are going to look at that, too.

COMMISSIONER FRY: In subsection (c), why are you stating that a person is not a partner in a partnership solely because named by another in a statement of partnership authority? Couldn’t that equally be true if they named themselves in, a statement of partnership authority and yet they were not otherwise a partner?

CHAIRMAN FRANCK: Response from the committee.
COMMISSIONER FRY: Conceivably you: could have wildcat filing, is what I’m getting at.

MR. DONALD J. WEIDNER (Reporter): I guess I don’t know of a single case that allows someone to back off his or her own declaration of partnership status when it comes, to liability to a third party. So, distinguish the two cases.

COMMISSIONER FRY: I see your point. Thank you.

....

COMMISSIONER BRUCE A. COGGESHALL (Maine): Why is the protection that’s given by this section limited to parties that give credit to the partnership? Why shouldn’t it be anybody that enters into a transaction with a partnership relying on the representation?

CHAIRMAN’FRANCK: Response from the committee.

MR. WEIDNER: The best answer that I can give you is that thought we were continuing the rule of the UPA on that. We’re not intending to enlarge the scope of that section.

COMMISSIONER COGGESHALL: I think that is the rule of the UPA, but MR. WEIDNER: Yes.

COMMISSIONER COGGESHALL: But I think it ought to be enlarged to include anybody that enters into a transaction with a partnership in reliance on that representation. There’s no reason to single out people that give credit.
MR. WEIDNER: I think, if I remember, the closest we got to a policy perception was the idea that they were that in the giving of credit, they were relying on the net worth of the partner who is purported to be a partner, whereas they --

COMMISSIONER COGGESHALL: I’m not sure where that leads you. I mean, if I’m running a company and I need 100,000 gallons of fuel oil and I go to the XYZ oil traders and they say -- they hold this guy out as a partner and I make a deal with him for my requirements of fuel oil, the price goes up and they don’t sell it to me, and I cover and sue them for the difference, and they say this guy wasn’t a partner, you’re not entitled to damages.

I, mean, there really is no reason whatsoever to distinguish between that situation and the situation where credit is given. And if you’re not willing to accept that, I’ll make it as a motion.

MR. WEIDNER: I don’t have any feelings on it.

We’ll look at it.

....

COMMISSIONER EDWARD I. CUTLER (Florida): On the same point, which would have been my second point, may I suggest that in lieu of the words “credit and reliance” on Page 21, you simply use the word “rely” -- rather, you have to take out. “give”, in the prior. line, too. So, you could delete “give credit in reliance” and change the words to’“who rely upon the
representation.” It would always have to be to the person’s detriment that there be reliance. It wouldn’t necessarily have to be credit.

My other point is, the first line of that subsection, Line 17, doesn’t say by-whom the representation is made And, for example, as in the case of Finley Kumble, persons were listed as partners in Martindale Hubbell. Wouldn’t it be relevant as to who made that representation for ‘this subsection to apply?

CHAIRMAN.FRANCK: Response from the committee.

COMMISSIONER CUTLER: ‘.Or would it be enough to show simply that the purported partner had not objected or had consented in some way to it?

I would think normally you say he makes a representation when you’re . . .

MR. WEIDNER: That would be the question here, whether you’re consenting to the representation of your listing in Martindale Hubbell as a partner.

COMMISSIONER CUTLER: Well, it just seems to me and I wish you would look at it and see if you need to say “by whom a representation is made.” Just to leave it blank and say “if a person is represented to be a partner,” without saying who does. The representing seems to me to miss something.

COMMISSIONER ROBERT H. CORNELL (California): What are you suggesting? What type of language do you mean?
COMMISSIONER CUTLER: Well, I think normally it would be by a partner, another person who is a partner or has an agent of the partnership or something like that.

MR. ED MERRILL (ABA): The concern was that I you and I are entering into a transaction, my creditworthiness is somewhat shaky, so I represent publicly that Nelson Rockefeller is in fact my partner.

Without this language and the consent aspect, and if you just said a public representation, then Nelson Rockefeller would be liable for that representation which is improper.

COMMISSIONER CUTLER: This doesn’t have your name in it. This says represented. It doesn’t say by you or by anybody else.

COMMISSION HOWARD J. SWIBEL (Illinois): The current act has two paragraphs set up like this. And the second paragraph has the word “thus,” like in where it is in Line 17 -- the “thus” referring to the very first paragraph, which says if a person represents himself or consents to allowing himself to be represented by others.

COMMISSIONER CUTLER: It doesn’t say who the others are.

CHAIRMAN FRANCK: That’s the point the Commissioner is making, whether you’re willing to consider putting something like that in this draft.
COMMISSIONER SWIBEL: I’m pointing out that I think our intention is that the "is represented" in context is referring to, the content of Lines 5 and 6.

COMMISSIONER CUTLER: By another. By another. That may be enough. I don’t know. But I did have that problem with the Martindale Hubbell.

CHAIRMAN FRANCK: They’ll take a look, Commissioner, to see if the wording is adequate or whether it needs some more clarification.

....

COMMISSIONER THOMAS L. JONES (Alabama): “SECTION 309. LIABILITY OF INCOMING PARTNER. A person admitted as a partner into a partnership is liable for all obligations of the partnership arising before the person’s admission as if the person had been a partner when the obligations were incurred, but this liability may be satisfied only out of partnership property.”

COMMISSIONER BRUCE A. COGESHALL (Maine): It would seem to me a better way to state that proposition to say: A person admitted as a partner into a partnership is not liable for obligations of the partnership arising before the person’s admission, period.

It’s rather clumsy -- the way you get at that now is kind of clumsy. I think that’s a much easier way to get at it.
CHAIRMAN FRANCK: Response from the committee. I would prefer changes like that to be handed up in writing.

COMMISSIONER ROBERT H. CORNELL (California): That would be a substantial change in meaning, because even if the partnership had very substantial assets and that partners interest in the partnership were distributable to him, it might create some problems in the future.

I think this is -- what this does is say that he is -- his liability is limited to the partnership property:

COMMISSIONER COGGESHALL: Well, as I understand the statute, it says that a partner is liable as I now reads, it says a partner is liable for preadmission debt, but any judgment against that partner is going to have to be satisfied out of partnership property. But if you look at Section 501, I think the import of 501 is that partnership property 16 cannot be taken for a personal judgment against the partner.

CHAIRMAN FRANCK: Response from the committee. Are you willing to look at this?

COMMISSIONER CORNELL: That’s not entirely true, where -- you go beyond partnership property there is still liability of partners under certain circumstances because you have -- you have unlimited liability. And this is a limitation on that liability as to new people coming in, and it is more consistent
with the entity theory. But it allows the ongoing dependence on creditors on the partnership.

I think you’d be distorting the aspect of it here.

COMMISSIONER MORRIS W. MACEY (Georgia): This is a direct copy of the present Uniform Partnership Act that was promulgated in 1916, and since we agreed with it in principle, we chose not to tinker with the arrangement of the words.

COMMISSIONER COGGESHALL: Well, I think you’ve tinkered, though, with the other end of the equation, because you’ve said that a partner has no interest in the property of the partnership. I mean, that’s the change that you’ve made. And having made that change, this formulation doesn’t work.

COMMISSIONER MACEY: A partner has no interest in the property of the partnership? Has a partnership interest in the property of the partnership. But you can’t seize the partnership property to satisfy the liability of the individual partner.

COMMISSIONER COGGESHALL: The partner’s only interest in the partnership is his right to distributions. He has no right, under the entity theory as you have now drafted it, he has no right to the partnership property.

COMMISSIONER MACEY: That was exactly right, and I think that was the law before we drafted that.

COMMISSIONER COGGESHALL: I would make that motion.

CHAIRMAN FRANCK: All right. State your motion.
COMMISSIONER COGGESHALL: My motion is that Section 309 be amended to read: A person admitted as a partner into a partnership is not liable for obligations of the partnership arising before the partner’s admission -- before the person’s admission.

CHAIRMAN FRANCK: All right. Do you want to say any more, speaking to your motion?

COMMISSIONER COGGESHALL: No, sir.

CHAIRMAN FRANCK: Response from the committee to the motion, which is -- let’s see if we have got it straight -- that we amend Lines 27, 28 and 29 by adding the word “not” on Line 28 between the word “is” and “liable” so. that that portion of Section 309 would read: A person admitted as a partner in the partnership is not liable for obligations of the partnership arising before the person’s admission.

Is that correct?

COMMISSIONER COGGESHALL: That’s correct.

MR. DONALD J. WEIDNER (Reporter): Question. I have a question, if I may. You agree with the substance that essentially the contribution to the partnership of the new partner would nevertheless be vulnerable to a judgment for the earlier claim.

COMMISSIONER COGGESHALL: As would all other partnership property.
MR. WEIDNER: So, it’s a matter of language. You’re really saying state the entity theory.

COMMISSIONER COGGESHALL: That’s correct.

WEIDNER: And what you, the new partner, do you is make a contribution to the entity who is put at risk for --

COMMISSIONER COGGESHALL: And I may or may not make a contribution.

....

COMMISSIONER THOMAS L. JONES (Alabama): Commissioner, I think at least you need to say personally liable.

COMMISSIONER COGGESHALL: I would accept that.

COMMISSIONER JONES: But I think even with that, you may be significantly changing the thrust of the section.

CHAIRMAN FRANCK: I am going to rule that the word "personally" has now been accepted by the movant, so it will read “not personally liable.”

We’re still on the motion.

Commissioner, are you on the motion?

COMMISSIONER EDWARD I. CUTLER (Florida): No. I’m on the same section. I would support the motion on the entity theory. Perhaps there needs to be a comment to the effect that the contribution of the partnership, having become partnership property, is still subject to the obligation.

....
CHAIRMAN FRANCK: All right. Let me restate the motion so we’re sure we understand it. I guess the entire section would read, if this motion is adopted: A person admitted as a partner into a partnership is not liable for obligations of the -- not personally liable -- excuse me -- for obligations of the partnership arising before the person’s admission, period.

That’s the motion.

COMMISSIONER COGGESHALL: That’s the motion.

CHAIRMAN FRANCK: As many as are in favor of the motion, please say “aye.”

Those opposed, please say “no.”

Well, now I’m going to need the parliamentarian because I’ve never seen this one before in this house. This group is split 47 to 47.

CHAIRMAN FRANCK: The question now is, does the motion fail or do I have a vote? I think that’s a good suggestion. Given the fact that there’s a split of the members of the Conference, 47 to 47, let us ask the committee to look at this issue again and bring it back with the right of the movant to persuade a couple of his friends to come in when this committee comes back, if he is so inclined.

COMMISSIONER ROBERT H. CORNELL (California): We’ll look at it seriously.
(Laughter)

COMMISSIONER PATRICIA FRY (North Dakota): Mr. --

CHAIRMAN FRANCK: I’m going to recognize Commissioner Cutler first.

COMMISSIONER EDWARD I. CUTLER (Florida): I’m sure this wasn’t-intended to preclude an assumption of liabilities by an incoming partner. I don’t know where it says that. But there ought to be somethingy to say that an incoming partner may assume one or more of the existing liabilities of a partnership.

CHAIRMAN FRANCK: The Committee will look at that.

COMMISSIONER PATRICIA FRY (North Dakota): May I suggest that one thing that might help. Resolve things -- I think it’s within the sense of the movant, at least, is that it be made clear that any distributive share thereafter of the partner would still be chargeable with the partnership’s liability for those preexisting debts.

I think that might resolve some of the problems.

CHAIRMAN FRANCK: They’ll consider that when they review that issue. Thank you, Commissioner.

Commissioner Reitz.

COMMISSIONER CURTIS R. REITZ (Pennsylvania): On Section 309, I’m not clear as to the effect of an admission to the partnership where prior to that the partnership had, entered into a long-term contract.
Take the typical example of a partnership in Year One enters into a 20-year lease. On Year Five, a new partner is admitted to the partnership.

CHAIRMAN FRANCK: Response --

COMMISSIONER REITZ: As I read this, I’m not clear on whether the new partner has any obligation as a partner for the balance of the lease.

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER THOMAS L. JONES (Alabama): My impression, Commissioner, is he would not unless he signed the lease.

COMMISSIONER REITZ: I’m sorry, Tom. I didn’t hear you.

COMMISSIONER JONES: Unless the incoming partner specifically signed the lease, I don’t think he’d be liable on it.

....

MR. ED MERRILL (ABA): I’ve been nominated, as surrogate --

MR. MERRILL: What Tom was saying is that unless the incoming partner assumes the lease, he would not be personally liable.

MR. DONALD J. WEIDNER (Reporter): But this I is -- there is some contrary authority to that. There is some authority that in effect adopts an accrual notion for purposes of this rule.
COMMISSIONER REITZ: It’s possible to say that what you mean to cover in 309 is only debt that has ripened into a mature debt by that time.

The way -- you have one of these long-term arrangements, which are executory, and the obligation arises when the commitment is made, but it cannot be enforced until in the case of my lease arrangement -- until the landlord continues to deliver the property during the 20 years. There is a -- it is not a ripened obligation. It arose, but it cannot be enforced except as you come by a -- term by term on the -- at the time of the lease.

I think you’ve got a similar arrangement with long-term debt, where there’s a repayment obligation on line of credit and the like.

CHAIRMAN FRANCK: Commissioner, they’re, going to look at this section again. I’m going to suggest they take that question into consideration as they review the section.

....

COMMISSIONER FRANCIS J. PAVETTI (Connecticut):
“SECTION 401. PARTNER’S RIGHTS AND DUTIES.

COMMISSIONER PAVETTI”SECTION 401. PARTNER’S RIGHTS AND DUTIES.

“(a) A partnership shall establish an account for each partner which must be credited with an amount equal to the cash
plus the value of any other property, net of the amount of any liabilities, the partner contributes to the partnership and the partner’s share of the partnership profit. Each partner’s account must be charged with an amount equal to the cash plus the value of any other property, net of the amount of any liabilities, distributed by the partnership to the partner and the partner’s share of the partnership losses.

“(b) A partnership shall credit each partner’s account with an equal share of the partnership profits and shall charge each partner with a share of the partnership losses, whether capital or operating, in proportion to the partner’s share of the profits.

“(c) A partnership shall indemnify each partner for payments reasonably made and liabilities reasonably incurred by the partner in the ordinary and proper conduct of the business of the partnership or for the preservation of its business or property.

“(d) A partnership shall repay a partner who, in aid of the partnership, makes a payment or advance beyond the amount of capital the partner agreed to contribute.

“(e) A payment made by a partner which gives rise to a partnership obligation under subsection (c) or (d) constitutes a loan to the partnership. Interest accrues from the date of the payment or advance.
“(f) Each partner has equal rights in the management and conduct of the partnership business.

“(g) A partner may use or possess partnership property only on behalf of the partnership.

“(h) A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership.

“(i) A person may become a partner only with the consent of all the partners.

“(j) A difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners. An act outside of the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the consent of all the partners.

“(k) This section does not affect the obligations of a partnership to other persons under Section 3-01.”

... COMMISSIONER PAVETTI: SECTION 402. DISTRIBUTIONS IN KIND: A partner. has no right to receive and may not be required to accept distribution in kind.”

...
OMMISSIONER PAVETTI: "SECTION 403. PARTNER’S RIGHTS TO INFORMATION.

"(a) A partnership shall keep its books and records, if any, at its chief executive office.

"(b) A partnership shall provide partners and their agents and attorneys access to its books and records. It shall provide former partners and their agents and attorneys access to books and records pertaining to the period during which they were partners. The right of access provides the opportunity to inspect and copy books and records during ordinary business hours. A partnership may impose a reasonable charge, covering the cost of labor and material, for copies of documents furnished.

"(c) Each partner and the partnership, on demand, shall furnish to a partner and a legal representative of a deceased partner or partner under legal disability, to the extent just and reasonable, complete and accurate information concerning the partnership."

COMMISSIONER RAYMOND P. PEPE (Pennsylvania): 403(b), of course, is a section that cannot be waived by agreement as to partners. But 403(b) confers rights upon both partners and former partners.
I’m curious as to whether the committee therefore feels that 403(b) may be waived by agreement as to former partners.

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER ROBERT H. CORNELL (California): If the former partner becomes a third party, then the partnership agreement cannot adversely affect them, unless -- I imagine there could be a consent on the person given to not have access.

....

COMMISSIONER PEPE: I believe it might be, worthwhile to clarify at least in the comment that this provision may not be waived by agreement prospectively. For example, I mean, would it be valid to have a partnership agreement that says, “if you leave the partnership in the future, you forfeit your right to information under 403(b)”?

CHAIRMAN FRANCK: They’ll look at that, Commissioner. Thank you.

....

COMMISSIONER SANDRA S. STERN (New York): I would like to ask why this right has not been provided to individuals to whom an offer of partnership has been extended, particularly since such individuals are rarely able to negotiate this right for themselves and they obviously have a need to know.

Isn’t this the logical outcome of the entity theory?
CHAIRMAN FRANCK: Response from the committee.

....

COMMISSIONER HARRY J. HAYNSWORTH, IV (Illinois): That person is not, yet a partner, but that person could bargain for the right to inspect, and if they didn’t inspect, give them that right, then they could refuse to become a partner.

COMMISSIONER STERN: Yes, theoretically, they could. I am suggesting that it probably would do the entity no harm if that right were conditioned upon the execution of the commercially reasonable confidentiality agreement so that the information would not be used to the detriment of the entity.

MR. ED MERRILL (ABA): There was some discussion of this as it came up in other contexts about when duties would start. And it was generally felt that pre-formation of the partnership, that the parties should be treated as dealing with arm’s lengths and that other law, such as fraud in the inducement and other contract related principles, would cover the period where a person is induced into the partnership on the basis of fraud.

....

COMMISSIONER STERN: Well, yes. But for fraud to operate, there has to be some information given.

MR. MERRILL: Concealment -- intentional concealment to induce conduct I think is actionable fraud.
COMMISSIONER FRANCIS J. PAVETTI (Connecticut):

“SECTION 404. GENERAL STANDARDS OF PARTNER’S CONDUCT.

“(a) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in this section.

“(b) The duties set forth in this [Act] comprise all of the duties, fiduciary or otherwise, appropriate to the partnership relationship.

“(b) A partner’s duty of loyalty to the partnership and the other partners is limited to the following:

“(1) to account to the partnership and hold as, trustee for it any property, profit, or benefit derived by the partner, without the consent of the other partners, in the conduct and winding up of the partnership business or from a use, by the partner of partnership property or opportunity;

“(2) to refrain from dealing with the partnership on behalf of a party having an interest adverse to the partnership without the consent of the other partners; and

“(3) to refrain from competing with the partnership without the consent of the other partners.

“(c) A partner’s duty of loyalty may not be eliminated by agreement, but the partners may by agreement exempt specific types or categories of activities from being breaches of the duty of loyalty.
“(d) A partner’s duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to acting in a manner which does not constitute gross negligence or willful misconduct.

“(e) A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement, and exercise any rights in good faith. The obligation of good faith may not be eliminated by agreement, but the partners may by agreement determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable.

“(f) A partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the partner’s conduct furthers the partner’s own interest. A partner may loan money and transact other business with the partnership. The rights and obligations of a partner who loans money to, or transacts business with the partnership are the same as those of a person who is not a partner, subject to other applicable law.

“(g) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.”
COMMISSION. JOHN H. LANGBEIN (Connecticut): I’m curious whether it is accurate in Section 404(a) to say that the only fiduciary duties a partner owes under this act are loyalty and duty of care, when, over in section (e) on Page 2 of the handout, you have, in fact, imposed a general duty of good faith dealing in all matters arising out of the partnership.

I wonder, in other words, whether the duty of good faith that you recite in (e) should, not in fact be included in the (a) paragraph.

....

COMMISSION HOWARD J. SWIBEL (Illinois): This section received as much attention as probably 25 or 30 of the other sections. And there’s a careful balance that’s being cut here, Commissioner Langbein.

The good faith duty in section (e) is deliberately not characterized as a fiduciary duty. Instead, it is being characterized as a duty to carry out statutory duties and contractual duties -- in Line 4, the reference to duties under this act, and on Line 5, duties under the partnership agreement. And the advisers from the American Bar Association felt strongly that it would be misleading and confusing to label the good faith obligation as a fiduciary obligation. They thought that it was closer to a covenant that arises out of a
contract or in relationship to the performance of the statutory duties.

COMMISSIONER LANGBEIN: Well, I have to say that I find that distinction quite unpersuasive. I find that distinction unpersuasive. I think that most fiduciary duties are deeply affected by contract, that they often arise out of contract or modified by contract. So, the notion that you have a tenable, defensible line between contract, fiduciary duty is, I think, not particularly plausible. I don’t understand what the objection is to simply recognizing that you have created, and admirably, I think, a general obligation to perform these duties in good faith over .in (e) and list that as nonwaiveable along with the others in (a). I’m just asking for internal consistency in your own statute.

....

COMMISSIONER LANGBEIN: All right. I’m going to -- I don’t want to draft on the floor, but I want to make a motion that (a) be -- section (a), 404(a) be revised in such a fashion that it enumerates that the duty, of good faith performance in (e) be among the itemized nonwaiveable duties that are identified in (a).

CHAIRMAN FRANCK: I think that is a sense of the house motion.
COMMISSION SWIBEL: It is a nonwaiveable duty under Section 103 already, but what you want to do is simply include it in the list of duties labeled as fiduciary, is that right?

COMMISSIONER LANGBEIN: I do indeed. I think 404(a) may be the most important road map provision in this act. You’ve done a fine job in (e). I want to make a couple of suggestions about (d) and (e) in a second. But you’ve done wonderful job with (e). And, I think you ought to be properly cross referencing it in (a).

CHAIRMAN FRANCK: Commissioner, the sense of the house motion as I have it, and I want to check to see that I am correct, is that it is the sense of the house, if the motion prevails, that the duty of good faith -

....

CHAIRMAN FRANCK: -- that the duty of good faith set forth in subsection (e) be incorporated into subsection (a)

....

COMMISSIONER LEWIS C. GREEN (Missouri): ... But it seems to me that Commissioner Langbein’s purpose would be served and a great deal of clarity would be brought to this first sentence if you simply abandoned your effort to characterize these duties at all and said the only duties a partner owes to the partnership and the other partners are the duties set forth in this section.
I don’t know what you would lose by doing that. You would avoid this mysterious classification of duties that has been discussed here.

COMMISSION HOWARD J. SWIBEL (Illinois): The question has been debated at length about whether or not we need to characterize any duties as fiduciary.

The current Uniform Partnership Act uses the word “fiduciary” only in the title of Section 21. It is nowhere in the text.

Many of the cases which enforce duties among partners in fact characterized those duties as being of a fiduciary nature. We made a policy decision that we would aid in the understanding of the law if we identified what exactly the fiduciary duties were rather than avoiding that nomenclature altogether.

....

COMMISSIONER FRED H. MILLER (Oklahoma): I would oppose the motion. The effect of the motion would be to create an independent duty of good faith for which breach the court could fashion a damage remedy that could include all sorts of damages.

The way the draft reads is that the good faith obligation is in reference to the method of performing either the contract or the obligation imposed by the statute. So, for example, if it’s a breach of contract because you haven’t
...[performed in] good faith, it falls within that context for the remedy rather than an independent remedy.

...  

COMMISSIONER DAVID S. WALKER (Iowa): Point of inquiry about the compromise struck by the committee. You have eliminated the duty of fair dealing from the concept of the duty of loyalty. And I think the difference from your earlier drafts that have been circulated is striking. I’d be interested in that, because the duty of fair dealing is one of those concepts which I think ought not to be eliminateable. And it’s particularly striking because the duty of loyalty in (c) may be varied to the extent that specific types of -- or categories of activities may be exempted, and there’s no limiting language unless manifestly unreasonable.

CHAIRMAN FRANCK: Commissioner, I think your comments are now a little bit tangential to the motion on the floor. Are you for or against the motion on the floor?

COMMISSIONER WALKER: It’s inquiring about the subject of the compromise, which is the point of the motion, to move (e) up into (a), as I understand.

....

MR. ED MERRILL (ABA): I think the best way I can respond to your question is to explain the rationale advanced by the proponents of the compromise, primarily the ABA
subcommittee. It is essentially what Commissioner Miller was saying. The concern was that if good faith and fair dealing were treated as an independent duty, then there would be a circumstance which would arise where, for example, a specifically agreed-to contractual remedy between the partners were being enforced and not in any kind of unusual circumstance, that there would be an argument against the enforcement of that specifically agreed contractual provision that somehow amorphously, it wasn’t fair, even though it had been agreed to at arm’s length.

The analogy drawn was the spate of litigation in dealer termination cases where for a long time the law was unclear whether the implied duty of good faith and fair dealing would prevent terminations of the contract strictly in accordance with their terms just because it did not meet some abstract concept of fairness.

The intention of the proponents of the compromise was to say: Look, if there is a specifically agreed-to contractual relationship and that is being performed in good faith and not in bad faith, that that should be enforceable and there should not be any ill-defined action or concepts brought in to undercut what was a specifically agreed-to provision. But if, on the other hand, that provision was being used not for its intended purpose, but in bad faith to try and gain some collateral
advantage, that that would be objectionable and should be controlled.

That was the rationale of the proponents behind the compromise.

COMMISSIONER WALKER: Wouldn’t you enforce the exemption or specific language but recognize a fiduciary duty of fair dealing as generally done in business law?

MR. MERRILL: Well, I think their response to that was that good faith and fair dealing was not recognized as a fiduciary duty. Fiduciary duties generally are relationship based. Rather, it was a contractual obligation arising out of contract and in the way that a contract must be enforced. And that was the reason that it was attempted to be separated from the relational obligations, which are the fiduciary duties, and moved over into the contractual area in the enforcement of the agreement. That’s the rationale.

CHAIRMAN FRANCK: Excuse me, Commissioner. I don’t want to have a debate between two Commissioners. They’ve answered your question as best they can.

....

COMMISSION JOHN H. LANGBEIN (Connecticut): Well, I’m still a little baffled. I’m a little baffled about why I’m being resisted on this. It seems to me that we’re, I guess, down to the question of whether or not good faith is a fiduciary
obligation and one that ought to be recognized in the category of 404(a). It seems to me that that’s almost too obvious for words, that what we are talking about is the need to carry out something in good faith. If you’re willing to impose that obligation, you ought to be willing to characterize it in the customary terms in which it’s been characterized, which is as a fiduciary obligation.

All I’m asking is that you handle your own (e) clause in a way that gives it the kind of parity that I think is intended for it in 404(a).

CHAIRMAN FRANCK: All right. The motion before the Committee of the Whole - Commissioner Langbein, stay there so I make sure that I get it correctly -- that the duty of good faith referenced in subsection (e) be added and referenced in subsection (a) as a fiduciary duty.

....

The “noes” appear to have it. The “noes” do have it.

Further comments on Section 404.

....

COMMISSIONER HARVEY S. PERLMAN (Nebraska): I’m confused, reading this section, as to what you do about duties that are at least analogous if not arising out of the duty of loyalty for former partners. Issues of competition after the partner -- after the person leaves the partnership, issues of
disclosure of trade secrets. How does that work in this section, particularly given that Lines 9 through 11 limit all duties to these listed. The ones you list I think would be inappropriately applied to former partners, and yet you can’t change it by the agreement.

Have you thought through that?

MR. DONALD J. WEIDNER (Reporter): The basic rule in 404(b)(1) is our attempt to make clear that the partnership opportunity doctrine continues to apply, so at least in trade secrets, in principle, you’re not to take assets of the partnership with you.

COMMISSIONER PERLMAN: May you compete with the partnership without the consent, of the partners after, you’ve left the partnership?

....

MR. WEIDNER: Yes

COMMISSIONER PERLMAN: Could you have an agreement that prohibited that -- a noncompetition agreement, for example?

CHAIRMAN FRANCK: The committee again says “yes”

....

COMMISSIONER BRUCE A. COGGESHALL (Maine): I find the second sentence in subparagraph (a), which starts on Line 9 of the handout to be rather astounding.
I feel that I have a duty to my partners and to my partnership to act with ordinary care. Now, you’ve decided in your wisdom not to impose that statutorily, but now you say to me that duty is inappropriate for the partnership relationship.

Now, I can think of a whole bunch of duties that aren’t in this act that are certainly appropriate for the partnership relationship. And I just don’t see any reason for that sentence to be there. The, sentence that says: The duties set forth in this [Act] comprise all of the duties appropriate to the partnership relationship.

....

COMMISSION SWIBEL: The intention of the committee’s draft is to circumscribe the common law outgrowths that have developed. There is not uniformity among the jurisdictions in imposing duties or in characterizing them. It is the intention to express to the legislature a desire to catalog in this statute the duties that apply to the partnership.

COMMISSIONER COGGESHALL: But you’re saying to me that a duty of ordinary care is inappropriate.

COMMISSIONER SWIBEL: The word “appropriate” is supposed to mean applicable. I mean, that’s what we’re meaning. If you’re picking on the word “appropriate” --

COMMISSIONER COGGESHALL: Perhaps you ought to use: There are no implied duties under this act.
COMMISSIONER COGGESHALL: Another question I have about this section, you deleted the word “informed” before the word “consent” in a couple of places. And why should not the consent be informed?

COMMISSIONER SWIBEL: The current statute has the word “consent” and does not have the word “informed.” The case law is virtually uniform in reading in a requirement that the consent be informed.

COMMISSIONER COGGESHALL: Except you’ve got a comment that says it no longer needs to be informed.

COMMISSIONER SWIBEL: Well, I’m not sure which comment you’re referring to, but we dropped the word “informed” –

COMMISSIONER SWIBEL: -- as a part of our negotiation, frankly, with the ABA subcommittee. But we expect that the way this is going to be enforced is that there will be a requirement that the consent be informed.

COMMISSIONER COGGESHALL: It says on the comment on Page 61, as in subsection (b)(2), the partners consent no longer need be, informed.

COMMISSIONER SWIBEL: We dropped the word from the statute. But it is not the intent that we drop requirement that
there already exists under the law that the consent be informed.

COMMISSIONER COGGESHALL: Maybe we ought to say that in the comment.

COMMISSIONER HARRY J. HAYNSWORTH, IV.

(Illinois): My understanding of reading the comment was, it was intended to say that the word in quote “informed” was being eliminate, but that did not change the fact that the consent had to be informed. That was clearly our intent. I know what the comment says. I’m just saying what we did not -- what we meant to say is, only the word “informed” does not precede the term “consent.”

COMMISSIONER COGGESHALL: I don’t understand what you’re saying. You’re saying in the comment that consent does need to be informed, but you’re unwilling to put that in the statute. Is that correct?

CHAIRMAN FRANCK: Well, let me get this straight now. The committee is saying that the comment at Page 61 does not say what they intended to convey?

COMMISSIONER HAYNSWORTH: That’s correct.

CHAIRMAN FRANCK: So I assume at least that the committee is saying that it will revise that comment.

COMMISSIONER HAYNSWORTH: That’s correct.
CHAIRMAN FRANCK: Is that correct? Just one second. There may be some dissent on this side. I don’t know.

MR. DONALD J. WEIDNER (Reporter): Well, the comment also says on Page 60 that the word “informed” was removed because it -- to tilt the substantive scales slightly.

CHAIRMAN FRANCK: But as to the statement on Page 61, as I understand it, at least this side of the committee has said this conveys a meaning that was not intended. If that is true -- this side of the committee has said that that comment conveys a meaning that was not intended. If that’s so, the comment needs to be revised. And the right side says they’re going to take a look at that also. So, that comment will be looked at. That’s the state which we’re in now, Commissioner.

COMMISSIONER COGGESHALL: I would like to make a motion, Mr. Chairman, that the word “informed” be put back into the statute.

CHAIRMAN FRANCK: Would you please be more specific and tell us the line numbers and page numbers.

COMMISSIONER COGGESHALL: On Page -- on the -- on the original -- on the original handout, it would be at Line 4 on Page 57.

CHAIRMAN FRANCK: That’s subsection (b)(2).

COMMISSIONER COGGESHALL: And on subsection (b) (1).
CHAIRMAN FRANCK: Excuse me. Line 23 of the first page of the handout right?

COMMISSIONER COGGESHALL: Line 23 of the first page of the handout and also on Line 17 of the first page of the handout.

CHAIRMAN FRANCK: Okay. So your motion is to insert the word “informed” in both of those places before the word “consent”.

COMMISSIONER COGGESHALL: And also on Line 26.

CHAIRMAN FRANCK: And also on Line 26; before the word “consent.” So, we have a motion, if it’s adopted, that would add the word “informed” in three places where the term “consent” is used, so the totality of the term would be in each of those three places “informed consent.”

....

COMMISSIONER MALKIEWICH: (Nevada):

At the bottom of Page 60 the comments, it explains the reason for the omission of the word “informed.” It was deleted at the request of the ABA ad hoc committee because of the excessive gloss accorded the word by some courts. The committee felt that good faith obligation was sufficient to take care of it.
If that’s the reason, I would accept that. I think perhaps the only change that needs to be made is clarifying that later comment.

CHAIRMAN FRANCK: Does the committee want to respond to this motion? Seeing no one on the committee seeking recognition, is there another speaker for the motion on the floor? Any other speaker opposed?

....

The “noes” do have it. The motion is defeated.

Further comments on Section 404. Commissioner Miller.

COMMISSIONER FRED H. MILLER (Oklahoma): It would seem that the duties in this section, however many there really are, are important. They have been elevated up for first class citizenship. And yet for a reason that seems puzzling to me, the duty of due care is not protected, and that even is more astounding when you look to find out what it means. It doesn’t mean ordinary negligence. It means willful misconduct.

Why does the committee permit the agreement to authorize willful misconduct among the partners?

....

MR. DONALD J. WEIDNER (Reporter): Fred, I guess I started off where you started off, and I thought it was just offensive even to suggest that parties didn’t owe a duty of reasonable care to each other.
As we looked at it, at least I was persuaded that the question more properly put is: Should there be a separate loss sharing ratio for losses caused by the conduct -- the negligence of a particular partner?

And the short of it is, backing off to what we saw this as embodying, which is a default agreement of the partners, that the partners would agree to mutually insure each other as to the injuries or damages resulting from what might be held to be their own negligence.

....

COMMISSIONER MILLER: I take it what you’re really saying is that there is an artful way to do this in the agreement, but I guess just looking at it and trying to think about selling this to a legislature, my alternative would be in the statute that you say essentially it can’t be eliminated, but the parties may set standards and by agreement may determine the damages that may flow from it, or something of this nature, which I think I find less offensive, even though you may get to the same point.

COMMISSIONER ROBERT H. CORNELL (California): Fred, one of the things that came about was a risky venture where they’re very apt to -- it is a high risk venture they’re very apt to lose money, and the person who is going to be the managing partner, so to speak, is taking on a burden he wouldn’t
take on normally -- he wouldn’t do this risky thing. You could be accused of lack of due care. He wants to protect himself and write a standard in there. I think that’s one of the examples we had in mind.

COMMISSIONER MILLER: Well, that may be, and I’m not really upset about that, but I keep telling you, Bob, it says willful misconduct.

COMMISSION HOWARD J. SWIBEL (Illinois): One answer, Commissioner Miller, is that we’re not intending here to interfere with other civil or criminal law which might intervene to punish the malfeasor. This is really a question of within the partnership agreement and within the duty under this statute, and the practitioners say they want complete freedom to agree of ahead of time that they’re note going to owe duties of care to each other, and that’s what we’re delivering.

....

COMMISSIONER MILLER: The motion would be that this particular duty in (d) have language similar to what is in (e), that it may not be eliminated by agreement, but the partners may by agreement determine the standards by which the performance of the obligation is to be measured and may determine the damages that may flow: from a breach of it or the remedy that may flow from a breach of it, if that’s not manifestly unreasonable.
CHAIRMAN FRANCK: Let me see if I can restate the motion so I can get the floor to understand it. The motion, as I understand it, is to treat the duty of care to the partnership and the other partners, cetera, referenced in subsection (d) in the same manner as subsection (e) treats the duty of acting in good faith, which is to say, it cannot be eliminated, but the damages and other aspects of its enforcement can be varied.

Does the floor understand the general sense of the --

COMMISSIONER MILLER: Duty of care.

CHAIRMAN FRANCK: Duty in (d), which is duty of care.

Now, does the committee want to respond to the motion, first of all? The committee has already spoken. Are you satisfactorily? Do you want to say; anything more on it?

COMMISSION HOWARD J. SWIBEL (Illinois): I want to add that we have -- in your reformulation now, you’ve added the reference to reasonableness. Originally you drew the analogy to the way we have talked about the duty of loyalty, where you cannot eliminate it, but it can be -- you can give various categories of activities that are exempt. We did not include any reasonableness standard there.

The advisers from the American Bar Association, among others, were vehement in their belief that we would be making a giant step backwards if we included a paternalistic standard such as the one you suggested which would give rise to
additional litigation and would impose additional burdens on Americans who want to organize themselves as partners.

CHAIRMAN FRANCK: Let me step in here for just a minute. I stated the motion as a sense of the house motion as I understood it. Commissioner Miller was speaking from the top of his head without having written this out. I did not understand you to say anything other than the duty of care would be treated the same way the duty of good faith is treated in (e).

COMMISSIONER MILLER: That is correct, but I will accept as a, shall we say, friendly amendment the suggestion by Commissioner Swibel. I think it basically gets at what I’m after and I’m not committed to one course as opposed to the other.

CHAIRMAN FRANCK: Where does that leave us?

COMMISSIONER MILLER: That would mean that there would be a limitation imposed with respect to the duty in (d) that would be similar to the language that is set forth in subsection (c).

CHAIRMAN FRANCK: All right. Let’s make sure the floor understands that the motion is now changed.

The duty of care in subsection (d) would be treated the way the duty of loyalty is treated in subject (c). That is Commissioner Miller’s revised motion.
Are there further comments from the committee on the motion as now revised?

MR. DONALD J. WEIDNER (Reporter): Yes. I just oppose it because you’ve essentially got a loyalty section that says you do have a formidable duty that you can’t eliminate, whereas you have a care section that says you have virtually no care duty. Somehow putting the same the language on the end of it doesn’t fit, so I would oppose the motion.

....

COMMISSIONER PATRICIA FRY (North Dakota): I’d like to point out that the duty of due care that you have defined in your section, or remind the Committee of the Whole, perhaps, is very limited duty as it stands. I seem to recall hearing something from a member of the committee suggesting that there might be insurance to allocate the risk amongst partners, and yet I believe that the very limited duty that you have described is one that many courts say -- that willful misconduct, et cetera, is not appropriate for insurance. I don’t believe that should be an element in our discussions.

I would strongly urge that the limited duty of due care that is described not be something that can be written out of the relationship between the parties by agreement. However, I would concur with Professor Miller that it is appropriate to permit the parties define by agreement what they mean by it.
COMMISSIONER MATTHEW S. RAE (California): If I understand the way the issue has now been restated, you’re going to take the duty of care which is described in section (a) as a fiduciary duty, make it the same as the duty of loyalty. And that raises a problem that I’ve had with the duty of loyalty. Because you say in this restatement, as I understand it, that then, by agreement, you can exempt piecemeal, bit by bit, the fiduciary duty between the partners.

I really question as to whether we should be promulgating legislation which says that by agreement you can agree to eliminate fiduciary duty.

Now, perhaps I misunderstood the restatement of the motion, but I don’t think I did. And so you would say that you could by agreement say that you don’t have, limiting myself to the motion, you don’t have the fiduciary duty of not acting in a grossly negligent manner.

COMMISSIONER MILLER: Thank you. I likewise, Commissioner Rae, have some difficulty with (c). I take it that you can chop away at what you cannot completely eliminate. I don’t know where the line is, but I am willing to assume that wherever that line is, this is an appropriate way to approach it as opposed to my original suggestion, which was to try to set
standards, which I had a little difficulty in thinking about in terms of how one would describe the standard of willful misconduct, et cetera.

(Laughter)

COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut): I’m not sure whether one is in favor or opposed to the motion. My sense is that Commissioner Miller has been too accommodating with the committee on this issue.

For those of us who have to appear from time to time before legislatures and their committees and engage in a dialogue, conceive of the possibility of being asked to stand before the committee of the Connecticut legislature and say: Well, listen, the Conference, at the request of the American Bar Association thought it was a good idea to let the organizers of these partnerships agree with their partners that they could willfully misconduct their affairs, and that would be okay. And we think this legislature ought to sanction that.

You know, you’d get laughed out. And we’ve got a PACE committee that’s supposed to be in favor of these uniform laws. I think it’s a terrible step in the wrong direction, and I think the notion if you’re going to stay with the language here of gross negligence as a standard, I think the duty of due care just cannot be waiveable as you’ve limited it here. And however it gets straightened out, I wouldn’t want to retreat from that.
COMMISSIONER BREETZ: I’m going to encourage Commissioner Miller to rephrase his motion here so I can be on his side, because that’s where I want to be.

COMMISSIONER ROGER C. HENDERSON (Arizona): I asked for some clarification because I’m not sure of the net effect of Commissioner Miller’s motion. Is Commissioner Miller’s motion, the effect of it, that the partners could agree that they have no right of indemnity against each other for negligence -- that is, malpractice -- but they cannot agree among themselves to waive gross negligence or willful misconduct? Is that the net effect?

COMMISSIONER MILLER: If the committee can tell me what they meant under subsection (c) by -- you can take a series of little bites, hopefully not eat the whole exception, and how we might work it out here, I’m willing to stand by the motion and let Commissioner Breetz make a substitute motion if he wishes.

CHAIRMAN FRANCK: Commissioner Miller, let me make a suggestion and see if it’s acceptable. A lot of the discussion has been about subsection (c), which we really haven’t discussed yet, and your motion is to treat the duty of due care or of care the way the duty of loyalty is treated in (c). Perhaps it might
be better if we open the floor to further discussion of subsection (c), and once we’ve done that, that you renew your motion if you’re satisfied then with the shape of (c) as it is.

CHAIRMAN FRANCK: Thank you. The motion then is withdrawn for the moment, with the right of the proponent to come back. The floor is open for further discussion of Section 404.

COMMISSIONER MATTHEW S. RAE (California): Mr. Chairman, I would like to directly raise the question of subsection (c) and the provision that the partners may by agreement exempt specific types or categories of activities from being breaches of loyalty.

I will make the same point I made a moment ago. It seems to me that when you have raised certain duties to the level of being fiduciary duties, I have real difficulty with the concept that you can then contract piecemeal to the point where, as I understand this draft, you could, in effect, eliminate all fiduciary duties between partners.

I would like to hear from the Drafting Committee what their responses have been to Professor Eisenberg’s correspondence with the Drafting Committee and whether this draft perhaps may have satisfied Professor Eisenberg. Because I
have great difficulty understanding the concept of being able to contract out of my fiduciary obligation.

CHAIRMAN FRANCK: Well, the Committee of the Whole does not have any professor’s correspondence on this subject, so I’ll take your question to be a question of the committee to explain how they envision the operation of subsection (c).

COMMISSIONER HARRY J. HAYNSWORTH, IV (Illinois): Commissioner, as the law now stands, virtually every real estate partnership has in it -- partnership agreement has in it a provision stating that a partner who is in the real estate business, in a different real estate business has the right to a real estate venture even though it might be viewed as being an opportunity for the second partnership.

That’s very common. So this idea of a waiving of a fiduciary duty, at least to some extent, is something that has existed in the law for many years and exists under the current law.

The idea of the formulation in subsection (c) was in response to comments that had been made from a number of sources saying that, in effect, when we -- the way the draft was worded before this amendment was made, that, in effect, you could write into a partnership agreement a provision stating that the partners in this partnership have no fiduciary duties, period.
And -- or you could say that they had no fiduciary duty of loyalty, because there are certain other limitations that apply.

So, the attempt here with this formulation in subsection (c) is to say: No, you cannot say that. But what you can do is to specify specific types of activities, i.e., real estate, if you’re in a real estate transaction -- partnership -- that are exempt from the duty of loyalty, and that that, in effect, confirms the existing law and existing practice.

COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut): Commissioner, do I understand that to be, for example, that looking at the revised draft in 404(b)(1), that says that the duty of loyalty is limited to the category of accounting? Could one eliminate the duty of loyalty with regard to accounting by listing that as a type of category which is which -- from which he is exempt so that he doesn’t have to be loyal with regard to accounting?

COMMISSION HOWARD J. SWIBEL (Illinois): No. We did discuss that very question. And the reason that we drafted it the way we did is that we did not contemplate that somebody could simply say we hereby waive the duties under Section 704(b)(1), or that they could even repeat the words of (b)(1).

The word “specific” in Line 29 is supposed to connote a requirement that there be a delineation of the type of
activity or conduct. For example, in Professor Haynsworth’s or Dean Haynsworth’s example, that in the real estate partnership you would say: own property across the street, and I’m going to be involved in leasing activities which are directly in competition. You would have to give a list of activities which would not be covered by the loyalty duty.

CHAIRMAN FRANCK: Excuse me. Commissioner Langbein is seeking recognition.

COMMISSION JOHN H. LANGBEIN (Connecticut): I wonder whether it would be helpful in this connection to think about adding a sentence -- I’ve given this to the reporter -- at the end of the existing language of section (c) to add a sentence saying roughly this: The person alleging that the duty of loyalty was modified by agreement bears the burden of proving the modification by clear and convincing evidence.

My thought is that what we’re worried about is kind of deception that you sign on to a vague clause or that an oral clause is alleged against you. There’s no statute of frauds here. And I’m wondering whether just simply by handling this in a proceduralized way and allocating a burden on anybody alleging a waiver of the basic duty of loyalty to prove it by a high standard of evidence if you don’t get the kind of precision that we’re groping for.
CHAIRMAN FRANCK: Let’s see if we can get a response from the committee to your suggestion.

Response from the committee.

COMMISSION HOWARD J. SWIBEL (Illinois): That also would be a change in the state of the law. We’re not aware that courts impose a special burden of proof in these situations, and we’re not aware of any problems that have developed, Commissioner Langbein, in practice that would require that sort of social engineering.

....

COMMISSIONER LANGBEIN: It would seem to me that you’re doing some remarkable social engineering here in authorizing -- and I agree with it -- in authorizing very broad waivers of the classical fiduciary duties if they get spelled out. You’re moving to a default approach in which if people spell out in detail that they’re waiving these duties of loyalty and good faith and so forth, you’re going to let them do it.

Now, that’s a dramatic movement away from traditional notions, and you can tell how upset various people, including Professor Eisenberg and others who have spoken here, have been about this. This is a very controversial thing. So, I don’t think it’s quite fair to say to me that I’m engaged in something novel. I’m trying to implement the sense of your reform by
suggesting a relatively simple way of clarifying whose responsibility it is to show that in any particular

....

MR. DONALD J. WEIDNER (Reporter): I think in answer to your question, I think it does help, but I think the really tough issue is not, quote, proving the modification, as you stated, but deciding whether the modification is at a sufficient level of specificity or generality.

I think that’s really the problem that we’re dealing with. A partnership agreement that says -- I mean, at one level, if you have a partnership agreement that says we agree that this is a partnership for this building only and the other partners -- the managing partners can acquire a building across the street and compete with you, there’s no problem with that.

Now, how far can you back off that? Can you say -- can the partners -- can acquire other real estate in the area, other real estate, other business opportunities, and so forth.

CHAIRMAN FRANCK: May the chair make a suggestion? I guess the chair, recognizing itself, will make a suggestion. We are very near the time for recessing this session. It seems to me that we are going to get lost if we keep on having general comments about (c).

....
COMMISSIONER HARVEY S. PERLMAN (Nebraska): This is a quick comment. I think I know what you want to do, but I don’t think this draft does it for anyone who hasn’t participated in your discussions. You have a duty of loyalty limited to three things, all of which can be done -- can be violated with the consent of the other partners. All right? And then you talk about in (c) eliminating it by agreement.

Now, what you mean is, you can’t do it in the initial agreement, but you can do it specifically with consent of the parties each time the transaction arises. But that doesn’t come through here.

MR. DONALD J. WEIDNER (Reporter): The point is, we do want to enforce the waiver in the initial agreement, at least at a certain level of specificity.

CHAIRMAN FRANCK: Again, I’m going to suggest that we continue this conversation, which is very general, we need motions to make it more specific, tomorrow morning, and that we now limit ourselves to comments other than those addressing subsection (c), if that’s possible.

Commissioner.

COMMISSIONER ROGER C. HENDERSON (Arizona): Mr. Chairman, let me make a quick comment about (d). In the first place, that is a very awkward way to word that, in the negative,
speaking of “is limited in acting in a manner that does not constitute gross negligence or willful misconduct.”

Moreover, I’m not sure you covered the waterfront when you talk about conduct that’s more culpable than ordinary negligence. In the first place, no one knows what gross negligence means. Prosser once said it’s negligence with an epithet. And willful misconduct can be an intentional act but yet have an unforeseen result.

So, I would suggest to you that you consider wording that in a positive manner, that is to say it’s limited to acting in a manner more culpable than ordinary care, or something of that nature. Because, first place, a restatement of torts seconds doesn’t even recognize willful any more. It talks about willful, wanton, reckless, and subsumes it under one word, “recklessness,” and there is a prong to the recklessness that does not involve willful misconduct. It involves inadvertent misconduct. So, you need to look at that again.

CHAIRMAN FRANCK: The committee will take a look at that.

....

COMMISSIONER DAVID S. WALKER (Iowa): I will take up this conversation tomorrow. I would like to move tomorrow to incorporate into 404(b) a duty of fair dealing.
It seems to me that the language in 404(e) of good faith is confusing. You leave that in the comments undefined. The reference to the Uniform Commercial Code would limit the concept to honesty in fact. Good faith is differently interpreted in case law involving partnerships as well as case law in corporations. The duty of fair dealing is recognized by the corporate directors guidebook, by case law across the land, by the principles of corporate governance. I think this is a tremendous variation from the concept of fiduciary duties which business associates owe to one another to make without further discussion.

CHAIRMAN FRANCK: Thank you, Commissioner.

....

Mr. President, the Committee of the Whole rises to advise that it has had under consideration the Revised Uniform Partnership Act, has made progress, and asks leave to sit again.

---o0o--
Michael Franck of Michigan, presiding

CHAIRMAN FRANCK: Thank you, Mr. President. We have a slight addition to our cast of characters up here. Commissioner Kneedler, the chair of the Drafting Committee, has broken free of his private practice obligations and has been able to join us this morning.

....

COMMISSIONER H. LANE KNEEDLER, III (Virginia): Good morning. ... I am delighted to be here this morning. I am Lane Kneedler from Virginia.

Judge Gardner, why don’t we start with you, ... Just introduce yourself and your jurisdiction.

COMMISSIONER WILLIAM C. GARDNER (District of Columbia): Commissioner Gardner, District of Columbia.

COMMISSIONER K. KING BURNETT (Maryland): King Burnett, Maryland.


COMMISSIONER SCOTT N. HEIDEPRIM (South Dakota): Heideprim, South Dakota.


MR. JOHN W. LARSON (Reporter): Larson, Assistant Reporter, Tallahassee, Florida.

MR. ED MERRILL (ABA): Doc Merrill, California State Bar.

COMMISSIONER THOMAS L. JONES (Alabama): Tom Jones, Alabama.

COMMISSIONER MORRIS MACEY (Georgia): Morris Macey, Commissioner from Georgia.

COMMISSIONER ROBERT H. CORNELL (California): Bob Cornell, Commissioner from California.

MR. ALLAN DONN (ABA Adviser): Allan Donn, ABA Representative, Virginia.

....

CHAIRMAN FRANCK: When we recessed yesterday afternoon, we were at Section 404. You had kindly indulged my suggestion that we defer consideration of subparagraph (c) until this morning so that the committee would have an opportunity to do whatever work it wanted to on that subsection and so that those of you who had indicated that you wanted some changes in that subsection could formulate those changes in writing in a fashion
that would make it more intelligible for the Committee of the Whole when it reconvened this morning. Let me ask the committee the status of that effort on 404 (c).

COMMISSIONER ROBERT H. CORNELL (California): With respect to 404, we are working it over. ...

MR. ALLAN DONN (ABA Adviser): There is a letter on the back table under the letterhead of McKenna & Fitting that sets forth the position of the ad hoc committee, the ABA Partnership Committee on the fiduciary responsibility rules. ....

CHAIRMAN FRANCK: I want to suggest to those who may have drafted changes in 404 (c) or any part of 404, it would be helpful if you gave those to the committee before the session ends this morning so the committee would have your written suggestions before it when it deliberations changes in 404. ....

COMMISSIONER FRANCIS J. PAVETTI (Connecticut): “SECTION 405. PARTNER’S LIABILITY TO PARTNERSHIP. A partner is liable to the partnership for a breach of the partnership agreement or other wrongful conduct harming the partnership.” ....

COMMISSIONER MILLER: -- I may be missing something. But the way I read 405, and I think 406, and their comments, is that we may in fact be able to back door, since 405 and 406 are
waivable by agreement, whatever we seek to achieve in 404. Beyond that, even if that is not true, it seems to me that there is some difficulty in the conception that one can have liability for harm done to the partnership, and by agreement one can remove that liability entirely. Therefore, it seems that it would be more appropriate to take a similar position with respect to 405 and 406 to what has, in effect, been done in 404, which is to say that if you have liability, you’re liable. But given that there are many variations on the theme, the parties by agreement ought to be able to do something concerning that liability.

I have submitted to a member of the committee a proposed draft to deal with this. In concept, essentially what I would like to do is say in effect you cannot by agreement waive the liability under 405 in a commensurate amendment to 406, but, by agreement, you may liquidate damages at an amount which is foreseeable -- which is reasonable given the foreseeable harm at the time you are entering into the agreement or by agreement provide a substitute remedy which would, in effect, provide a fair quantum of remedy for the harm that is foreseeable at the time the agreement is entered into. These suggestions are modeled on the provisions of Article 2A, which is a modern formulation of the liquidation of damage rule, and a modern
formulation of an-agreement-remedy structure substituted for the remedy structure that otherwise would exist in law.

....

MR. DONALD J. WEIDNER (Reporter): We discussed this issue, and I think what you’re talking about is whether we should include in Section 103 some sort of qualification to both 405 and 406. And the committee view on it was that whenever there is a mandatory right in the act, that the remedies appropriate under 406 to pursue that right would be available and not waivable, you couldn’t eliminate through the back door the right by eliminating all the remedies. And the understanding was that, for example, if you had a liquidated damages clause for breach of a partnership agreement that gave you a dollar settlement, that that would be unenforceable by the general law of penalty.

The problem you get into in drafting is that in 103 there is fairly carefully chosen language with respect to the various rights -- that is to say, in some cases, we may not vary a right; in other cases, you may not eliminate the right. And in some of the sections we have qualified further. We have said you may not eliminate the right, but you may do something -- you may it hobble it little bit.

We have looked at that and have tried to figure out
how we could go about stating some sort of floor on remedy, and we haven’t been able to find a way. We decided to leave it to comment to say something that would reflect the policy you’ve just stated.

....

COMMISSIONER MILLER: I must say that I am not particularly bothered by that. I am not a big fan of 103, as you know. I think it is a mistake. But I don’t see that in the statutory text. I think while the comment is a fine way to go about it, it’s not that difficult to draft it into the statutory text. For example, in 103 with respect to 404, you have said you can eliminate the duty. And then in 404, although we haven’t seen your reformulation, essentially you’re saying but you set standards or you may make certain exclusions. I don’t think it is that difficult to write into 103. You may not eliminate the liability, and then provide it back in 405 and 406, but you may by agreement set the remedy with a certain minimum floor. And I think the formulation in Article 2A is approved by this Conference and workable as transported over. And it would certainly get rid of your issue on … the normal rule of liquidated damages, which I think is probably, and we concluded in Article 2A, outdated today.

....
CHAIRMAN FRANCK: However, I want to caution the floor that the committee has so far taken under advisement a great number of matters, and this is a final reading. I have let that happen because I am mindful of the fact that we have more sessions scheduled on Monday. But pretty soon I am going to take the position that if the committee and the Commissioner on the floor cannot agree, that the Commissioner on the floor is going to have to be prepared to make a motion so that these issues become finally resolved. Otherwise, we are going to put too much on the menu for Monday, more than we can achieve. But I think in this instance, Commissioner Miller, this issue is sufficiently connected to other matters that the committee has taken under advisement that we will let them do that on this issue. We will recognize you on Monday if they have not satisfied you in their redraft.

....

COMMISSIONER BRUCE COGGESHALL (Maine): Does the term “wrongful conduct” in this section include wrongful conduct of third parties or is it directed at a violation of the partner’s duty to the partnership?

....

MR. DONALD J. WEIDNER (Reporter): Duties to each other.
COMMISSIONER COGGESHALL: I had submitted some language yesterday that would make that clear, which I gave to Bob Cornell. Basically, it would read: A partner is liable to the partnership for a breach of the partnership agreement or for the violation of any duty to the partnership causing harm to the partnership.

I think as now written it could be construed to mean a wrongful conduct to a third party as harm caused by ordinary negligence for which the partnership is then sued. As I understand 405, the partnership would not have a claim against the partner in that situation.

....

COMMISSIONER H. LANE KNEEDLER, III (Virginia): We accept it in concept. We are looking at the particular language now.

....

COMMISSIONER KNEEDLER: We accept the language.

CHAIRMAN FRANCK: I am going to ask the committee reporter to read that language.

MR. WEIDNER: The new language would provide as follows: A partner is liable to the partnership for a breach of the partnership agreement or for the violation of any duty to the partnership causing harm to the partnership.
COMMISSIONER COGGESHALL: Mr. Chairman, just to save time, I think the same comment would be appropriate for the next section. I won’t get up to make that comment, but the language is about the same in 406 (a).

CHAIRMAN FRANCK: Does the committee agree that this same change applies to 406.

....

COMMISSIONER KNEEDLER: Yes.

CHAIRMAN FRANCK: They accept 406 as well.

....

COMMISSIONER FRANCIS J. PAVETTI (Connecticut):

"SECTION 406. REMEDIES OF PARTNERSHIP AND PARTNERS.

“(a) A partnership may maintain an action against a partner for a breach of the partnership agreement or other wrongful conduct harming the partnership.

(b) A partner may maintain an action against a partnership or another partner for legal or equitable relief, including an accounting as to partnership business, to:

“(1) enforce a right under the partnership agreement;

“(2) enforce a right under this Act], including:

“(i) the partner’s right under Section 401, 403 and 404;
“(ii) the partner’s rights on disassociation to have the partner’s interest in the partnership purchased pursuant to Section 701 or enforce any other right under Article 6 or 7; or

(iii) the partner’s right to compel dissolution in winding up of the partnership business under Section 801 or enforce any other right under Article 8; or

“(3) enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.

“(c) The accrual of, and any time limitation on, a right of action for remedy under this section is governed by other law. A right to an accounting upon of a dissolution and winding up does not revive a claim barred by law.”

CHAIRMAN FRANCK: Before recognizing anyone to comment on this section, let me advise the Conference that the change, the parallel change that’s up in 405 will appear in 406 (a), the same rewording of 406 (a) as was accepted for Section 405.

COMMISSIONER EDWARD I. CUTLER (Florida): I haven’t asked Judge Burdick, maybe he has already told the committee, but on Lines 23 to 25 dealing with limitations, would that language cover the defense of laches? I am a little bit worried that the word “time limitation” and the way it’s
discussed in the comments would refer only to a statute of limitations. As we know, accounting matters and other equitable matters are handled by the defense of laches.

....

COMMISSIONER CUTLER: Or it should it be specifically included in the text?

....

MR. DONALD J. WEIDNER (Reporter): Our sense, at least my sense is that we did not mean to exclude laches, that that would come under “or other law.” We would invite a different way of stating it. agree with you on the substance.

....

COMMISSIONER H. LANE KNEEDLER, III (Virginia): We believe it does.

....

COMMISSIONER CUTLER: Well, please put it in a comment.

CHAIRMAN FRANCK: They say they will put it in the comment.

COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut): I note in the comments that no derivative suit or class action is recommended. Is the committee’s intent that by virtue of the comments when they’re revised, that your comments would indicate that none would be available, even under other law, or were yon
planning on relying on other law for derivative and class action?

MR. WEIDNER: The latter.

CHAIRMAN FRANCK: They indicate they were relying upon other law to determine that question.

....

COMMISSIONER FRANCIS J. PAVETTI (Connecticut): "SECTION 407. CONTINUATION OF PARTNERSHIP BEYOND DEFINITE TERM OR PARTICULAR UNDERTAKING.

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

"(b) A continuation of the business by the partners or those of them who habitually acted in the business during the term or undertaking, without any settlement or liquidation of the partnership business, is prima facie evidence of an agreement that the business will not be wound up."

....

COMMISSIONER MORRIS W. MACEY (Georgia): "SECTION 501. PARTNER’S INTEREST IN PARTNERSHIP PROPERTY NOT
TRANSFERABLE. A partner is not a co-owner of partnership property and has no interest that can be transferred, either voluntarily or involuntarily, in partnership property.

COMMISSIONER MACEY: “SECTION 502. PARTNER’S TRANSFERABLE INTEREST IN PARTNERSHIP.

“(a) The only transferable interest of a partner in the partnership is the partner’s interest in distributions. The interest is personal property.

“(b) A transferee of a partner’s transferable interest in the partnership has the right to cause a winding up of the partnership business as provided in Section 801 (6).”

COMMISSIONER C. ARLEN BEAM (Nebraska): You may decide to call me out of order because I want to step back to 407 and inquire of this committee, as I did the committee that functioned yesterday, what they mean when they use the term “prima facie evidence.” How is that supposed to be applied in this situation? Section 407, Line 25.

CHAIRMAN FRANCK: ... I will ask the committee to respond.

COMMISSIONER BEAM: It may be evidence, I will agree with that. Are you attempting to create a rebuttable presumption that the evidence must be accepted by the trier of fact?
COMMISSIONER BEAM: I consulted with the new Commissioner from Oklahoma who is replacing Mr. Miller, who is an evidence teacher at the University of Oklahoma, and I think an expert in this area who couldn’t explain to me the use of the term as the committees have been using it. I thought maybe the committee could give us some insight.

....

MR. DONALD J. WEIDNER (Reporter): By background, that is the language in the present UPA, Section 23. ...

....

COMMISSIONER BEAM: I move that “prima facie” be dropped from that language.

CHAIRMAN FRANCK: The motion, as I understand it, is to strike the words “prime facie” from Line 25, Page 69, is that correct?

Response from the committee.

COMMISSIONER H. LANE KNEEDLER III (Virginia): It is true that the language is from the original act. But I do think that we intended substantively to say that if the elements preceding that were proven in your case, you get a directed verdict absent evidence on the other side to make it clear that that is needed to prove as a prime facie case, to entitle you to a direct verdict in the absence of other evidence.
COMMISSIONER BEAM: I think the term is not widely understood, and suggest that it may create some problems in trying to figure out how to apply it, and would suggest that you consider making the evidence a rebuttable presumption that the fact in issue has been proved.

I will stick with my motion. I think that prima facie should come out of there. If it is evidence and it’s sufficiently probative, then the trier of fact is going to find what you want it --

CHAIRMAN FRANCK: ... Is there is a speaker in opposition to the motion?

COMMISSIONER GEORGE BUXTON (Tennessee): You ought to also take note that that phrase appears in Section 202 (c)(3).

COMMISSIONER KNEEDLER: Mr. Chairman, with all due respect to the gentleman from Oklahoma, the use of prima facie evidence has exactly (having taught evidence myself for a while) the meaning that I have suggested is essentially interchangeable with the term “rebuttable presumption,” and, frankly, is quite common in statutes, certainly in Virginia, with that precise meaning. I think we would be opposed to the motion.

CHAIRMAN FRANCK: Commissioner Miller, are you seeking recognition on this motion for the University of Oklahoma Law School?
COMMISSIONER MILLER: But I think, Commissioner Kneedler, that the point that was being made is very much the one that you stated, and the thought is that this is not a clear exposition of that point. And I would suggest that maybe we just have a sense of the house motion on this. You consult with the reporters for the other act where this point was debated and maybe come back with language which would clarify the intent. I don’t think there is any desire to do anything different than what you’re saying.

CHAIRMAN FRANCK: Well, first of all, there is a motion on the floor so we can’t have a sense of the house motion. Secondly, I gave the indication that the committee would like the floor to vote on this motion as it stands.

COMMISSIONER EUGENE A. BURDICK: (North Dakota): I think Commissioner Kneedler’s position is absolutely correct. If you take out “prima facie” here, you might as well as take out the whole section, and I think that would be a mistake. Prima facie evidence, as I understand it, is evidence sufficient to sustain the case against a motion for directed verdict at the close of the plaintiff’s evidence. And that is all it is. It’s sufficient to carry the day for him until the defendant presents
his case.

CHAIRMAN FRANCK: You may close on your motion, if you want.

COMMISSIONER BEAM: Well, with due regard to the Commissioner, I think that the evidence may be sufficient to sustain a prima facie case, but you have a prima facie case, you don’t have prima facie evidence. So, there are a number of other places in the act that this appears, and I guess I would like to expand my motion to have the committee consider, if this motion passes, taking them out –

....

COMMISSIONER CUTLER: The only reason I rise, I raised this same objection earlier in two places where it appears, and your good Commissioner from Illinois had a very sound answer. If this is taken out, then a court is going to look for a difference between the meaning of prime facie evidence which is in the UPA and evidence which would be in this new act. I think it would be a mistake to take it out for that reason.

CHAIRMAN FRANCK: Thank you, Commissioner. Commissioner Beam, I will give you the right to close again if you want to use it. He waives.
The motion before you is to strike the words “prima facie” on Line 25, Page 69. in Section 407 (b). Everybody understand the motion?

As many as are in favor of the motion, please say “aye.”

As many as are opposed, please say “nay.”

The “nays” appear to have it. The “nays” do have it. The motion is defeated.

....

We will now proceed, seeing no one else seeking recognition on that section, to a reading of Section 503 and then you’ll be able to be recognized.

COMMISSIONER MORRIS W. MACEY (Georgia): “SECTION 503. TRANSFER OF PARTNER’S TRANSFERABLE INTEREST.

“(a) A transfer of a partner’s transferable interest in the partnership:

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

“(2) does not by itself cause a winding up of the partnership business; and

“(3) does not, as against the other partners of the partnership, entitle the transferee, during the continuance of the partnership, to participate in the management or conduct of the partnership business, to require access to information
concerning or an account of partnership transactions, or to inspect or copy the partnership books or records.

“(b) A transferee of a partner’s transferable interest in the partnership is entitled to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled. Upon transfer, the transferor has the rights and duties of a partner other the interest in distributions transferred.

“(c) If an event causes a dissolution and winding up of the partnership business under Section 801, a transferee is entitled to receive, in accordance with the transfer, the net amount otherwise distributable to the transferor. In a dissolution and winding up, a transferee may require an accounting only from the date of the last account agreed to by all the partners.

“(d) Until receipt of notice of a transfer, a partnership has no duty to give effect to the transferee’s rights under this section.”

....

COMMISSIONER JUSTIN L. VIGDOR (New York): Line 10 on Page 74, the word “has” almost seems to connote that those rights and duties somehow are connected and arise upon the transfer. And I would suggest that it be changed to “retains.”

....
MR. DONALD J. WEIDNER (Reporter). I think that is acceptable to the committee.

CHAIRMAN FRANCK: The committee accepts that change.

Other comments on Section 503?

COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut): I note that the comments indicate that it was your intention that a provision in the partnership agreement barring transfers or pledges of your partnership distribution rights is intended. And in Connecticut, our provision, our statute expressly provides that a restriction in the partnership agreement barring pledges is void. I am told by Commissioner Coggeshall that there is a provision in the code that takes the same approach. I am wondering if the committee can tell us why it is that you think it’s important to prevent partners from pledging their distribution rights as security for a loan.

....

MR. WEIDNER: My sense was that the understanding of the committee was, No.1, as far as the charging order remedy was concerned in our own act that the partners could not by agreement prohibit the creditor of an individual partner from using the charging order remedy to get at the partnership interest.

We also discussed that under the UCC, there are
provisions that would hobble an attempt by contract between the partners to create -- I don’t know UCC speak, but inalienable estate. And we assumed, in short, that both from the third party remedies under this act and third party remedies under other acts, that we could not -- that the partners could not by agreement draft those away, but they could subject themselves to liability among themselves for damages for breaching their agreement not to let other in.

COMMISSIONER BREETZ: Your comments make clear that the transfer is effective with respect to third parties only if those third partners, don’t have notice of the partnership agreement. And in the normal course, a lender who has taken a pledge of your interest would want to see the partnership agreement, and he would lose in that transaction. I don’t understand the policy that would cause the committee to depart from the commercial code in this respect.

....

MR. MERRILL (California State Bar): We discussed this at some length, and the concern was that this is the default rule. If the partners intend to make these interests alienable, they can do lots of things in the partnership agreement that will make them readily pledgeable, in fact, even attractive security. But that as the default rule, it is unfair, where there might not even be a partnership agreement, to saddle
one being in partnership with a person who essentially has no longer any economic interest in what he is doing and has general agency power to bind you. And we thought that that was an unattractive result as the default rule. And if the partners intend this to be available as loan security for creditors or otherwise, it is a very simple matter to provide for that in the agreement. But the better default rule is essentially not to force someone to be a partner with a creditor.

....

MR. DONALD J. WEIDNER (Reporter): Just doing a quick head count of some of the Commissioners here, the sense is that the comment does not accurately reflect what I said to you orally. I get the sense that the Commissioners I’ve talked to agree with what I said orally, and would be in favor of amending the comment to that effect.

COMMISSIONER BREETZ: What would be the outcome of the amended comment?

MR. WEIDNER: To amend the comment to delete the statement that the third party would be bound by the partnership agreement if the third party were on notice or had knowledge or notice of the partnership agreement.

COMMISSIONER BREETZ: As I understand it, whether or not the third party had notice of the partnership agreement, the
effect would be that as between the partner and the third party lender, it would be effective. Is that correct?

MR. WEIDNER: Yes, sir.

COMMISSIONER BREETZ: So that --

MR. WEIDNER: Not to make the person -- the third party lender would not become a partner --

COMMISSIONER BREETZ: I understand. As I understand, with the amended comment, it is the committee’s intention that a pledge of my right to receive a distribution of income would be effective as between the lender and the partnership. so that the lender would be able to take that distribution, is that correct?

MR. WEIDNER: Yes, sir. And we would be consonant with the UCC in that respect.

COMMISSIONER BREETZ: In that regard, I guess if that is the committee’s intention, I would like to put it in the black letter, Mr. Chairman, and I would move a sense of the house resolution that the --

CHAIRMAN FRANCK: Will you state --

COMMISSIONER BREETZ: -- that the act be amended to make it clear that that result would attain.

CHAIRMAN FRANCK: Make your sense of the house motion a little bit more concrete, that what be incorporated in the
COMMISSIONER BREETZ: I move that this section under consideration be amended to state explicitly that a pledge of the distribution rights that a partner has is effective, notwithstanding any restriction on that pledge to the contrary. Commissioner Coggeshall suggests, and I accept it, that it be a pledge or other assignment.

....

COMMISSIONER HARRY J. HAYNSWORTH, IV, (Illinois): Might I point out to the Commissioner that the Revised Uniform Limited Partnership Act which this Conference approved has basically the same formulation that we have now, and that is it says in our proposed act “except as provided in the partnership agreement, a partnership interest is assignable in whole or in part.” And everyone fully understands what that means has caused no difficulty. And if you start putting in additional statutory language in another act which interplays with the Limited Partnership Act, I think you may be creating some difficulties.

CHAIRMAN FRANCK: We have a sense of the house motion. As I understand the sense of the house motion, the sense of the house to the black letter incorporate the concept that a pledge of partner’s distribution rights is effective, notwithstanding any commitment to the contrary. Is that correct?
COMMISSIONER BREETZ: I didn’t use the word “commitment.” I thought I was speaking of restriction in the partnership agreement to the contrary.

CHAIRMAN FRANCK: Notwithstanding any contrary restriction in the partnership agreement. Is that correct?

COMMISSIONER BREETZ: That is correct.

CHAIRMAN FRANCK: The motion is a sense of house motion to amend the black letter, to provide in substance that the pledge of the partner’s distribution rights is effective, notwithstanding any contrary restrictions in the partnership agreement.

... The “nays” do have it. The motion is defeated.

COMMISSIONER MORRIS W. MACEY (Georgia): “SECTION 504. PARTNER’S TRANSFERABLE INTEREST SUBJECT TO CHARGING ORDER.

“(a) On application by a judgment creditor a partner or partner’s transferee, a court having jurisdiction may charge the transferable interest of the debtor partner or transferee to satisfy the judgment. The court may appoint a receiver of the debtor’s share of the distributions due or to become 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) A charging order constitutes a lien on the judgment debtor’s transferable interest in the partnership. The court may order a foreclosure of the interest subject to the charging order at any time and upon conditions it considers appropriate. The purchaser at the foreclosure sale has the rights of a transferee.

(c) At any time before foreclosure, an interest charged may be redeemed:

“(1) by the judgment debtor;

“(2) with property other than partnership property by one or more of the other partners; or

“(3) with partnership property, by one or more of the other partners with the consent of all of the partners whose interests are not so charged.

“(d) This [Act] does not deprive a partner of a right under exemption laws with respect to the partner’s interest in the partnership.

“(e) This section provides the exclusive remedy by which a judgment creditor of a partner or partner’s transferee may satisfy a judgment out of the judgment debtor’s transferable interest in the partnership.”

....

COMMISSIONER BRUCE COGGESHALL (Maine): As written, this section is limited to a judgment creditor. Does the
committee intend to state affirmatively that a prejudgment attachment would not be permitted against a partner’s interest?

....

MR. DONALD J. WEIDNER (Reporter): The answer is no.

COMMISSIONER COGGESHALL: The answer is no, you are just leaving that to other law?

MR. WEIDNER: Yes, sir.

COMMISSIONER COGGESHALL: In subsection (c), Lines 7 through 12, dealing with redemption of these interests, is there any intended order of priority?

....

COMMISSIONER COGGESHALL: Any intended order of priority. In other words, does the debtor have the right to redeem before one of his partners does?

....

MR. WEIDNER: The sense of the people I have just spoken to is that we didn’t have any priority scheme in order -- this is a continuation of the old act. We didn’t intend to say anything about priorities.

COMMISSIONER COGGESHALL: As I understand it, as it’s now written, if a partner’s interest is subject to a charging order, if one of his partners beats him to it the partner can redeem it and get rid of his partner. One of the other partners
that is not subject to the charging order, if he is the first one to attempt to redeem, he buys the other guy out of the amount of the charging order.

MR. JOHN W. LARSON (Reporter): We discussed this. There is very, very little case law on how the foreclosure of charging order works. It was our sense that the good faith requirement, at the very least, would require a partner -- another partner to say he is thinking of doing this. Your question is a good one, that there virtually is no law, and we decided to leave it the way it was under --

COMMISSIONER COGGESHALL: Would it be appropriate to put in the comment that in ordinary circumstances the partner ought to -- the partner subject to the charging order ought to have the first opportunity to redeem?

CHAIRMAN FRANCK: The committee indicates they will make that comment.

....

COMMISSIONER EDWARD I. CUTLER (Florida): With regard to both of the points just made, I suggest that a comment ought to make it clear that other law may permit a garnishment or attachment before a judgment is obtained by the creditor, and also that this does not prevent a security interest from having been established against the partnership interest, not the right to be a partner, but the right to the funds. would be satisfied
if the comment clearly pointed that out, otherwise it might be an inference from this language that this is exclusive in the text.

....

MR. WEIDNER: I think that is our intent.

....

COMMISSIONER MORRIS MACEY (Georgia): Commissioner Cutler is raising the issue that we discussed at some length in the committee, and that is the meaning of the word “exclusive.” That is what you’re addressing, isn’t it, Commissioner Cutler, whether or not the partnership could garnish or attach or whether that judgment creditor has the exclusive remedy --

COMMISSIONER CUTLER: Yes –

....

CHAIRMAN FRANCK: The response I have heard so far is that the committee agrees with what you are saying and we will put that into the comment or clarify the comment on that point.

COMMISSIONER MACEY: It will take more than a comment.

....

COMMISSIONER HARRY J. HAYNSWORTH, IV, (Illinois): What I was going to suggest, that this section only deals with a right of a judgment creditor, it does not deal with anyone else’s rights. Therefore, the comments should explicit say that
other rights -- in other words, the right to foreclose on security interest would be available. Just as long as that is understood. The exclusivity would not affect that.

....

COMMISSIONER WILLIAM C. GARDNER (District of Columbia): "SECTION 601. EVENTS CAUSING PARTNER’S DISSOCIATION. A partner is dissociated from a partnership upon:

“(1) receipt by the partnership of notice of the partner’s express will to withdraw as a partner or upon any later date specified in the notice;

“(2) an event agreed to in the partnership agreement as causing the partner’s dissociation;

“(3) the partner’s expulsion pursuant to the partnership agreement;

“(4) the partner’s expulsion by the unanimous vote of the other partners if:

“(i) it is unlawful to carry on the partnership business with that partner;

“(ii) there has been a transfer of all or substantially all of that partner’s transferable interest in the partnership, other than a transfer for security purposes or a court order charging the partner’s interest which has not been foreclosed;
“(iii) within 90 days after the partnership notifies a corporate partner that it will be expelled because it has filed a certificate of dissolution or the equivalent, its charter has been revoked or its right to conduct business has been suspended by the jurisdiction of its incorporation, there is no revocation of the certificate of dissolution or no reinstatement of its charter or its right to conduct business; or

“(iv) a partnership that is a partner has been dissolved and its business is being wound up;

“(5) on application by the partnership or another partner, the partner’s expulsion by judicial degree because:

“(i) the partner engaged in wrongful conduct that adversely and materially affected the partnership business;

“(ii) the partner willfully and persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners under Section 404; or

“(iii) the partner engaged in conduct relating to the partnership business which made it not reasonably practicable to carry on the business in partnership with that partner;

“(6) the partner’s:

“(i) becoming a debtor in bankruptcy;

“(ii) executing an assignment for the benefit of creditors;
“(iii) seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of that partner or of all or substantially all of that partner’s property; or

“(iv) failing within 90 days after the appointment to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the partner or of all or substantially all of the partner’s property obtained without the partner’s consent or acquiescence, or failing within 90 days after the expiration of a stay to have the appointment vacated; “

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

“(i) the partner’s death;

“(ii) the appointment of a guardian or general conservator for the partner; or

“(iii) a judicial determination that the partner has otherwise become incapable of performing the partner’s duties under the partnership agreement;

“(8) 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, distribution of the trust’s entire transferable interest in the partnership, but not merely the substitution of a successor trustee;

“(9) 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 of the estate’s entire transferable interest in the partnership, but not merely the substitution of a successor personal representative; or

“(10) termination of a partner who is not an individual, partnership, corporation, trust, or estate.”

CHAIRMAN FRANCK: Comments on Section 601. Commissioner.

....

COMMISSIONER BRUCE COGGEHALL (Maine): I had a difficult time understanding that I think I read it incorrectly the first couple of times. I think what you’re saying is that if there has been a transfer of all of the transferable interest in the partnership other than, one, a transfer for security purposes, or, two, a court order. I think if you put an (a) or (b) or (1) or (2) there, it makes it read a little easier, it makes it clear as to what is intended.

Secondly, on Page 81, Line 21, after the word “incorporation,” I would suggest that you add the words “or this state.” You might well have a foreign corporation that is a partnership -- a partner and a partner in this state, and this state has suspended it.

CHAIRMAN FRANCK: Your first change is a style change and I suggest you give that in writing. But this one is a substantive change. Let’s get a response from the committee. The
suggestion is to add in Line 21 after the word “incorporation,” “or this state,” is that right?

COMMISSIONER COGGESHALL: That is correct.

CHAIRMAN FRANCK: Comment from the committee.

COMMISSIONER ROBERT H. CORNELL (California): The thought there was where a chartered corporation has actually terminated. There is a Catch 22. We didn’t want to catch up the foreign corporation partner who has a problem in being qualified within the state. That wasn’t intended. It was more the equivalent of the death situation. It could include that, but I think we would be picking up a lot of extra problems, and that was not the intention.

COMMISSIONER COGGESHALL: As now written, if you have a foreign corporation that is a partner in a partnership in this state, and this state suspends its right to conduct business in the state, we are not able to expel that partner.

CHAIRMAN FRANCK: Further comment from the committee.

COMMISSIONER CORNELL: Not just by virtue of that, no. 

COMMISSIONER JUSTIN L. VIGDOR (New York): I have a question about the relationship of Section 103, old (4)

COMMISSIONER VIGDOR: 103, old (4), and 601 601 (1) suggests that dissociation is effective immediately upon receipt
of a notice. 103, old (4), says that you may not vary the power of a partner to withdraw under 601 (1). Could you have in a partnership agreement a requirement of, say, 30 days prior notice before a withdrawal becomes effective? Is that a variation that is permitted?

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER VIGDOR: And if not, should it be? It seems very unclear to me.

....

MR. DONALD J. WEIDNER (Reporter): This is a very basic issue. I want to make sure the committee is in agreement on this.

....

MR. WEIDNER: The answer is, you could not prevent the partner from separating, you cannot make him wait 30 days. On the other hand, if there were such a provision and the partner violated that provision, he would get out, but he’d be subject to damages for getting out prior to the time appointed in the partnership agreement. And we would be thus continuing present law in this respect.

COMMISSIONER VIGDOR: I suggest that if a court were to read 103 old (4), it might not give effect to that requirement for prior notice and it might not award damages. I just wonder if there ought to be something to make that absolutely plain,
because I think that remaining partners may have a great deal at stake if someone dissociates instantly without prior notice, it may affect their rights in relationships to third parties and to one another.

MR. MERRILL (California State Bar): Remember, we have taken quite a bit of pressure off this concept, because now the partnership continues if the partner dissociates. It does not automatically dissolve, as it does under the current law.

....

COMMISSIONER ELLEN F. DYKE (District of Columbia): I’d like to know if the committee feels confident that the dissociation provisions because of bankruptcy are enforceable the way they are here, that this doesn’t run afoul of the bankruptcy code.

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER MORRIS W. MACEY (Georgia): No, we don’t feel comfortable about it. But we were troubled about how to deal with it. We felt that whatever we wrote here, the bankruptcy code would be paramount, and rather than try to plunge into the relatively unchartered waters, what treatment would be given an interest in a partnership of a partner who was in either a Chapter 11 or a Chapter 7 that we decided we would track the present Uniform Partnership Act and await developments in the bankruptcy court. We were not prepared to write a mini
bankruptcy code. And even if we had, there was no assurance that the bankruptcy courts would enforce it. So, in answer to your question, no, we don’t feel comfortable at all.

COMMISSIONER DYKE: I see a substantive difference between saying that a bankruptcy of the one partners causes a dissolution of the partnership and the bankruptcy of one of the partners causing a dissociation of that partner from that partnership. And I think it is a radical departure from what is violative of the bankruptcy code. I am not sure it should be in here at all. Maybe it should come out.

COMMISSIONER MACEY: Are you proposing that the bankruptcy partner not be a basis for dissociation?

COMMISSIONER DYKE: Not if it is an automatic dissociation, especially since you don’t know -- you have feelings about this not being enforceable to begin with.

COMMISSIONER ROBERT H. CORNELL (California): The feeling was that generally as a default rule that partners prefer not to continue in partnership with a person or entity that has gone into bankruptcy, but to time.

MR. DONALD J. WEIDNER (Reporter): Point of further information. In fact, I think the change that the degree that that will be prevented by the bankruptcy code, and it’s a moving target right now, obviously the federal law is going to control. But we think as a default provision, this is the sort of
provision people prefer to put in the partnership agreements, and we saw no reason to change it at this we have made from the Uniform Partnership Act is the reverse of the change you suggest. The Uniform Partnership Act in Section 31 says that the bankruptcy of a partner will cause a dissolution. We say that the bankruptcy of a partner does not cause a dissolution. We say it merely causes a dissociation.

....

MR. WEIDNER: I think that that is a change that is more consonant with the bankruptcy law decisions that have already said that bankruptcy law trumps the UPA.

COMMISSIONER DYKE: I understand the distinction. What I’m getting at is if you’re making it a default in any way, that occasions bad things to happen to a partner. In other words, the partnership goes on and that partner is disassociated because he files a bankruptcy petition. I am saying, in my mind, the law that has come down in bankruptcy would more than likely say that that is unenforceable, that you can’t have impediments, and you shouldn’t have impediments in law that make it a bad situation for someone to file a petition in bankruptcy. And that is all I am saying. It seems to me that once you start making it a default on a person to use the bankruptcy code in some way, I think you are going to run afoul of the bankruptcy code.
CHAIRMAN FRANCK: I am going to allow one more response from the committee. At that point, commissioner, we are either going to change the topic or we are going to ask you to make a motion. Let’s have a response from the committee.

COMMISSIONER MORRIS W. MACEY (Georgia): Well, there are two separate situations. One, of course, involves Chapter 7 of the party who is a partner in a proceeding. And it is unlikely that the courts would permit a partner who is in a Chapter 7 to continue fully active in a partnership. In Chapter 11, the law is still in a state of flux, as witnessed by the Priestly case, which says you can’t, and the Cardiminsky case, which says you can continue the individual as a partner or the entity as a partner.

We elected, as our reporter says, to go with the dissociation route and avoid developments in the court, but we considered omitting it altogether -- that is, the bankruptcy of an entity as terminating the partnership. But on further reflection, we decided that we would leave it in the code, whether or not -- in the Uniform Partnership Act. We thought that was a better posture than just to omit it altogether, which seemed to be our other option.

CHAIRMAN FRANCK: Do you want to make a motion, commissioner?
COMMISSIONER DYKE: Yes. I would like to make a motion to insert -- the words before the dissolution, where it says “dissolution” to say that if -- say it artfully, something about if it is set forth in the partnership agreement. In other words, if it is already in the partnership agreement, then you can do it under the act.

....

COMMISSIONER DYKE: And maybe right after (6) saying something like “if in accordance with the partnership agreement, the partnership” --

CHAIRMAN FRANCK: Your motion is to insert language, the sense of which would be to modify (6) on Page 82 so that it would be “if in accordance with the partnership agreement.” Is that your motion?

Response from the committee.

COMMISSIONER GEORGE BUXTON (Tennessee): I would ask you to bear in mind that the default statute we have drafted, if you leave it and vote against the motion, it would be the same as the Revised Uniform Limited Partnership Act. The comment in there provides that it’s the judgment that unless limited partners agree otherwise, they ought to have the power to rid themselves of a general partner who is in such dire financial straights that he is the subject of proceedings under national
bankruptcy code or similar provision of the law, and this is the way we have drafted the Revised Uniform Partnership Act.

COMMISSIONER CURTIS R. REITZ (Pennsylvania): Am I correct, that the effect of the motion is simply to say that an agreement could override Paragraph (6)?

CHAIRMAN FRANCK: My understanding of the motion is it subjects the provisions of (6) to only the situation where the partnership agreement so provides. That is my understanding of the motion.

COMMISSIONER REITZ: Perhaps I am not stating my question correct. Am I correct that under the frame of this act, Paragraph (6) is subject to agreement by, the partners?

MR. DONALD J. WEIDNER (Reporter): Yes, you are correct.

COMMISSIONER REITZ: An agreement could provide contrary to (6)(i)?

MR. WEIDNER: Yes, that is correct.

COMMISSIONER REITZ: What we are discussing now is what the default rule ought to be in the absence of agreement. It is subject to agreement. We all understand that. Either way, whichever way the default rule is, an agreement could change the default rule. And the issue is whether the default rule should
be as the committee has stated it or as has been suggested, that
the default rule is -- bankruptcy does not disassociate.

MR. WEIDNER: That is correct.

COMMISSIONER REITZ: I strongly oppose the motion.

CHAIRMAN FRANCK: Further comment on the motion?

Commissioner, you have the right to close. She waives
the right to close.

The motion is to amend subsection (6) on Page 82 to
incorporate language which would subject the provisions of that
subsection to there being in accordance with the partnership
agreement.

As many as are favor of the motion, please say “aye.”

Those opposed, please say “nay.”

The “noes” do have it. The motion is defeated. ...

....

COMMISSIONER M. KING HILL, JR. (Maryland): My comments
and inquiry are directed to Page 82, Lines 3 and 4, subsection
(5). The first inquiry, is the choice of the word “judicial
decree” broad enough to include an arbitration award? I don’t
find the definition, and I am not sure we pick up dispute
resolution awards as an act that will have the operative effect.

CHAIRMAN FRANCK: Response from the committee.

MR. WEIDNER: My sense is that we discussed that, and
that the answer was, yes, we decided at the various places not
to add arbitration -- not to make references to arbitration awards throughout the act.

CHAIRMAN FRANCK: But your answer is that arbitration award would be picked up by the term “judicial decree”? ...

CHAIRMAN FRANCK: They think it would be picked up.

COMMISSIONER HILL: Secondly, I question the choice of the word “judicial decree” in the act. Don’t you really mean a judgment, not a judicial decree? It’s a strange word to use. We think, at least in my state, a judicial decree is strictly an equity term and not a judgment of the court of record.

And along with that, for your consideration at the same time, I think you have a timing problem here. You have a judicial decree or you use the word “judgment.” At what time does the operative event occur? At the trial court level or after a final judgment or final judicial decree?

CHAIRMAN FRANCK: Response from the committee.

MR. JOHN W. LARSON (Reporter): In the original draft, we used various formulations of the concept of judicial decree, and in conjunction with the Style Committee had chosen to use, we hope consistently throughout, the term “judicial decree.” It would be inartful, but it was intended to include arbitration. We did not consider at what point it would become effectively. It would depend, in our judgment, on the form of the order.
COMMISSIONER HILL: Would you consider defining “judicial decree” to make certain that in this world where we are trying to promote arbitration, particularly in these kinds of disputes, that you pick up arbitration deliberately, and, secondly, I really think you need to think about the timing issue as to whether the first judgment or decree that is handed down dissolves the partnership, or whether if you have go. a pending appeal, you have got some sort. of something influx in the meantime so third parties dealing with a partnership will know what is going on.

CHAIRMAN FRANCK: The first part of your suggestion, Commissioner, was to add arbitration --

COMMISSIONER HILL: Either define “judicial decree” to make sure what we are talking about, because I think this Conference’s philosophy is to support arbitration. And if judicial decree hangs out there by itself, I am not sure a court is going to construe it to mean an arbitration award.

Secondly, I am concerned about the timing problem. If there is a trial court judgment, is the partnership dissolved at that time or must you have a final judgment so the third parties dealing with the partnership will know the status of the entity while litigation continues?

CHAIRMAN FRANCK: Let’s get the committee’s response first to the question of defining the term, “judicial decree.”
COMMISSIONER H. LANE KNEEDLER III (Virginia): We will define “judicial decree,” make it clear that arbitration awards are intended to be included.

COMMISSIONER HILL: While you look at that, will you also consider the timing issue, as to whether it’s dissolved immediately upon the entry of the first order or judgment or whether it must be a final judgment.

COMMISSIONER KNEEDLER: Yes, we will consider that.

CHAIRMAN FRANCK: Seeing no one else seeking recognition on this section, we will go to Section 602.

COMMISSIONER WILLIAM C. GARDNER (District of Columbia): There have been two changes in Section 602. The first occurs on Page 88, Line 33, the words “dissolution of” have been deleted and replaced by “right to dissolve.”

CHAIRMAN FRANCK: Line 33, the words “dissolution of” have been struck and there has substituted for those two words, the words “right to dissolve.” The last phrase in that line reads “and results in a right to dissolve the partnership,” et cetera.

COMMISSIONER GARDNER: The other change will occur in 603 and will be read to you.

CHAIRMAN FRANCK: Proceed to read 602.

COMMISSIONER GARDNER: “SECTION 602. PARTNER’S WRONGFUL DISSOCIATION.”
“(a) A partner’s dissociation is wrongful only if:

“(1) it is in breach of an express provision of the partnership agreement;

“(2) in the case of a partnership for a definite term or particular undertaking, before the expiration of the term or the completion of the undertaking:

“(i) the partner withdraws by express will, unless the withdrawal follows the dissociation of another partner and results in a right to dissolve the partnership under Section 801(2)(1);

“(ii) the partner is expelled by judicial decree under Section 601(5); or

“(iii) in the case of a partner who is not an individual, trust, other than a business trust, or estate, the partner is expelled or otherwise dissociated because it willfully dissolved or terminated.

“(b) A wrongfully dissociating partner is liable to the partnership and to the other partners for damages caused by dissociation. That liability is in addition to any other liability of the partner to the partnership or to the other partners.”

CHAIRMAN FRANCK: Commissioner, before we take comments, although it’s a little confusing as it is set forth, I
believe this is no “or” after the first semicolon in (ii). The “or” simply separates (ii) from (iii) in that subsection.

COMMISSIONER GARDNER: That is correct.

CHAIRMAN FRANCK: Comments on the section.

COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut): Does the committee intend that a wrongful dissociation which is wrongful under the act would also be wrongful?

CHAIRMAN FRANCK: Response from the committee?

MR. DONALD J. WEIDNER (Reporter): I am sorry, you have several people up here who don’t understand the question.

COMMISSIONER BREETZ: You have said that that the dissociation is wrongful only if it violates an express provision of the agreement. Suppose there is no provision in the agreement with respect to dissociation by less than unanimous consent, but in fact less than all, toss him out. So, the agreement is a silent, but that the standards of the act are not followed. What do you contemplate would happen in that situation?

COMMISSIONER HOWARD J. SWIBEL (Illinois): The focus on wrongful in 602 is on the conduct of the party who is being removed, not on whether or not the process by which he removed was itself wrongful. So this section simply doesn’t address the question that you raise as to whether or not the partnership or the other partners violated some agreement or duty.
COMMISSIONER BREETZ: Let me go back and think about that.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER MICHAEL P. SULLIVAN (Minnesota): I guess I missed the point that you made there.

CHAIRMAN FRANCK: Can you speak into the microphone, please.

COMMISSIONER SULLIVAN: I take it that in order to be a wrongful disassociation, there has to have been an attempt to disassociate. Am I correct in that? In other words, is a wrongful disassociation in effect a disassociation? Are they disassociated? Is there some legal impact because of what you’ve done? And notwithstanding that legal impact, was something wrongful?

CHAIRMAN FRANCK: Response from the committee.

While the committee is thinking about this, you used the term “disassociation,” which is my tendency also, but they have deliberately not used the word “disassociation,” the word is “dissociation.”

....

COMMISSIONER SULLIVAN: The point that was raised by the previous speaker was a partner’s disassociation is wrongful “only if,” so the only way you can have one is if you do one, two or three --
CHAIRMAN FRANCK: I think the committee’s response, and the committee should correct me if I’m wrong, is that this section deals with actions by the partner, by which the partner dissociates which are wrongful. It is not a wrongful throwing out of a partner. It’s the partner’s conduct that is the focus — the dissociated partner’s conduct which is the focus of this section. Is that correct?

COMMISSIONER SWIBEL: That is correct.

COMMISSIONER SULLIVAN: Then what you’re saying is if the partner should disassociate a person or there should be a wrongful disassociation, but the reason it’s wrongful is that they did something that was violative of a provision of this act or a provision of the previous section dealing with disassociation, that that would not be something that gives rise to a wrongful disassociation. If you have a partnership at will apparently, there can be no express provision that is being violated or breached. So, anything that you’re doing by way of disassociation would have to be done pursuant to the statute. And you can’t attempt to disassociate a person wrongfully in any other way.

COMMISSIONER SWIBEL: The importance of 602 (b) is to create a separate right to recover from the partner for his wrongful dissociation. If he violates other duties under the act, such as duties of loyalty or duties of care or duties of
good faith, there are independent actions that the partnership may have against that person. The narrow subject matter of this section is the mere act of the dissociation itself may give rise to liability. 602 (b) indicates that in that situation the partnership may have a cause of action for damages against that partner.

COMMISSIONER SULLIVAN: Am I correct then in saying the partner has not been disassociated? In other words, can you -- under this provision, you’re talking about a right that a partner has if somebody apparently attempts to wrongfully disassociate them. It’s a right of the partner to bring some kind of an action.

COMMISSIONER SWIBEL: This is a right of the partnership to go against that partner.

MR. MERRILL (California State Bar): I think I understand your concern. Let me see if I can straighten it out.

This creates kind of a term of art, wrongful dissociation, which is related only to the conduct of the partner and has certain consequences regarding the buy out, the price and other things. It is not intended to preclude an action by a partner who is wrongfully thrown out of the partnership back against the partnership for wrongful conduct by the other partners in throwing him out. It does not preclude that. It is instead defining a term of art which is later used in the remedy
section, which is related only to the conduct of the dissociating partner. Does that help?

COMMISSIONER SULLIVAN: No.

[Laughter]

CHAIRMAN FRANCK: It may be that the committee ought to look at the heading they have given this section. I think the heading could probably make it clear that they are talking about the conduct of the partner who is dissociated, not the conduct of the partnership in dissociating one of its partners.

Commissioner.

COMMISSIONER CURTIS R. REITZ (Pennsylvania): I think there is a gap in communication. And I would urge the committee to think about what Commissioner Sullivan has said. An act of wrongful dissociation is, I think in the committee’s judgment, dissociation. The question is, what are the consequences of that. I don’t think the act says that. If I understood the committee’s draft, for example, 601 (1), is subject to agreement to the contrary. It is not one of the provisions that cannot be varied by agreement. The agreement might say that a partner may not withdraw by simply saying, “I quit.” I take it that is not controversial. But, nonetheless, the committee has the view that a partner can quit and dissociate, and then the consequences under 602 fall in.

CHAIRMAN FRANCK: Commissioner Kneedler.
COMMISSIONER H. LANE KNEEDLER, III (Virginia): Thank you, Mr. Chairman. I would like to ask Commissioner Sullivan, just so I understand the problem, is the problem that it appears we have defined a one-way street, that we are talking about the -- this is talking about what happens when the partner who dissociates does something that is wrongful. And your concern is what happens if something is done wrongfully to him?

COMMISSIONER SULLIVAN: I have been convinced that I don’t understand what you’re talking about or I am talking about. I would suggest that the reason I got to that point may have something to do with you’ve written.

CHAIRMAN FRANCK: We will accept that statement as a truism.

Commissioner.

COMMISSIONER STANLEY PLETTMAN (Texas): Am I correct or incorrect that what the committee means in subpart (a) would be as follows “a disassociation by a partner is wrongful only if”?

That is not correct. I mean, somebody is shaking their head. I would like to know why it’s not correct.

COMMISSIONER SWIBEL: We cover in Line 1 on Page 89 the expulsion by judicial decree, which would be initiated by presumably somebody other than the partner himself. Your language might not work because it would suggest that the action is initiated only by, that partner.
CHAIRMAN FRANCK: I suggest that the committee take a look at that. That was the suggestion I had in mind in the title of this section, and I do think that a dissociation by judicial decree would be because of the conduct of the partner. But I think there has enough discussion on this subject that you had better revisit this point so you can clarify the sections so that everyone can comprehend what you are addressing.

COMMISSIONER GARDNER: There has been one change in Section 603. Line 7, Page 91, “Article 8” has been replaced with “Section 804.”

CHAIRMAN FRANCK: Changes on Line 7, strike “Article 8” and substitute “Section 804.” Proceed.

COMMISSIONER GARDNER: “SECTION 603. EFFECT OF PARTNER’S DISSOCIATION.

“(a) a dissociated partner’s interest in the partnership must be purchased pursuant to Article unless the partner’s dissociation results in a dissolution and winding up of the partnership business under Article 8.

“(b) Upon a partner’s dissociation, the partner’s right to participate in the management and conduct of the partnership business is terminated, except as provided in Section 804.”

CHAIRMAN FRANCK: Comments on Section 603?
COMMISSIONER NEAL OSSEN (Connecticut): I am asking some questions to see how this works in when a trustee in bankruptcy now is the trustee of a partner. There has been a dissociation because of the filing of the individual partner’s bankruptcy case, either 13, 11 or 7. And now do I take it that the remaining partners pursuant to the other sections will decide what the value of partnership is, and then if the dissociated partner doesn’t like it, he can bring a lawsuit?

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER HARRY J. HAYNSWORTH, IV (Illinois): The answer is yes.

COMMISSIONER MORRIS W. MACEY (Georgia): Macey says yes, too.

[Laughter]

COMMISSIONER OSSEN: Let’s take the case of the Chapter 7 trustee. The partnership interest is an asset of the estate and he is contacted by somebody who says: Hey I, think that interest has a lot of value. I want you to sell that partnership interest to me. Assign it.

Is the trustee prohibited under this section from saying to the partnership, “I am selling the interest of the debtor”?

CHAIRMAN FRANCK: Response from the committee?

MR. DONALD J. WEIDNER (Reporter): No.
COMMISSIONER OSSEN: Are there other sections that would say now that the trustee in bankruptcy has assigned the bankrupt partner’s total interest in the partnership that would cause a dissolution and winding up of the partnership, that would then interfere with perhaps the benefit of barter for the estate state.

CHAIRMAN FRANCK: Response from the committee.

MR. WEIDNER: No and yes.

MR. WEIDNER: What we have done is say that -- becoming a debtor in bankruptcy takes us to the consequences that we have just discussed, but they also activate a responsive right of the other partners to cause a liquidation. The question we got to in the committee was, well, does that mean that if your partner goes bankrupt that you must buy him out. And we said, no, if the partner goes bankrupt and you can respond by liquidating the whole partnership, but not taking away anything from the trustee in that process.

COMMISSIONER MORRIS W. MACEY (Georgia): The pattern of the act is that in the event of a bankruptcy, the trustee would offer the partnership interest to the other partners. There is a formula for determining that value. The other partners would have the opportunity to buy the interest of the partnership from the trustee in bankruptcy. But they would not be required to follow this act. If they choose not to, they could propose to
terminate the partnership and then they would not be required to buy out the partnership interest. When they terminate the partnership, then they go into winding up and the other procedures without reference to the formula provided in this act.

COMMISSIONER OSSEN: What happens when the trustee in bankruptcy wants to sell it to a non partner, a third party?

COMMISSIONER MACEY: Well, I find that a difficult scenario, the idea that a third party would be interested in buying a partnership interest. I don’t think there is any question that the trustee in bankruptcy could not sell a partnership [interest], could not bring somebody into a partnership who wasn’t a partner. He might sell the economic interest, but the partnership itself would have to go into a liquidation, termination. You can’t make somebody a partner when the other partners don’t want him or her. So, that is would be a non-event.

COMMISSIONER OSSEN: Thank you,

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut) Following up on Commissioner Ossen’s suggestion, if the partnership agreement provided that upon the dissociation of a partner without unanimous consent, for example, when there was a bankruptcy filing, that the valuation of the partner’s interest
would be essentially on a distressed basis. The effect would be
that Mr. Ossen as trustee got ten cents on the dollar, and that
is what the partnership agreement provided. Did the committee
discuss that concept? Is there any reason to suggest that under
the variation by agreement provisions of the act that that
wouldn’t be valid except under the bankruptcy law.

MR. DONALD J. WEIDNER (Reporter): No.

....

MR. WEIDNER: There is no reason to suggest that that
would be valid.

......

MR. WEIDNER: Yes, we discussed it. And there is no
reason to believe that we have intended anything to invalidate
that under the act. We have consistently followed the policy
that -- under our act, we would strike down any provision that
would tend to create a defeasible estate because it was about to
pass into the hands of other creditors.

COMMISSIONER MACEY: Well, Commissioner Breetz, are you
referring to a provision in the partnership [agreement] that
says if the partner is dissociated on account of bankruptcy,
then the remaining partners could buy that partner’s interest
for ten cents on the dollar? Is that the hypothetical?

COMMISSIONER BREETZ: I am sure that you, Commissioner
Macey, would draft it much more artfully. It might be put in
terms of dissociation without unanimous consent of the other parties, that the remaining partners could value it on the basis of a distress sale or something along those terms. And the question is, would the effect be that the trustee would be bound by that valuation. That is my question.

COMMISSIONER MACEY: The cases show that would be a penalty, and precedent in the Bankruptcy Courts would be that provision would not be enforced. Outside of bankruptcy, Bill, I think the partners could agree among themselves, and it would be enforceable. But [in bankruptcy] it’s a forfeiture or penalty and would not be enforced.

....

COMMISSIONER BRUCE E. MUNSON (Wisconsin): I want to revisit the Section 602, if it pleases the chairman. Dealing with the wrongful dissociation, the only expulsion that we are referring to 602 is the judicial expulsion. I wonder, what would be the effect under 601 (4)(i), where the partner has created a situation where the other partners are basically forced to unanimously vote that partner out-of the partnership because it’s unlawful to carry on the partnership business with that partner, would that partner then be liable for a wrongful dissociation under Section 602?

COMMISSIONER HOWARD J. SWIBEL (Illinois): We chose not to include that in 602. That partner might have independent
liability for wrongful conduct that led up to his expulsion. But we did not want to have the partners have the power to, in effect, cause this to be a special cause of action for wrongful dissociation under 602.

COMMISSIONER MUNSON: Would you create a situation where those partners were forced to wait for a judicial decree in order to create that sort of liability?

CHAIRMAN FRANCK: The response of the committee is that they did not intend to incorporate that concept into 602.

....

COMMISSIONER HARRY J. HAYNSWORTH, IV, (Illinois):

"SECTION 701. PURCHASE OF DISSOCIATED PARTNER’S INTEREST.

"(a) If a partner is dissociated from a partnership without resulting in a dissolution and winding up of the partnership business under Section 801, the partnership shall cause the dissociated partner’s interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b).

"(b) The buyout price of a dissociated partner s interest is the amount that would have been distributable to the dissociating partner under Section 808 (b) if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the
dissociated partner and the partnership were wound up as of that date. In either case, the sale price of the partnership assets must be determined on the basis of the amount that would be paid by a willing buyer to a willing seller, neither being under any compulsion to buy or sell, and with knowledge of all relevant facts. Interest must be paid from the date of dissociation to the date of payment.

“(c) Damages for wrongful dissociation under Section 602(b), and all other amounts owing, whether or not presently due, from the dissociated partner to the partnership, must be offset against the buyout price. Interest must be paid from the date the amount owed becomes due to the date of payment.

“(d) A partnership shall indemnify a dissociated partner against all partnership liabilities incurred before the dissociation, except liabilities then unknown to the partnership, and against all partnership liabilities incurred after the dissociation, except liabilities incurred by an act of the dissociated partner under Section 702. For purposes of this subsection, a liability not known to a partner other than the dissociated partner is not known to the partnership.

“(e) If no agreement for the purchase of a dissociated partner’s interest is reached within 120 days after a written demand for payment, the partnership shall pay, or cause to be paid, in cash to the dissociated partner the amount the
partnership estimates to be the buyout price in accrued interest, reduced by any offsets in accrued interest under subsection (c).

“(f) If a deferred payment is authorized under subsection (h), the partnership may tender a written offer to pay the amount it estimates to be the buyout price in accrued interest, reduced by any offsets under subsection (c), stating the time of payment, the amount and type of security for payment, and the other terms and conditions of the obligation.

“(g) The payment or tender required by subsections (e) or (f) must be accompanied by the following:

“(1) a statement of partnership assets and liabilities as of the date of disassociation;

“(2) the latest available partnership balance sheet and income statement, if any;

“(3) an explanation of how the estimated amount of the payment was calculated; and

“(4) written notice that the payment is in full satisfaction of the obligation to purchase unless, within 120 days after the written notice, the dissociated partner commences an action to determine the buyout price, any offsets under subsection (c), or other terms of the purchase obligation.

“(h) A partner who wrongfully dissociates before the expiration of a definite term or the completion of a particular
undertaking is not entitled to payment of any portion of the buyout price until the expiration of the term or completion of the undertaking, unless the partner establishes to the satisfaction of the court that earlier payment will not cause undue hardship to the business of the partnership. A deferred payment must be adequately secured and bear interest.

“(i) A dissociated partner may maintain an action against the partnership pursuant to Section 406(b)(2)(ii) to determine the buyout price of that partner’s interest, any offsets under subsection (c), or other terms of the purchase obligation. The action must be commenced within 120 days after the partnership has tendered payment or an offer to pay or within one year after written demand for payment if no payment or offer to pay is tendered. The court shall determine the buyout price of the dissociated partner’s interest, any offset due under subsection (c), and accrued interest and enter judgment for any additional payment or refund. If deferred payment is authorized under subsection (h), the court shall also determine the security for payment and other terms of the obligation to purchase. The court may assess reasonable attorney’s fees and the fees and expenses of appraisers or other experts for a party to the action, in amounts the court finds equitable, against any other party, if a court finds that the other party acted arbitrarily, vexatiously, or not in good
faith, including the partnership’s failure to tender payment or an offer to pay or to comply with the requirements of subsection (g).”

CHAIRMAN FRANCK: Comments on Section 701. Commissioner.

COMMISSIONER BRUCE COGGESHALL (Maine): On Page 93, Line 23, reference to “statement of partnership assets and liabilities” is that any different than the reference on the next page to the partnership balance sheet?

CHAIRMAN FRANCK: Response from the committee.

MR. MERRILL (California State Bar): I think it was, because it was intended to cover the less formal situation where there is not a formal balance sheet. That is why the balance sheet is qualified by “if any,” so that if it were a more informal partnership, if it would be adequate just to say: Look, we got the pickup truck and two chain saws, and we owe a repair bill of 200 bucks to the repair company.

COMMISSIONER COGGESHALL: On Page 95, Line 4, the reference to “not in good faith,” does that relate only to the negotiation of the buyout price or does that relate to the expulsion as well?

COMMISSIONER HARRY J. HAYNSWORTH, IV, (Illinois): It could result to the expulsion as well, because that could be what triggered the buyout.
COMMISSIONER COGGESHALL: But if the parties acted in bad faith in the expulsion but in good faith in the buyout, attorney’s fees are awarded, is that what is intended? Litigation is only over the buyout.

MR. DONALD J. WEIDNER (Reporter): My sense -- Harry, isn’t this provision just confined to the negotiation of the buyout price? I thought we were concerned about the price only and not reopening --

COMMISSIONER HAYNSWORTH: He would have an independent cause of action for the --

MR. WEIDNER: Independent cause of action.

CHAIRMAN FRANCK: The committee says this would apply only to the negotiation of the buyout.

COMMISSIONER COGGESHALL: Could you make that clear? Thank you.

....

COMMISSIONER FRANK F. JESTRAB (North Dakota): Throughout the act, when we talk about the transferring of the partnership interest, the question of the bankruptcy of a law firm and the distributable interest, of course, will include legal fees, which, as I understand it, are not supposed to go to laymen. Does this cause you any problem or is it something you ought to look at, or have you said something about it?
CHAIRMAN FRANCK: You are talking about the provision of the rules of professional conduct that prohibit the sharing of legal fees with a nonlawyer?

COMMISSIONER JESTRAB: That is correct.

MR. MERRILL (California State Bar): In California at least, we are also precluded from being partners with anyone but other lawyers. I don’t know about other states, so the question wouldn’t arise.

COMMISSIONER JESTRAB: That is another aspect of the same question.

MR. MERRILL: That means that the problem couldn’t arise in the buyout of a partner because they would all be one.

COMMISSIONER JESTRAB: You haven’t dealt with it.

COMMISSIONER MORRIS W. MACEY (Georgia): Commissioner Jestrab, I don’t understand the question. You are saying that on a liquidation of a partner --

COMMISSIONER JESTRAB: Transfer --

COMMISSIONER MACEY: -- partnership that there would be something unethical about distributing the assets, including legal fees, to the creditors if the creditors are not lawyers?

COMMISSIONER JESTRAB: Well, the transfer. The transfer of the interest, whether it’s in an insolvency proceeding or otherwise. If it’s the assets of a law firm and it includes accounts receivable, that means those are legal fees. And it
doesn't seem to me that there is any treatment of that in this act. Maybe it isn't a problem, I don't know. I am willing to be instructed.

COMMISSIONER MACEY: I understand that lawyers are assigned legal fees as collateral to banks for loans if there is a default.

COMMISSIONER JESTRAB: I don't know that that is the same thing.

COMMISSIONER MACEY: Some banks take it.

....

MR. DONALD J. WEIDNER (Reporter): Under this section, what we are crafting is a default agreement among the partners.

COMMISSIONER JESTRAB: Under this section.

MR. WEIDNER: Under this section. In the case of a law firm, the receivables would ordinarily be the principal asset. This section simply addresses, as among the partners themselves, if they don't have an agreement to determine what the buyout would be, what is the default agreement. They can draft any other agreement. We have chosen not to fashion in this act any special rules concerning law partnerships or medical partnerships. In each of those professions there are rules that would override normal rules. We have not attempted to address those in this act.
COMMISSIONER JESTRAB: Those rules would override the act.

MR. WEIDNER: In some cases, they would, yes.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER MILLARD H. RUUD (Texas): I think the answer is here, but it is not clear to me, that accrued interest is calculated against the net amount due to the dissociated partner? In initial reading, I had the concern that that person got accrued interest for the amount due, but the partnership didn’t get any accrued interest on what he may owe the partnership, either damages under (c), or loans. The comment doesn’t directly -- comment on (c) doesn’t directly, address that. The last clause of (e), the last two lines of (e) does raise the question -- whether my understanding is correct, that the accrued interest will be on the net amount due to the dissociated partner.

MR. WEIDNER: Yes, sir.

CHAIRMAN FRANCK: Your understanding is correct. ...

COMMISSIONER RANDAL C. PICKER (Illinois): I have a question about language. The language in subsection (d) on Page 93 is slightly different from the language in Section 309 describing obligations -- obligations, which is liability incurred before, arising before. Is there some intended
difference in the language or should those be conformed. That is Question 1.

Question 2, same issue with regard to subsection (d) about 309, an act occurs prior to the event, the liability arises after the event. How do you intend to treat those?

CHAIRMAN FRANCK: Response from the committee after they have had an opportunity to look at Section 309.

MR. WEIDNER: I don’t think there is any necessity to conform the two sections. What we are talking about here is, what would you assume the agreement would say with respect to those prior liabilities.

COMMISSIONER PICKER: Why do you intend to use the word “obligations” in one section and “liabilities” in a different section? What is the advantage of having two different words if you’re intending to accomplish the same thing?

MR. WEIDNER: Again, I am not sure we are intending to do the same thing. What we are trying to do in the earlier section is describe when it is that the new partner will be liable to third parties. Here what we’re trying to do in the buyout is say when the buyout price can be upset, when it is determined that there are other obligations, what happens if we agree to a buyout price of a hundred bucks and it then appears that there is a contingent liability for malpractice action, and that results in a judgment of $75, do you assume that the $100
was net of that $75? That is the problem we are dealing with here.

COMMISSIONER PICKER: I move to conform the language.

CHAIRMAN FRANCK: You move to conform the language where to what?

COMMISSIONER PICKER: The language in Section 309, subsection (d) on Page 93, either that they both should read "liabilities" or they both should read "obligations." "Arising before" and "incurred before" should be the same in both sections.

CHAIRMAN FRANCK: Your motion is conform the language in 701 (d) to the language in Section 309, is that right?

COMMISSIONER PICKER: That is correct.

CHAIRMAN FRANCK: Response from the committee to the motion.

COMMISSIONER HOWARD J. SWIBEL (Illinois): I want to give one further background comment, Commissioner Picker. I think you’re probably substantively correct. Just so you will know why it happened this way, Section 309 is modeled on Section 17 of the Uniform Partnership Act, which uses the word “obligations.” The section that you’re looking at in 701 was a brand-new crafted section, and it was done without really comparing it to 309.
CHAIRMAN FRANCK: If the Commissioner is substantively correct, does that mean that the committee agrees to this motion?

COMMISSIONER SWIBEL: We haven’t conferred.

CHAIRMAN FRANCK: I understand that. But the motion is on the floor and we are going to have to decide it. Some members of the committee are conferring now.

They tend to think that you’re right, but they want to take a look at it.

COMMISSIONER PICKER: Just to amend, given what, Commissioner Swibel said, I, have a preference then for staying with the language in 309 and conforming (d) to 309 rather than vice versa.

CHAIRMAN FRANCK: That is the motion as I understand it. We will let you renew it when they come back, but they want a chance to take a look at that. Thank you, Commissioner. Would you put the language in writing for the committee? They have asked that you do that. Thank you.

Commissioner.

COMMISSIONER ELLEN F. DYKE (District of Columbia): Under Section (d), Page 93, it appears that the reason for the indemnification against all partnership liabilities incurred before the dissolution is because those liabilities should be taken into consideration when the purchase, the buyout price is
done. In (c) when we talk about offsetting the buyout price, though, we talk about “and all other amounts owing from the dissociated partner to the partnership.” Does that take into consideration outside third party amounts as well? In other words, a partner by virtue of being a partner in the partnership owing money to an outside third party so that both provisions take into consideration the same obligations?

MR. MERRILL (California State Bar): We are intending there to pick up obligations of the partner to the partnership in a third party capacity, e.g., as a lender or a landlord, but not totally unrelated third parties.

COMMISSIONER DYKE: But in the indemnification provision, when you’re indemnifying against all partnership liabilities incurred before dissociation, that is partnership liabilities to third parties, for example, lenders and anybody else.

MR. MERRILL: Those would be included in the calculation of the buyout price under (b), I believe.

COMMISSIONER DYKE: That is what I was asking. You feel that they are.

CHAIRMAN FRANCK: Yes, Commissioner.

COMMISSIONER CARLYLE C. RING, JR. (Virginia): I have assumed throughout that your comments are really a historic note for the guidance of the Drafting Committee and the floor as how
you got to where you are at the present moment, and not really the official comments that will be later prepared.

However, on Page 97, I note that you point out that (b), establishing the price of buyout in the absence of an agreement to the contrary is nonetheless subject to whatever may be included in the partnership agreement. I would assume that in addition that that agreement, if the formula for buyout was grossly inequitable, that the provisions of Section 103 would apply. And to the extent that there was a rule of unconscionability in the common law of that particular state or an implied obligation of good faith and fair dealing, that those supplemental principles would apply if in that state those rules would say the formula you have selected doesn’t comply with those equitable principles. Is that correct?

MR. DONALD J. WEIDNER (Reporter): Yes, it’s correct. 104 (a) is the reference that would bring in the broader principles.

COMMISSIONER RING: I would suggest in your official comment, in addition to pointing out that it’s always subject to modification by agreement, the principles that you lay out, that also the general principles of equity brought in by 104, is it, I may have used the wrong reference, would also apply.

CHAIRMAN FRANCK: Thank you, Commissioner.

Commissioner.
COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut): In your deliberations, did the committee consider the possibility of developing an enhanced protection at all for those investment partnerships which may be formed by a promoter, to have special limitations on what a promoter might put into his documents as opposed to the kinds of restrictions you would expect in an equal dealing situation?

CHAIRMAN FRANCE: Response from the committee.

MR. WEIDNER: I don’t understand how that is different than really the question of mandatory fiduciary duty questions.

....

COMMISSIONER BREETZ: I guess my question is whether the committee thinks there ought to be different standards that might apply in a situation where we all form ourselves together as a partnership of lawyers on the one hand, presumably as equals, and a situation where for whatever reasons, say, a managing general partner comes together to purchase real estate in a general partnership form and offers it to the public as an investment opportunity and drafts the documents themselves, and then says, listen, fellows, I can’t vary these things for you because I’ve got other investors I am going to have to deal with.

COMMISSIONER HARRY J. HAYNSWORTH, IV, (Illinois): We considered that in to the extent that that was the purpose of
104, which says that other law can come into play, and also the hypo that you mentioned of securities law coming into play. But the point of that is that those other principles would be the ones that would apply, but that the general principle would be partners, you know, could have an agreement that they agreed upon, subject to these overriding principles of law and equity.

COMMISSIONER BREETZ: But the overriding principles of law and equity, I would suppose being more general principles, would be subject to the more specific provisions of this statute, which permits you, for example, to limit the obligation of good faith, use that as an example.

CHAIRMAN FRANCK: One more response from committee and then we are going to turn to another subject or seek a motion, Commissioner. Response from the committee.

COMMISSIONER HOWARD J. SWIBEL (Illinois): Just to expand, there are state securities laws which deal with the question of investment partnerships. And we expect that this partnership act, as with the existing partnership act, would co-exist with it and to the extent that the state had decided to regulate investment partnerships through some other statutes, that they would apply to partnerships.

COMMISSIONER BREETZ: Thank you.

CHAIRMAN FRANCK: Thank you, Commissioner.
COMMISSIONER BRUCE COGGESHALL (Maine): I would like to go back subparagraph (d), subsection (d) on Page 93. If we have a claim which has been not asserted at the time of dissociation, but is asserted after dissociation based upon an occurrence prior to dissociation, is that something that the dissociated partner is indemnified for?

CHAIRMAN FRANCK: Response from the committee.

MR. MERRILL (California State Bar): I believe it would depend on whether the facts giving rise to the claim were known by the partners or the partnership, as defined here, at the time of the dissociation and buyout.

COMMISSIONER COGGESHALL: Let’s take the case of a law partnership which knows what it has done but doesn’t know that somebody is going to sue it for malpractice. After the partner is dissociated, the partnership is sued for a malpractice claim for something that occurred prior to dissociation. Now, if that had been known at the time, obviously it would have been reflected in the value paid to the dissociated partner. But it not having been known, the partner’s interest is valued without that being deducted from the value, and it seems to me that he ought not be indemnified for that.

MR. MERRILL: My response would be that if the partnership knew they had committed malpractice but they had not been sued, that rationally --
COMMISSIONER COGGESHALL: I’m posing the situation were they did not know they had committed malpractice, nobody had suggested it to them, but --

MR. MERRILL: My reaction to that would be that they didn’t know, then.

COMMISSIONER COGGESHALL: The question, has the claim been incurred at time of dissociation, is the language of liabilities incurred before dissociation or is the liability incurred after dissociation?

MR. MERRILL: But in any event, incurred or not, if it was unknown, it would not be included and the indemnity would not apply.

CHAIRMAN FRANCK: I guess the question of the Commissioner is, can you go back.

COMMISSIONER ROBERT H. CORNELL (California): I think that the liability would have been incurred when the malpractice took place, not when someone decided to file the lawsuit. That is what we are intending to do, I think this does it. It obviously relates back, because this is malpractice that took place while this partner was active in the law practice. The fact that they waited a year to bring a lawsuit, if a year is allowed, is another -- in the case of a will in California, that could be 20 years later.
COMMISSIONER COGGESHALL: Commissioner, what you’re suggesting is that you are going to indemnify dissociated partner against all partnership liabilities arising from facts existing prior to the dissociation.

MR. DONALD J. WEIDNER (Reporter): The question is, what is the presumed bargain that the parties struck, if there — if that -- the possibility of that suit had not entered into their calculation, as I understand our draft, that would constitute a liability, Line 6, that although it was incurred before the dissociation was a liability then unknown to the partnership, governed by the except clause, and that would take you down to Lines 9 and 10 and you would say that the indemnification did not then apply to that liability. That is the substantive outcome you think is the right result.

COMMISSIONER COGGESHALL: I do, too. It’s your view that the liability has been incurred.

MR. WEIDNER: Yes.

....

COMMISSIONER CURTIS R. REITZ (Pennsylvania): Subsection (h) provides that the capital of a partnership can be protected against a buyout when a partner wrongfully dissociates in a partnership for a definite term or a particular undertaking. It does not include protection of the partnership capital in a similar partnership, when the partner is rightfully
expelled. Is it intention of the committee to permit the expelled partner to force an immediate payout, subject, of course, to the offset under (c) where it seems to me you have a more egregious situation of wrongful dissociation, you have a rightful expulsion of a partner, and I don’t quite understand why the deferred payout applies to one but not the other.

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER ROBERT H. CORNELL (California):
Wrongfully dissociates includes the partner who dissociates because of expulsion based on wrongful misconduct under the section that we are going to re-review.

COMMISSIONER REITZ: Under 602.

MR. MERRILL: I think that it’s a difficult call. But the view of the committee, when we discussed this, when there is an expulsion rightful under the agreement without a determination by a third party, that that is always a tough call, there are always two sides to that. And in that situation, it is not appropriate for the partnership itself to be able to determine that the guy has to wait 20 years to get his money.

COMMISSIONER REITZ: Thank you.

COMMISSIONER HARRY J. HAYNSWORTH, IV, (Illinois):
"SECTION 702. DISSOCIATED PARTNER’S POWER TO BIND PARTNERSHIP."
For two years after a partner dissociates without resulting in a dissolution and winding up of the partnership business, the partnership, including a surviving partnership under Article 9, is bound by an act of the dissociated partner that would have bound the partnership under Section 301 before dissociation if the other party to transaction reasonably believes when entering the transaction that the dissociated partner is a partner at that time, does not have notice of the partner’s dissociation, and is not deemed to have notice under Section 704.”

COMMISSIONER HAYNSWORTH: “SECTION 703. DISSOCIATED PARTNER’S LIABILITY TO OTHER PERSONS.

“(a) A partner’s dissociation does not of itself discharge the partner’s liability for a partnership obligation incurred before dissociation.

“(b) A partner who dissociates without resulting in a dissolution and winding up of the partnership business is liable as a partner to the other party in a transaction entered into by the partnership or a surviving partnership under Article 9 within two years after the partner’s dissociation. If the other party reasonably believes when entering the transaction that the dissociated partner is a partner at that time, does not have notice of the dissociation, and is not deemed to have notice under Section 704.
“(c) By agreement with the partnership creditor and the partners continuing the business, a dissociated partner may be released from liability, for a partnership obligation.

“(d) A dissociated partner is released from liability for a partnership obligation if a partnership creditor, with notice of the partner’s dissociation but without the partner’s consent, agrees to a material alteration in the nature or time of payment of a partnership obligation.”

CHAIRMAN FRANCK: Comments on Section 703. Commissioner.

COMMISSIONER HARVEY S. PERLMAN (Nebraska): I take it under 702 a dissociated partner who enters into a transaction with a third party can bind the partnership. I take it under Section 703 the dissociated partner who binds the partnership is still liable as a partner. Is there any provision that makes the dissociated partner liable back to the partnership for binding them to an agreement that they didn’t want to be involved with but are stuck because of 702?

MR. DONALD J. WEIDNER (Reporter): That is the policy, we assume, and I can’t tell where it is right now.

COMMISSIONER PERLMAN: I would suggest to you that subject to your redraft of 405, or whatever it is you have got, that you may not have it, even though you may assume that that is policy, because, as you recall in an earlier discussion, we
talked that you don’t deal with duties of former partners to the partnership, and yet, at least in the last draft I saw, you attempt to limit the duties of partners to partnership arising out of a partnership to the limited duties that you articulate in that. I suggest you look at that when you go back and redraft.

CHAIRMAN FRANCK: My understanding, Commissioner, is they agree with you that the partnership should have a right over a dissociated partner. They think they may have it. They will look for it. If they don’t have it, they will include it.

COMMISSIONER PHILLIP CARROLL (Arkansas): Line 25 on Page 104, the words “does not have notice of the dissociation,” who does not have notice, the other party, or the dissociated partner?

COMMISSIONER HAYNSWORTH: The other party.

COMMISSIONER CARROLL: Doesn’t that need to be made clear? Can’t it be read either way?

COMMISSIONER HAYNSWORTH: There are three requirements that must be met by the other party. One, reasonably believes; two, be without notice of the disassociation; three, is not deemed to have notice.

COMMISSIONER CARROLL: It seems to me it would be helpful to put one, two and three in —
COMMISSIONER H. LANE KNEEDLER, III (Virginia): We can do that.

COMMISSIONER RANDAL C. PICKER (Illinois): I just want to reconfirm a point from yesterday, which is clear to me but I am not sure it’s where you want it to be, which is the interaction between Section 703 and Section 103 (b)(7) regarding nonwaivability regarding third parties. I understand the current draft to say that 703 is subject to be overridden as currently formulated, given the use of the word “restrict” in 103 (b)(7). I understand you want to visit that and think about whether that’s where you want to be.

MR. DONALD J. WEIDNER (Reporter): 103 --

COMMISSIONER PICKER: 103 (b)(7).

MR. WEIDNER: -- would say that to the extent that 703 establishes the liability of a dissociating partner to a third party, the partners in their agreement may not lessen that liability.

COMMISSIONER PICKER: The question is if they want to increase the liability.

MR. WEIDNER: That is your point of yesterday. Yes

COMMISSIONER HARRY J. HAYNSWORTH, IV, (Illinois): There are significant changes in Section 704. Line 1 on Page 108, the designation 301, following the word “Sections” is struck.
On Line 2 and continuing down on Line 3, the words "and the termination of the dissociated partner’s authority as a result of the statement of dissociation" are struck. On Line 4, the word "it" is struck. The insertion in place of "it" is "the statement of dissociation."

CHAIRMAN FRANCK: Commissioner, would you read that section as it would read with the changes.

COMMISSIONER HAYNSWORTH: As changed it would be: "For the purposes of Section 702 and 703 (b), a person not a partner is deemed to have notice of the dissociation 90 days being after the statement of dissociation is filed."

CHAIRMAN FRANCK: Will you now read the entire section, both (a) and (b).

COMMISSIONER HAYNSWORTH: "SECTION 704. STATEMENT OF DISSOCIATION.

“(a) A dissociated partner or the partnership may file a statement of dissociation stating the name of the partnership and that the partner is dissociated from the partnership. A statement of dissociation is a limitation on the authority of a dissociated partner to the extent provided in Sections 303 (d) and (e).

“(b) For the purposes of Sections 702 and 703 (b), a person not a partner is deemed to have notice of the
dissociation 90 days after the statement of dissociation is 
filed."

CHAIRMAN FRANCK: Comments on Section 704.
Commissioner.

COMMISSIONER SANDRA S. STERN (New York): With respect 
to dissociation, dissolutions and general statements of 
limitation, what you’ll now have is a running record of the 
partnership’s authority and of the authority of various people 
to bind the partnership to which creditors are supposed to 
resort. At the same time, you have commitments to lend which 
extend to the partnership which extend many years into the 
future, and revolving credits under which the representations 
and warranties are supposed to be true at the time of each 
successive draw.

I would suggest that creditors will probably throw up 
their hands at the whole scheme and make a successive filing as 
to the filing upon which they in fact relied on event of default 
under those agreements, which will have serious consequences for 
the partnership as the aggregate theory formerly did.

And begging the committee’s indulgence for the 
reconsideration of a prior section, I would like to suggest that 
this problem could be partially cured by returning to Section 
303 and inserting the words on Line 10 “in favor of a person who 
gives value without knowledge to the contrary,” inserting after
the words “value,” “or enters into a legally binding commitment
to give value.” That would preserve the effect of the revolving
credit upon the partnership --

... COMMISSIONER STERN: The suggestion of the
incorporation of the words “after gives value,” and the
insertion would be “or enters into a legally binding commitment
to give value.”

CHAIRMAN FRANCK: Between the word “value” and the word
“without knowledge”? COMMISSIONER STERN: Yes, that is correct.
CHAIRMAN FRANCK: Response from the committee.
COMMISSIONER ROBERT H. CORNELL (California): Would
you repeat the motion.

COMMISSIONER STERN: An insertion [in Section 303] on
Line 10 of Page 32, after the words “gives value,” and the
insertion would read “or enters into a legally binding
commitment to give value.”

MR. DONALD J. WEIDNER (Reporter): Our sense is that
that would be covered. We agree on the policy. We do intend to
cover that kind of transaction. In fact, we assumed that most
of the statements, or least a good chunk of the statements would
be activated at the request of lenders.
COMMISSIONER STERN: I would like to say that lenders distinguish between the term “commitments” and the actual giving of value frequently enough so that the point is probably not sufficiently clear to lenders.

CHAIRMAN FRANCK: I guess the point is at this point, does the committee accept the suggestion to add that language?

The committee does not accept the suggestion. They believe the concept is already covered. They would put that in the comment, Commissioner. Would you be satisfied with that?

COMMISSIONER STERN: I would. I hope the lenders are as well.

Commissioner.

COMMISSIONER BRUCE COGGESHALL (Maine): Yesterday when we discussing Section 105, which deals with the filing and recording of statements, we discussed the distinction between filing on the one hand in the Secretary of State’s office and recording on the other hand in the registering of the real estate office. I think this section ought to provide for recording as well as filing, if that is not intended, what is already here. And it would seem to me that if it’s recorded in the land records, the effect of that notice ought to be immediate and it ought not to wait 90 days.

CHAIRMAN FRANCK: Response from the committee.
The first question, as I understand it, is whether or not 704 (a) encompass the concept of recording as well as filing?

COMMISSIONER COGGESHALL: That is correct.

CHAIRMAN FRANCK: And the second question is if there is a recording with respect to real estate, should they have to wait 90 days.

COMMISSIONER HARRY J. HAYNSWORTH, IV, (Illinois): When you file, it’s my understanding of the recording statutes, when you file something, the person doing filing has done as much as they can do. What happens to it after that is up to the person --

MR. MERRILL (California State Bar): Commissioner Coggeshall, can I refer you to Section 303 (e), Page 32.

COMMISSIONER COGGESHALL: That deals with the statement of partnership authority, does it not?

MR. MERRILL: It says a limitation on the authority of a partner to transfer real property is deemed [if recorded to be notice to third parties...]

COMMISSIONER COGGESHALL: That is a limitation contained in the statement of partnership authority.

MR. MERRILL: No, it is a limitation. The notice of dissociation is specifically defined as a limitation for the purposes of Section 303(e).
COMMISSIONER COGGESHALL: Where is that?

MR. MERRILL: That is in Section 704(a).

COMMISSIONER COGGESHALL: Okay. You’re right.

...

COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut): The consequence then is if I record on the land records a certified copy, or whatever else you come up with, a copy of what I filed with the Secretary of State, then with respect to real estate transfers, nonpartners are found by it at that time whether they have actual knowledge.

CHAIRMAN FRANCK: Correct.

COMMISSIONER BREETZ: Whereas if you just file with the Secretary of State, they’re not bound by it for 90 days, is that right?

MR. MERRILL: Correct.

COMMISSIONER BREETZ: Could I additionally supplement that by sending them a personal copy of this thing --

MR. MERRILL: Actual notice.

COMMISSIONER BREETZ: You might want to put that in the comments since it’s not self evident in this section itself.

CHAIRMAN FRANCK: Are you seeking recognition, Commissioner?

COMMISSIONER DAVID S. WALKER (Iowa): I didn’t understand the response to Commissioner Coggeshall’s question.
It seems like there was an inconsistency between 303 (d), as suggested by Mr. Merrill, that notice would be immediate, and 704 (a), which suggested that it didn’t take effect for 90 days.

CHAIRMAN FRANCK: Mr. Merrill, would you want to respond to that.

MR. MERRILL: The operative effect of a limitation is in Section 303. A general -- applying to all limitations of which 704 is a special case. All limitations on the authority to convey real estate are effective immediately when recorded the real estate records under Section 303 (e). In addition to that, a specialized case, Section 704, notice of dissociation, also has an additional deemed effect of 90 days after it is filed with the Secretary of State.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER BRUCE COGGESHALL (Maine): Could I suggest that perhaps this could be clarified by saying on Page 107, Lines 35 and 36, that a statement of dissociation is a limitation on the authority of a dissociated partner for the purposes of Section 303 (d) and (e)?

MR. DONALD J. WEIDNER (Reporter): That is better.

CHAIRMAN FRANCK: The committee accepts the suggestion. It will read in Line 36 “for the purposes of Section 303 (d) and (e) rather than to the extent provided in.”
COMMISSIONER HARRY J. HAYNSWORTH, IV, (Illinois): "SECTION 705. CONTINUED USE OF PARTNERSHIP NAME. Continued use of a partnership name, or a dissociated partner’s name as part thereof, by the partners continuing the business does not of itself make the dissociated partner liable for an obligation of the partners or the partnership continuing the business."

CHAIRMAN FRANCK: Seeing no one seeking recognition, we proceed to the reading of Article 8 which will be read by Commissioner Swibel.

Do you want to give a little overview before you read Article 8. The committee had thought that that might be helpful to the Conference if we had a little overview of this article. ...

COMMISSIONER HOWARD J. SWIBEL (Illinois): This is one of the most important sections of the Uniform Partnership Act as revised and represents a significant change from the current law. The current law provides that in a host of circumstances, such as death, bankruptcy, the withdrawal of a partner, et cetera, the partnership will be dissolved and its business finished and its assets liquidated.

The trend in the law that we are endorsing is to favor the continuity of the partnership. As we have indicated earlier, by announcing and declaring that the partnership is an entity, we are favoring for many purposes the interests of the group in
continuing the partnership activity and are cutting back, to some extent, the rights of the individual partner. It’s important in this section to focus that.

The statutory buyout remedy, which was credited under Section 7, is what is the remedy that is available in many of the situations that formerly under the current Uniform Partnership Act led to the dissolution and the wind up of the partnership business. We have retained a power that exists in the current law that an individual partner in a partnership where there has not -- we call it an at will partnership, where it is not for a definite term or undertaking, that the single partner who wishes to withdraw may cause the business to be wound up. We believe that this is not only consistent with the current law, but it is also consistent with the expectations of most persons who enter into partnership relations who view the partnership arrangement as somewhat of a business marriage, that any individual partner has the right to veto the continuation of the business.

Now, as a practical matter, we are aware that in many circumstances when a partner withdraws from such a partnership, the partners do work out a way for the partnership business to continue and for the withdrawing partner to have his interest purchased.
The policy decision that is reflected in this draft is that in order to maximize the bargaining power of the withdrawing partner, he will retain the power to cause the business to be wound up, and that that power will enable him to effectively bargain with his partners, former partners, and he may in fact be bought out on a consentual basis.

The American Bar Association subcommittee, ad hoc committee -- I guess the official title is the Subcommittee on the Revised Uniform Partnership Act of the Partnership Committee of the Section of Business Law of the ABA -- believes that we should further cut back the power of the individual partner and should also relegate him to the situation of having to pursue the statutory buyout remedy. The committee felt consistently over a period of years, reviewing the situation over and over again, that that was not the right outcome.

Before we go into the section, I want to also note that we have added an additional provision which does not have an analog in the existing Uniform Partnership Act, but which does have an analog in the Revised Uniform Limited Partnership Act, which is Section 802 which provides, in effect, a cooling off period. The idea is that even though we are giving that individual partner the power to cause the bust up of the partnership, we’re suspending, in effect, the effectiveness of that bust up power for 90 days to permit the partners to try to
work it out. That is an attempt, again, to favor continuity, to favor the entity, but again not to totally remove the power that the individual partner has under existing law.

CHAIRMAN FRANCK: Thank you, Commissioner. We will now proceed to a reading of Section 801.

COMMISSIONER SWIBEL: "SECTION 801. EVENTS CAUSING DISSOLUTION AND WINDING UP OF PARTNERSHIP BUSINESS. A partnership is dissolved, and its business must be wound up, only upon:

"(1) except as provided in Section 802, receipt by a partnership at will of notice from a partner, other than a partner who is dissociated under Section 601(2) to (10) of that partner’s express will to withdraw as a partner or to terminate the partnership, or upon any later date specified in notice:

"(2) in a partnership for a definite term or particular undertaking:

"(i) except as provided in Section 802, within 90 days after a partner’s wrongful dissociation under Section 602 or a partner’s dissociation by death or otherwise under Section 601(6) to (10), receipt by the partnership of notice from another partner of that partner’s express will to withdraw as a partner or to terminate the partnership;

"(ii) the express will of all the partners; or
“(iii) the expiration of the term or the completion of the undertaking, unless all the partners agree to continue the business, in which case the partnership agreement is deemed amended retroactively to provide that the expiration or completion does not result in a dissolution and winding up of the partnership business.

“(3) an event agreed to in the partnership agreement resulting in the winding up of the partnership business, unless all the partners agree to continue the business, in which case the partnership agreement is deemed amended retroactively to provide that the event does not result in the dissolution and winding up of the partnership business;

“(4) an event that makes it unlawful for all or substantially all of the business to be continued, but any cure of illegality within 90 days after notice to the partnership of the event is effective retroactively to the date of the event for purposes of this section;

“(5) on application by a partner, a judicial decree that

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

“(ii) another partner has engaged in conduct relating to the partnership business that makes it not reasonably
practicable to carry on the business in partnership with that partner; or

“(iii) it is not otherwise reasonably practicable to carry on the partnership business in conformity with the partnership agreement; or

“(6) on application by a transferee of a partner’s transferable interest, a judicial decree that it is equitable to wind up the partnership business:

“(i) if the partnership was for, a definite term or particular undertaking at the time of the transfer or entry of the charging order that gave rise to the transfer, after the expiration of the term or completion of the undertaking; or

“(ii) if the partnership was a partnership at will at the time of the transfer or entry of the charging order that gave rise to the transfer at any time.”

CHAIRMAN FRANCK: Comments on Section 801.

Commissioner.

COMMISSIONER H. KING HILL (Maryland): Without burdening you with a restatement that I made before on 601, I’d like to call your attention and ask you to consider Line 15, Page 111, incorporating the same comments I made before about the use of the term “judicial decree.”

CHAIRMAN FRANCK: The committee intends to do that, Commissioner. Thank, you.
COMMISSIONER HOWARD J. SWIBEL (Illinois): "SECTION 802. DISSOLUTION DEFERRED 90 DAYS.

“(a) Except as provided in subsection (b), a partnership is not dissolved until 90 days after receipt by the partnership of notice from a partner under Section 801(1) or (2)(i), and its business may be continued until that date as if no notice were received. Before that date, the partner who gave the notice may waive the right to have the partnership business wound up. If there is no waiver before that date, the partnership is dissolved and its business must be wound up.

“(b) A partnership may be dissolved at any time during the 90-day period, and its business wound up by the express will of at least half of the other partners.”

I forgot to point out that ... [in subsection (C)(2)], the word "remaining" is deleted, and in its stead is inserted the word "other."

“(c) After receipt by the partnership of notice from a partner under Section 801(1) or (2)(i), the partner who gave the notice:

“(1) has no rights in the management and conduct of the partnership business if it is continued under subsection (a), but may participate in winding up the business under Section 804 if the partnership is dissolved on or before the
expiration of the 90-day period pursuant to subsection (a) or (b);

“(2) is not liable to the other partners for, and must be indemnified by them against, any partnership liability incurred by another partner to the liability is not appropriate for winding up the partnership business; and

“(3) must be credited with a share of any profit or charged with a share of any loss from a partnership transaction to the extent the transaction is appropriate for winding up the partnership business.”

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COMMISSIONER STANLEY PLETTMAN (Texas): Page 110. My inquiry relates to Line 15 of sub (1) where you have “except as provided in Section 802 received by a partnership at will,” et cetera. You do not have in there the qualifying language “within 90 days.” Why did you have “within 90 days” in subpart (2)(i) on Page 20 but not put “within 90 days” in Line 15?.

MR. DONALD J. WEIDNER (Reporter): 801(1) is the section that reflects the right of a partner to give notice of his will to liquidate. 801(2)(i) is the section that allows other partners to react to the preceding dissociation of someone else. And what 801(2)(i) says is they have only 90 days to exercise the right.
MR. MERRILL (California State Bar): There is another distinction. The first section deals with the partnership at will, where there is an implication that the partners did not have an agreement to lock themselves in for a certain term. In the second section, it is a situation where the partners have agreed to lock themselves in for a certain term, but an event has now occurred which will allow partners to make a decision to withdraw that they would not otherwise have had. And it is in that situation where they originally intended to be locked in for a term that we have put a drag on the operation of that right to get out so that the other partners can negotiate with the ... [withdrawing] guy to try and buy him out or keep him in and avoid a dissolution. We thought that because that was originally a term partnership, as opposed to first case, which was partnership at will, that the 90 day distinction was warranted.

....

COMMISSIONER PETER F. LANGROCK (Vermont): Do I understand that a partnership at will now has a 90-day waiting period before it can be wound up?

MR. WEIDNER: That is correct.

COMMISSIONER LANGROCK: We have in Vermont in the marriage law a decree nisi, where you have to wait 90 days before it can be dissolved. And it seems to me that what you
have here -- and it doesn’t work there, and I think it is nonsense here. I think it’s paternalism at its worst. You are telling people that they have no independent right to break up. There are tremendous consequences. You have tried to deal with the consequences between the partners, share some liabilities. I don’t think you deal with the consequences of third parties or liability of the partnership of third parties. I don’t know how a law partnership would dissolve. You’re part of a partnership for 90 days, you can’t practice independently. Do you have two practices, one in the partnership and one outside?

It seems to me that there are a whole series of questions. I don’t want to take a long time going on it tack by tack. But it just seems to me -- this is a new concept, the first that I have ever seen. I haven’t seen a justification for this concept yet. It’s a nice thought. People ought to be adult and mature and spend 90 days talking about things. But, damnit, I don’t think we should mandate it.

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER HOWARD J. SWIBEL (Illinois): It’s novel for the Uniform Partnership Act. It does have an analog in the Limited Partnership Act, Commissioner Langrock. It’s a hybrid situation. There is no 90-day delay on the right of the partner to cut off his ongoing liability. In 802(c), he has an immediate right, he immediately cuts himself off for liability on an on-
going basis. The only thing really that is being suspended is the question of do you liquidate the partnership and give that partner his share of the net assets, or do you agree on a price to buy out his interest. But parts of the relationship do go immediately into effect.

COMMISSIONER LANGROCK: You said under (c) it cuts off his rights, responsibilities to third party dealing with the partnership? I don’t see that.

COMMISSIONER SWIBEL: Under 802(c)(2), he gets indemnified for any --

COMMISSIONER LANGROCK: That’s being indemnified. That’s a lot different than not having the liability in the first place. Your partner can be bankrupt, and that’s the reason why you’re out of it. That indemnification is a long way from being equated with your responsibility to third parties dealing with a partnership.

CHAIRMAN FRANCK: Commissioner Cornell, did you want to be heard on this point?

COMMISSIONER ROBERT H. CORNELL (California): I did want to point out that the remaining partners, the other partners do have the right to cut it off immediately, too, if they want to terminate the partnership. What we are talking about here is treating the partnership as an entity, as on-going thing, because having it stop immediately and then having it
revived later on creates more problems than this procedure. And that was the reason we chose the RUPA type analog.

COMMISSIONER FRANCIS J. PAVETTI (Connecticut): You don’t need all the other partners. Only half of the remaining partners can cut it off. So, it’s even more liberal than that.

CHAIRMAN FRANCK: Commissioner Langrock, the committee seems to be saying that they have thought this through and they want to stand on the concept. Do you want to make a motion?

COMMISSIONER LANGROCK: I will, but there may be some more discussion first--

CHAIRMAN FRANCK: Let’s have a motion, please.

COMMISSIONER LANGROCK: I will make a motion. I would move that it be a sense of the house -- were in final reading, I can’t. I move to strike Section 802.

CHAIRMAN FRANCK: The motion is to strike 802.

COMMISSIONER JOSHUA M. MORSE, III (Florida): Point of inquiry.

CHAIRMAN FRANCK: What is the inquiry?

COMMISSIONER MORSE: As I understand it, 801, subsections (1), (2) and (3), and all of 802 are just default provisions which can be contracted out, are they not?

CHAIRMAN FRANCK: That has been asked and answered. Let’s get a response from the committee to the motion pending on
the floor, Commissioner Langrock’s motion, to strike Section 802. Response from the committee.

MR. DONALD J. WEIDNER (Reporter): Just to explain the big picture, I think the basic policy debate behind 801 and 802 was whether the Uniform Partnership Act should continue the traditional rule that allows any partner in an at will partnership to liquidate the business. As Howard alluded to before, certain representatives of the ABA ad hoc group, the committee on partnerships, felt very strongly that we should move more toward an entity model and eliminate the right of any partner in at will to liquidate. 802, at least we felt, was central to -- striking a compromise to say, well, we will give any individual partner in an at will partnership the right to liquidate, but we will make him stand available to listen to the arguments of his fellow partners for 90 days.

CHAIRMAN FRANCK: Is there any other Commissioner on the floor who wants to be heard on this motion at this point? Commissioner.

COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut): I support the motion from commissioner Langrock. It seems to me, given the fact that the partners couldn’t agree among themselves to continue the partnership by variation of agreement, the very notion that a dissenting minority partner wants to get out and avoid liability, a three-man partnership couldn’t do it under
your rules. It strikes me as just irrational. You have said to
the person he can’t participate in management. But at the same
time, you have said that his liability continues to the extent
that the liability is appropriate for winding up the partnership
agreement. So, he doesn’t have the right to participate, but he
is stuck with the consequences if those consequences are, quote,
appropriate during this 90-day period. These fellows had the
right to agree, they didn’t agree, and they ought to able to get
out.

CHAIRMAN FRANCK: Is there a member of the committee
wants to be heard on the motion? Commissioner Swibel.

COMMISSIONER HOWARD J. SWIBEL (Illinois): Commissioner
Breetz, with all due respect, you mischaracterized the import of
this section. Even if a person -- if Section 802 did not exist,
under both existing law and under other sections of this draft,
a withdrawing partner and all the partners have liability to
third parties during the winding up process. So, you’re wrong in
attacking Section 802 because it does not do anything different
than the current law does or other sections of the act, even if
this section were not present. The on-going liability among the
partners is protected for the withdrawing partner. He is a
dissociated partner. His status dues change.

The only thing that is being done by this section is
saying that that partner does not have the right to immediately
cause the liquidation of the entire partnership business in order to get his pro rata share, that for 90 days the business can continue and the parties can try to work out a possible buy-out price. But it doesn’t put him in any worse position than he otherwise would be if he had the power to cause the wind up immediately.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER RONALD W. DEL SESTO (Rhode Island): I speak in favor of the motion. I disagree with the Commissioner’s comments that it does not change the existing situation. 802 (a) specifically says that the business may continue. When you get to Page 125, the comment says that the dissociating partner has no rights in the management and conduct of the business if it is continued without winding up during the 90-day period. And the next paragraph states, Lines 22 and 23, that the partners that I am trying to separate myself from have the right to bind me with third parties. So, it seems to me that 802 is the worst of all worlds. I am in a partnership, I do not like what my fellow partners doing. I give them notice, and then for 90 days I have absolutely no rights to manage that very partnership that I think is, let’s say, sinking, and they have the right to bind me, continue with the business. So, I think it’s the worst of all worlds.
CHAIRMAN FRANCK: I will recognize a member of the committee to respond to that point.

MR. MERRILL (California State Bar): One thing to note is that the partner has two options there. One, he may dissociate and cut off liability under 704, at least as to future obligations. But by doing that, he gives up his right to participate in the management, or, alternatively, he may elect only to exercise his right to cause the business to be dissolved, which triggers the 90-day waiting period under 802.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER STANLEY M. FISHER (Ohio): What is the effect of 802 on a law partnership of the withdrawing partner setting up another partnership during that 90 days to practice law? Is there a conflict and ethical considerations that haven’t been looked at here?

CHAIRMAN FRANCK: Response from the committee? What is the situation of a law partnership?

MR. MERRILL: My previous comment would apply. If the partner has chosen the route, essentially, to force the dissolution but not to dissociate, he would still be a partner and would presumably be prohibited from competing. If instead he disassociated himself, he should be able to move outside of the partnership and take other actions.
COMMISSIONER FISHER: But don’t you have a continuing obligation under that 90-day provision where he is in two partnerships at the same time? You say no, but tell me why.

MR. MERRILL: Under 802, yes.

COMMISSIONER FISHER: Well, then there is a conflict there.

MR. MERRILL: But you wouldn’t be in the 802 section if you didn’t -- if you went the 704 disassociation route.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER JAMES C. McKAY, JR. (District of Columbia): I think the main point is that this is only a default provision. As I understand it, and the committee should correct me if I am wrong, a partnership agreement could write out 802.

MR. MERRILL: That is correct.

COMMISSIONER McKay: The arguments of paternalism and being liable to creditors I think all fall because a partnership can easily protect itself by just putting in the partnership agreement that there won’t be a 90-day period. So, I oppose motion for that reason.

CHAIRMAN FRANCK: Commissioner.

....

COMMISSIONER DAVID S. WALKER (Iowa): I think the presumption should run in the opposite direction and allow for immediate withdrawal and permission to compete and following the
contractarian model leave it to people who are actually entering into written agreements to provide for continuation of 90 days. It seems to me that the duty of loyalty under current 404, which I understand will be in revision, would prevent competition during that three-month period, that same period during which one has no right under 802 to participate in the conduct and management of the business. It is a real Catch 22.

COMMISSIONER MORRIS W. MACEY (Georgia): There is another factor which should be considered that occupied a lot of the committee’s time in dealing with the development of Section 802. There are a lot of provisions in loan agreements that provide for the loan coming due on termination of the entity, of the partnership. And we were concerned about the situation where the partner says: I withdraw, it’s over. And that accelerates the loan and triggers a default. Today, that is probably handled informally. If a partner changes his mind a few days later, all the damage has been done, the loan is in default, acceleration has been triggered. We were really attempting to address that in the problems of coming up with this deferred dissolution so that in the event they did get back together again -- it happens often -- we wouldn’t have brought down the house.

What happens today a lot of times today, the lending institution doesn’t really hear about it or they patch it back
up again, but in fact the loan is really in default when that occurs. And we were really thinking very heavily along those lines in developing 802.

CHAIRMAN FRANCK: Do you want a chance to respond, Commissioner?

COMMISSIONER WALKER: Again, following contract, that should be handled separately in the contract with the lender. Where there are persons other than the partners to be protected, I think that that could be accomplished. Again, you are not permitting the partner to follow his or her own trade or business. It seems to me the reference to the Revised Uniform Limited Partnership Act which provides for a 90-day extension is in an inept analogy because that 90-day period provides for protection of the limited partners where there is only a single general partner who is dissolving. In that sense, the partnership should continue. This is different.

....

COMMISSIONER MICHAEL P. SULLIVAN (Minnesota): Point of inquiry to Commissioner Langrock. Is the thrust of what you’re saying is that you want to have this partner this is getting out to be in a position to force the dissolution immediately rather than waiting 90 days, or is the thrust of what you’re saying is that you want to put this dissociated partner into the position of protecting yourself from liabilities to third parties during
that period of time and not having any on-going obligations to the partnership during this 90-day period of time?

COMMISSIONER PETER F. LANGROCK (Vermont): If I could respond to that in this sense. This is a new provision in the draft. I don’t know historical jurisprudence which brings this forward. It seems to that what we have is either you draft it in or you draft it out. And this committee has said we are going to draft this in for all these agreements. And all the people who don’t want it and the sophisticated people can knock it out. The sophisticated big corporations, the big partnerships, the entities, they can make their big entity by draftsmanship. This is going to be a default provision for the inadequate drafters, and that is basically the small people.

....

COMMISSIONER SULLIVAN: The reason I asked the question was this, that I don’t see much sympathy towards forcing a quick dissolution. I think it kind of goes away from everything that has been moved, the direction that it’s been going, and the whole concept of this dissociating partner being able to get out and let the thing move ahead. Then the question becomes one of the notification to creditors. Once you have made the determination that you don’t want to force an immediate dissolution, then you come to the question of what happens to creditors during this period of time. And as I understand it,
in terms of the 90 days, that ties in, in many respects, to the period of time in which creditors are deemed to have, in effect, notice of this dissociation. Doesn’t this create problems in terms of forcing you either into a dissolution or forcing yourself into a situation where creditors are not having protection for that 90-day period of time. I think that their resolution is a fair approach to it. And I think to the extent that you want a better approach, then you should look to the contract itself.

....

COMMISSIONER SANDRA S. STERN (New York): I would like to suggest that few partnerships would be able to negotiate with the creditor or provision that says that dissolution is not an automatic event of default. I think it’s more likely that they would able to deal with a creditor later. But I do think that some relief is necessary, because I think that creditors will not accept a broad relief from that remedy.

CHAIRMAN FRANCK: Commissioner Langrock, you have the right to close on your motion.

COMMISSIONER LANGROCK: Thank you. I suspect that the major partnership agreements have much more sophisticated continuation entity provisions than what we have here. It seems to me that the question that Morris Macey brought up about dissolution for purpose of treating notes can all be handled in
those agreements by saying it does not terminate, that --
whatever can be done by contract. What we have here is an
entirely new provision, which is a 90-day waiting period, which
is basically saying you don’t know -- you aren’t really sure
what you’re doing when you dissolve. You really ought to think
it over. You really ought to take some more time and not rush to
judgment.

Well, that is a very nice concept. But I am not sure —
— it’s one without precedent in the business law area that I am
aware of. It is one which comes to this Conference for the first
time here today, as we move towards judgment on this matter. And
it seems to me that what we’re really doing here is not
prohibiting this, we’re really putting which emphasis, which way
the drafts people should have to go. And it seems to me that
this can be drafted into a provision, you can even make it check
mark, if you want to, on a form. But what you are saying is if
you don’t put anything in this, to the unsuspecting person out
there, you now on every partnership have built in a 90-day
waiting period. I assume there are also partnerships that this
controls which may not be sophisticated or even -- I am not
sure, are oral partnerships covered by this?

MR. DONALD J. WEIDNER (Reporter): Yes.

COMMISSIONER LANGROCK: Two people kind of partnership
on a matter and all of a sudden they have a 90-day waiting
provision. This runs contrary to the whole experience we have had as lawyers before. And it just seems to me that the time has come when this -- I am not against the concept. I am not against anything that Commissioner Sullivan has said. I’m not against any provisions that Morris Macey has said. But make the people who want this type of sophisticated thing draft it in. Don’t place it on the mom-and-pop partnerships that would automatically fall by default.

....

A COMMISSIONER: Division.

CHAIRMAN FRANCK: I will recognize a division.

Will those who are in favor of the motion, please stand so we can have a look at you.

Those opposed who are opposed to the motion -- please sit down. Let those who are opposed please stand.

I think that the question is too close for me call by sight. We will have a count. Please sit down.

All those in favor, please stand. I will ask Commissioner Willoughby to count those in this section. I will ask Commissioner Henderson to count those in this section. Commissioner Chanin, will you count those in your section.

Opposed, please stand. The same tellers make the count.
There are 53 voting in favor of the motion. There are 73 voting against. The motion fails.

COMMISSIONER RANDAL C. PICKER (Illinois): Just a clarification. Where do the duties of loyalty stand, after I have dissociated but before it’s dissolved? All the other duties as well.

CHAIRMAN FRANCK: Response from the committee.

MR. WEIDNER: The duty of loyalty continues during the liquidation period.

COMMISSIONER PICKER: As does the duty of good faith and the duty of care and everything else?

MR. WEIDNER: Yes.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut): Can the committee explain the theory that says we want these folks to stay married for 90 days, but one of the marriage partners can’t participate in running the household,

COMMISSIONER HOWARD J. SWIBEL (Illinois): We tried as much as possible to put the partner who would otherwise have the power to cause the immediate winding up to be in same situation as if there were not a 90-day period. And under the current
law, if somebody withdraws from the partnership, they have no further right to participate...

COMMISSIONER BREETZ: But that is because the partnership is gone, isn’t that right? Isn’t that your theory?

COMMISSIONER SWIBEL: The partnership first has to enter into the winding up phase. The partnership is not immediately terminated.

COMMISSIONER BREETZ: It strikes me intuitively that if the partnership is going to continue, the partners ought to continue to have the right to be a partner. It just intuitively strikes me as the way it ought to be.

MR. WEIDNER: The concept was that one partner wants to liquidate, his or her other partners want to continue the ordinary operation of the business. What we wanted to say, if they choose to continue that ordinary operation of the business, then they alone should bear all the losses. That was only appropriate to do when he was taken out of management. So, we simply said in that period, to the extent they continue normal operations and incur losses, they will bear them and he will be out of it on the upside also. So, during that period, no losses, no profits and no right to participate in management. That is the concept.

CHAIRMAN FRANCK: Commissioner over there, please.
COMMISSIONER RONALD F. PHILLIPS (California): I would like to reask the question as to why the committee doesn’t give the states option of changing the time period from 90 days by placing that in brackets.

CHAIRMAN FRANCK: There was a question about bracketing 90.

COMMISSIONER SWIBEL: The limited partnership act, which this Conference adopted, chose a 90-day period for this holding. We thought that it would be desirable to have uniformity and not simply to put it in brackets with a recommendation. That is our policy decision.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER CURTIS R. REITZ (Pennsylvania): I think Mr. Merrill made this point earlier. A partner in one of these partnerships has two choices, to dissociate or to seek dissolution. Am I correct?

COMMISSIONER ROBERT H. CORNELL (California): No.

MR. WEIDNER: Could you repeat the question.

COMMISSIONER REITZ: I thought you were saying that a partner in this situation could go the dissociation route without seeking dissolution and take benefits of Article 7 rather than getting dissolution under Article 8.

CHAIRMAN FRANCK: I thought your earlier question was that those were the only two alternatives to which you --
COMMISSIONER REITZ: No, no. There are alternative choices that a partner can make. I want to disassociate, and that is immediately effective. Or I want dissolution, which I can only get in 90 days.

COMMISSIONER SWIBEL: In 601(1), when you indicate that you want to withdraw, that makes you a disassociated partner.

COMMISSIONER REITZ: You are at that moment dissociated. For purposes of Article 7, you get all the benefits of being a dissociated partner.

COMMISSIONER SWIBEL: But you’re directed in Section 603 to go to Section 8, because you then have the right to -- the consequence of doing it is that you have a right to wind up. You can always give up that right. You can tell your partners that they don’t have to actually liquidate.

COMMISSIONER REITZ: I think the question I am asking, it’s pretty evident on the face of 801 --

CHAIRMAN FRANCK: What is the question?

COMMISSIONER REITZ: Under 801 --

MR. WEIDNER: Your question is that when a partner in a partnership at will declares his intent to liquidate the partnership, he can really do so in one of two ways. No. 1, he or she can say, No. 1, I intend to dissociate now and I want the business liquidated, or, No. 2, he can say, I don’t
disassociate, I want the business liquidated, let’s all do it together.

COMMISSIONER REITZ: My question is the other way around. If a partner files a statement which says only “I want to withdraw,” it says nothing more, “I quit, I want to withdraw,” that is, under 802, effective as a triggering the dissolution rules. Under Article 6 and 7, that is also a dissociation. It’s ambiguous whether it’s a dissociation only or a dissociation and a termination. And I don’t understand why you’re leaving the ambiguity as it is, that the --

CHAIRMAN FRANCK: Give them a second. They’re still working on their answer.

Commissioner Kneedler.

COMMISSIONER H. LANE KNEEDLER, III (Virginia): Commissioner Reitz, the discussion here is proceeding on the basis that we don’t understand your question. Could you ask the question again?

COMMISSIONER REITZ: If a partner files an expressed will to withdraw notice -- that’s all he says, “I express my will to withdraw.” Is he now a dissociated partner?

COMMISSIONER SWIBEL: Yes, under 601(1).

COMMISSIONER REITZ: What is the effect under 801?

COMMISSIONER SWIBEL: First you turn to 603(a), and it says a dissociated partner’s interests must be purchased
pursuant to Article 7 unless the dissociation results in a winding up under eight. You have to turn to eight, and you see in 801(1) that it does result in a winding up subject to 802, which says that it’s suspended for 90 days.

COMMISSIONER REITZ: But during that 90 days is this a dissociated partner?

COMMISSIONER SWIBEL: Yes. You’re a dissociated partner, but you’re subject to the special rules under 802.

COMMISSIONER REITZ: You’re subject to the rules under 802, but are you also entitled to the benefits under Part 7 of limited liability? Are you a dissociated partner pending dissolution?

CHAIRMAN FRANCK: Is there an answer from the committee to the question?

MR. JOHN W. LARSON (Reporter): I will offer still another answer, a slight variation on Commissioner Swibel’s answer. I think that if you say “I quit,” it triggers both. But then under 802, if you say “I waive,” that is going to throw you back under Article 7 and you will have a buyout rather than a dissolution.

COMMISSIONER REITZ: I recognize once the waiver is made, the partner has now cleared up the ambiguity of the partner’s position. But until that decision is made, and even afterwards, if he elects to waive, he is only a dissociated
partner. Does the partner who files an express will to withdraw get all of the benefits of protection from liability of a dissociated partner pending dissolution?

CHAIRMAN FRANCK: At this stage, the committee is going to have to answer it definitely or say they’re going to look at it.

Their answer seems to be yes. Under 703(b), the answer would be yes.

COMMISSIONER REITZ: You go through dissociation period, you’re not a partner during this dissolution wind up.

CHAIRMAN FRANCK: That seems to be their answer. Thank you, Commissioner.

Commissioner.

COMMISSIONER ELLEN F. DYKE (District of Columbia): I am hoping that the answer being yes means that we know what the liability is during that period of time. Because, under Section 802, I am very concerned with some of the things that were stated before, but if in fact this partner does not have any right to manage, I do not believe Section 2 relieves that partner of liability to third parties. It’s one thing to have an indemnification but that, for the most part, that could be very illusory. And what you’ve got is that partner being on the line to all kinds of third parties for everything that is going on, and having a right of indemnification by its other partners,
which, insurance policy means absolutely nothing unless that partner does get the limited liability of Section 703. So, I think it has to be very, very clear.

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER H. LANE KNEEDLER, III (Virginia): We think the answer to that is yes, but we will look at it in our meeting immediately following this session.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER STANLEY M. FISHER (Ohio): In light of the answer to a previous comment that the duty of loyalty continues as a result of Section 802, would you tell me what the effect of that is on a law partner who withdraws or dissociates, a practicing joint 90-day period. Same question I raised earlier.

CHAIRMAN FRANCK: Response from the committee.

That is similar to the question that was asked before. What is the effect upon a law partnership of the duty of loyalty during the 90-day period.

MR. DONALD J. WEIDNER (Reporter): We don’t intend to say anything in this act about covenants not to compete.

CHAIRMAN FRANCK: He is not asking about covenants not to compete. He is asking about the duty of loyalty.

COMMISSIONER ROBERT H. CORNELL (California): I think that that is the problem we are going to address in 404 as to
the person who dissociates. If you belong to a 20-man partnership and you decide that you’re going to quit during that 90-day period, you should not be -- that doesn’t mean that if during the 90-day period it’s agreed that the partnership can continue, that you’re still going to be a member of that partnership. That is the old UPA theory, that your entity dissolved. We are trying to keep the entity going here and not create a draconian result that in effect the 20-man partnership is now a 19-man partnership, but it’s a new and different entity. But I think we do have to address in 404 the duty of loyalty, what you can and can’t do during that period. I think that is a very important element.

CHAIRMAN FRANCK: They’re going to come back with that, Commissioner, when we redraft 404.

Commissioner Langrock.

COMMISSIONER PETER F. LANGROCK (Vermont): Do I understand that this will have retroactive effect on existing partnerships?

CHAIRMAN FRANCK: Say that again, Commissioner.

COMMISSIONER LANGROCK: If this were passed in its present form, this would be written into existing partnerships.

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER HOWARD J. SWIBEL (Illinois): Section 1006, which we will get to later hopefully, indicates that the
statute would apply to the existing partnerships. But there is also a saving clause that says that it cannot abrogate existing contractual rights.

COMMISSIONER LANGROCK: If I am in partnership with a person with a horse, and I want to dissolve that relationship and that other person wants to race it, would you say that that -- and this statute is passed, are we bound by the 90 days or not?

MR. MERRILL (California State Bar): The answer is yes unless the partnership agreement says otherwise.

COMMISSIONER LANGROCK: Does that abridge my contractual rights? That is the constitutional question. I am curious where the committee comes out on it. If it doesn’t affect the existing partnership of my buddy with the horse, then I have a -- I should be knowledge able enough in the future to protect myself. But to effect it retroactively presents, I think, that calls for a saving provision.

CHAIRMAN FRANCK: I think we are going to reach that question more directly when we get to 1006. That is where the provision is about the retroactive effect.

COMMISSIONER LANGROCK: I don’t think -- as far as I am concerned, it only applies in concern with regard to this section. I have asked the question, and I think it’s appropriate to be answered here.
COMMISSIONER HOWARD J. SWIBEL (Illinois): I beg to differ, that it applies only here. It really applies to numerous changes that we have made in the law. In the hypothetical that you’ve suggested, for example, you have a partnership with a horse or a person with a horse --

COMMISSIONER LANGROCK: Two people own a horse. One wants to race it and the other wants to breed it. They want to dissolve.

COMMISSIONER SWIBEL: Two people investing in a horse. Under the current law, if one of you dies, the other has an automatic right to wind up the business. Under Section 801 as drafted, if one of you dies, there is not an automatic wind up of the business. There are a lot of sections where this statute would apply to existing partnerships. There are going to be different results.

COMMISSIONER LANGROCK: Just answer my question. In this case, if I have that partnership and I want to dissolve it, and this act is passed and we have had horse before the statute was passed, does the 90-day waiting period apply or not?

COMMISSIONER SWIBEL: Yes.

MR. DONALD J. WEIDNER (Reporter): The answer would be yes.

COMMISSIONER LANGROCK: That in no way abridges the contractual relationship that existed.
COMMISSIONER SWIBEL: First of all, you can cut short the 90 days under 802(b) if you’ve got at least half of the remaining partners who want to immediately liquidate the business. So, you can do that. But, yes, the section applies to your existing partnership.

....

COMMISSIONER DAVID S. WALKER (Iowa): The committee indicated it was going to revisit 404, and the obligation of loyalty. I think you need to look at it in connection with 802(c) as well. There are two interests. One is the interest of preserving the entity and preventing dissolution. That is a separable interest from that of the individual partner who wants to dissociate. What you are talking about is the right to enter into a trade or business, the right to compete at that next day, and I think those can be accommodated while still preserving the entity.

I would say, in response to Commissioner Langrock’s concern, that you are necessitating that anybody who is in a partnership seek a lawyer, and this will be seen as a lawyer’s full employment act to the extent that they need to contract out of this 90-day period.

CHAIRMAN FRANCK: Thank you.

COMMISSIONER CARLYLE C. RING, JR. (Virginia): Going back to Commissioner Reitz’ question, it seems to me that if the
answer is that he is a dissociated partner during the period, maybe you have to say that and maybe -- that is in Line 22 Page 122, and maybe it goes in somewhere else. But the partner who gave the notice is dissociated and has no rights, et cetera.

CHAIRMAN FRANCK: Thank you, Commissioner. ...

COMMISSIONER HOWARD J. SWIBEL (Illinois): “SECTION 803. PARTNERSHIP CONTINUES AFTER DISSOLUTION. A partnership continues after dissolution until the winding up of its business is completed, at which time the partnership terminated.”

CHAIRMAN FRANCK: Seeing no one seeking recognition, we proceed to the reading of Section 804.

COMMISSIONER SWIBEL: “SECTION 804. RIGHT TO WIND UP PARTNERSHIP BUSINESS.

“(a) After dissolution, the partners who have not wrongfully dissociated may wind up a partnership’s business, but on application of any partner, partner’s legal representative or transferee, the [designate the appropriate court], for good cause, may order that the partnership business be wound up.

“(b) The legal representative of the last surviving partner may wind up a partnership’s business.

“(c) A person winding up a partnership’s business may preserve the partnership business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, settle
and close the partnership’s business, dispose of and transfer the partnership’s property, discharge the partnership’s liabilities, distribute the assets of the partnership pursuant to Section 808, and perform other necessary acts, including settlement of disputes by mediation or arbitration."

Mr. Chairman, I believe that I may have made a mistake.

CHAIRMAN FRANCK: Commissioner Swibel indicates that he did not read some changes the committee wanted to incorporate in this section. Where are those changes?

COMMISSIONER SWIBEL: They’re in Section 804 (a).

....

COMMISSIONER SWIBEL: Yes. On Line 9, we are removing the word “the” before “partner” and substituting “a,” making “partner” singular, changing the word “have” to “has,” and deleting the word “may.” That line reads: “After dissolution, a partner who has not wrongfully dissociated.”

Then on Line 10 —

CHAIRMAN FRANCK: Excuse me. You need something if you’re going to strike “may.”

COMMISSIONER SWIBEL: We are changing it now on Line 10. We are taking out the words “wind up a” and substituting “has a right to participate in winding up the.” We are changing
“partnership” to singular. Line 10 would read “has a right to participate in the winding up of the partnership business.”

....

Line 12, inserting after the word “order,” “judicial supervision of,” and then after the word “the,” the words “winding up,” period. Line 12 would read “may order judicial supervision of the winding up.”

CHAIRMAN FRANCK: Would you read subsections (a) and (b) once again for the Conference.

COMMISSIONER SWIBEL: Yes. “After dissolution, a partner who has not wrongfully dissociated has a right to participate in winding up the partnership business, but on application of any partner, partner’s legal representative or transferee, the [designate the appropriate court], for good cause may order judicial supervision of the winding up.”

....

COMMISSIONER BRUCE COGGESHALL (Maine): Mr. Chairman, in the group of people who are entitled to petition the court for a judicial supervision, does that include the dissociated partner?

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER ROBERT H. CORNELL (California): Yes.

COMMISSIONER COGGESHALL: Whether wrongfully or rightfully dissociated?
COMMISSIONER CORNELL: It is supposed to. The policy behind that is that it is sometimes hard to tell in a partnership dispute who the wrong guy is. There may be more interest in the dissociating partner in having court supervision to wind up the business.

COMMISSIONER COGGESHALL: I agree with you. I just wondered if it is clear in the section that that dissociated partner has that right.

MR. DONALD J. WEIDNER (Reporter): We can make that clear in a comment that any partner includes a wrongfully dissociated partner.

CHAIRMAN FRANCK: Thank you. Commissioner.

COMMISSIONER DALE G. HIGER (Idaho): Comment on 804(b). It’s a little unclear as to the last surviving partner. I think you want to say the legal representative of the last partner to die.

CHAIRMAN FRANCK: Response from the committee?

COMMISSIONER HARRY J. HAYNSWORTH, IV, (Illinois): The difficulty with that is what do you do in the case of a partner that is a corporation, and that is the last partner.

COMMISSIONER HIGER: My only concern is that there is an implication that the surviving partner is still surviving. It’s a matter of style and --
COMMISSIONER HAYNSWORTH: This was taken out of the old UPA. I must admit, we didn’t spend a lot of time on it.

COMMISSIONER CORNELL: The last partner may not be the last one to die, but the last remaining partner may die, and this gives the representative the same position that partner would have.

COMMISSIONER HIGER: I understand what the purpose is. It’s not entirely clear that that surviving --

CHAIRMAN FRANCK: Commissioner, if you have a suggestion, why don’t you think about that and put it in writing and they will consider it.

Commissioner.

COMMISSIONER PETER F. LANGROCK (Vermont): I have a question regarding 802. I know we passed it, but I think it’s important. One of my concerns is -- and I can make this into motion -- is the two-person partnership --

CHAIRMAN FRANCK: Where is your concern?

COMMISSIONER LANGROCK: 802, Section (a). My suggestion, and I will put it into motion, and that is that we insert the words after “a partnership” on Line 12 “of more than two persons.” Let me give you the hypotheticals that bother me, and I’ll use the horse example.

A friend of mine and myself buy a horse, a race horse. We are now in partnership on this horse. We call ourselves
partners. We haven’t got a written agreement. We just went down to the sale and we each put our money in. The time has come whether we are going to race that horse this spring or we are going to breed that horse. Whoever withdraws has absolutely no control over the next 90 days. The remaining partner is in control.

What you really have, you no longer have a partnership. You have one person who is making the decisions with a half interest of the other person’s property in that control.

The arguments that you have made I think are much more cogent when you talk about a multi person partnership than you’re dealing with the two person. It seems to me that there really is no justification for this 90-day waiting period in a two person arrangement. And there are thousands of arrangements. The 90-day period presents a real problem when you’re talking about a horse. Also when you’re talking about feeder cattle, agriculture products, when you’re talking about other matters.

And it seems to me that those are the types of informal partnerships where you’re putting a default judgment in. And I think this would come a long way towards making me happy, and I would be curious how the committee would react, and the justification for making this apply to --
CHAIRMAN FRANCK: The motion is to amend Section 802(a) by adding in Line 12 after the words “a partnership” the words “of more than two persons.” Response from the committee.

COMMISSIONER H. LANE KNEEDLER, III (Virginia): Commissioner Langrock, if I understand your point, if it’s more than two people, you would at least have a majority of the original partnership.

COMMISSIONER LANGROCK: Yes.

COMMISSIONER KNEEDLER: Is that the idea? Instead of 50/50?

COMMISSIONER LANGROCK: You really don’t have a partnership any more. You have one person controlling what is called a partnership. It’s those very type of deals where two people go out and do it where you really don’t want to impose a 90-day waiting period. I can just see somebody coming in to my office and saying: My partner wants to dissolve it. I say we have got 90 days to complete control.

Unless there is a reason why you feel you need that in the two person, I would hope that -- I think one thing, too, and that is from a passage standpoint -- when I see this provision here, I go back and I am tempted to tell you all the places it won’t work and to write something about it and say this is a ridiculous provision, it shouldn’t be in there and here are the reasons why, and the state legislature is going to understand a
horse case a hell of a lot better than they are a sophisticated legal document from Simpson & Thatcher or somebody in New York.

CHAIRMAN FRANCK: Commissioner, give them a second to discuss this.

COMMISSIONER KNEEDLER: Commissioner Langrock, can you give us a moment to work on this and come back to this?

....

COMMISSIONER HOWARD J. SWIBEL (Illinois): “SECTION 805. PARTNERS POWER TO BIND PARTNERSHIP AFTER DISSOLUTION. Subject to Section 806, a partnership is bound by a partner’s act after dissolution that:

“(1) is appropriate for winding up the partnership business; or

“(2) would have bound the partnership under Section 301 before dissolution, if the other party to the transaction does not have notice of the dissolution.”

COMMISSIONER SWIBEL: “SECTION 806. STATEMENT OF DISSOLUTION.

“(a) After dissolution, a partner who has not wrongfully dissociated may file a statement of dissolution stating the name of the partnership and that the partnership has dissolved and is winding up its business.

“(b) A statement of dissolution cancels a filed statement of partnership authority to the extent provided in
Section 303(d) and is a limitation on authority to the extent provided in Section 303(e).

“(c) For the purposes of Sections 301 and 805, a person not a partner is deemed to have notice of the dissolution and the limitation on the partner’s authority as a result of the statement of dissolution 90 days after it is filed.

“(d) After filing and, where appropriate, recording a statement of dissolution, the dissolved partnership may file and, where appropriate, record a statement of partnership authority which will operate with respect to a person not a partner as provided in Section 303(d) and (e) in any transaction, whether or not the transaction is appropriate for winding up the partnership business.”

COMMISSIONER RANDAL C. PICKER (Illinois): Just a clarification question. The language in Line 13 referring to wrongfully dissociated partner, can a properly dissociated partner file a dissolution statement?

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER H. LANE KNEEDLER, III (Virginia): Sorry, Mr. Chairman, we are still trying to resolve 802.

COMMISSIONER HARRY J. HAYNSWORTH, IV, (Illinois): The answer should be yes, because it says who is a partner who is not wrongfully dissociated.
COMMISSIONER PICKER: Now I go back to a change I thought you made before in Section 603 where you limited -- Page 91. Maybe I misunderstood the change. I thought on Page 91, Line 7, instead of having Article 8, you limited that to Section 804.

CHAIRMAN FRANCK: That is correct, Commissioner.

COMMISSIONER PICKER: What I understand Commissioner Haynsworth to be saying is at least the rights under 806(a) should be embraced in that as well. Is that right, Commissioner Haynsworth?

COMMISSIONER HAYNSWORTH: I am not able to make the transitions as quickly as you are. Would you please repeat that.

COMMISSIONER PICKER: My only question is whether -- understanding your answer to my question, whether the rights under 806(a), which are now conferred upon a partner who dissociates properly, should be embraced in Section 603(b).

COMMISSIONER HAYNSWORTH: I think we are going to have to take another look at that. The reason we made the change in 603 was that it seemed to be overly broad.

COMMISSIONER PICKER: All I’m suggesting is that now you have gone the other direction and you are missing things --

COMMISSIONER HAYNSWORTH: We will look at that again.

CHAIRMAN FRANCK: They’re going to take a look at whether or not that should be picked up in 603(b).

Commissioner.
COMMISSIONER BRUCE COGGESHALL (Maine): Would you make the change in subparagraph (b) similar to the change you made in Section 704 so that reads that it’s a limitation on authority for the purposes of Section 303 --

COMMISSIONER HAYNSWORTH: Yes, that would be accepted.

CHAIRMAN FRANCK: They will make that change, “for the purpose of,” rather than “to the extent provided.”

Seeing no one else seeking recognition, is the committee ready to return to Commissioner Langrock’s motion with respect effect to Section 802. The committee is not ready.

Proceed to the reading of Section 807.

COMMISSIONER HOWARD J. SWIBEL (Illinois): “SECTION 807. PARTNER’S LIABILITY TO OTHER PARTNERS AFTER DISSOLUTION.

“(a) Except as provided in subsection (b) and Section 802(c)(2), after dissolution a partner is liable to the other partners for the partner’s share of any partnership liability incurred under Section 805.

“(b) The other partners are not liable to a partner who, with knowledge of the winding up, incurs a partnership liability under Section 805(2) by an act that is not appropriate for winding up the partnership business.”

....
COMMISSIONER BORIS AUERBACH (Ohio): With apologies, in order to help the committee on 802, could I ask an innocent question?

CHAIRMAN FRANCK: Is this on commissioner Langrock’s motion?

....

COMMISSIONER AUERBACH: All I am looking for is a definition of half of the remaining as a way of either making it worse or better.

CHAIRMAN FRANCK: A definition of --

COMMISSIONER AUERBACH: Half of the remaining, which is key language --

CHAIRMAN FRANCK: That involves the direct issue that Commissioner Langrock has raised --

COMMISSIONER AUERBACH: Let me just state it and then I will shut up very quickly. It’s half of the number of partners or half of the remaining partnership interest. And I think that is worth clearing up as you go through.

COMMISSIONER HOWARD J. SWIBEL (Illinois): It’s supposed to mean half of the other. We changed the word “remaining” to “other.” It’s the partners other than the one who gave the notice of --

COMMISSIONER AUERBACH: My question, Howard, is very simple. Is it the number of heads or is it the percentages?
Number of heads.

COMMISSIONER AUERBACH: That could be a bizarre result, I would think.

....

COMMISSIONER SWIBEL: "SECTION 808. SETTLEMENT OF ACCOUNTS AMONG PARTNERS.

"(a) In winding up the partnership business, the assets of the partnership must be applied to discharge its obligations to creditors, including partners who are creditors. Any surplus must be applied to pay in cash the net amount distributable to partners in accordance with their right to distributions pursuant to subsection (b).

"(b) Each partner is entitled to a settlement of all partnership accounts upon winding up the partnership business. In settling accounts among the partners, the profits and losses that result from the liquidation of the partnership assets must be credited and charged to the partners' accounts. The partnership shall make a distribution to a partner in an amount equal to that partner's positive balance. A partner shall contribute to the partnership an amount equal to that partner's negative balance.

"(c) To the extent not taken into account in settling the accounts among partners pursuant to subsection (b), each
partner shall contribute, in the proportion in which the partner shares partnership losses, the amount necessary to satisfy partnership obligations. If a partner fails to contribute, the other partners shall contribute, in the proportions in which the partners share partnership losses, the additional amount necessary to satisfy the partnership obligations. A partner or partner’s legal representative may recover from the other partners any contributions the partner makes to the extent the amount contributed exceeds that partner’s share of the partnership obligations.

“(d) The estate of a deceased partner is liable for the partner’s obligation to contribute to the partnership.

“(e) An assignee for the benefit of creditors of a partnership or a partner, or a person appointed by a court to represent creditors of a partnership or a partner, may enforce a partner’s obligation to contribute to the partnership.”

CHAIRMAN FRANCK: Comments on Section 808.

Commissioner.

COMMISSIONER NEAL OSSEN (Connecticut): Would the committee consider putting a comment that says that the equitable power of a court to subordinate the claims of a partner to other creditors would be allowed? As you know, I think in the corporation law, at least the small corporations, we have abolished the jingle rules. But at least in small
corporation situation, there is the power of courts to say, you, shareholder, who is also a creditor of the corporation, your creditor claim will be subordinated to the rights of the general unsecured creditors. And I think this is inappropriate since you have abolished the jingle rule where you might want a comment that says in some partnership dissolutions, the partnership creditor’s claim should be subordinated to the claims of other general -- other creditors.

CHAIRMAN FRANCK: The question is, is the committee willing to put in such a comment?

MR. DONALD J. WEIDNER (Reporter): Yes.

COMMISSIONER OSSEN: It’s my understanding that the dissolution statutes for corporations have a priority scheme for how the creditors should be paid. And that seems to be lacking in the partnership section. It would seem to me, I would think states would like to have the same scenario that is available when a corporation dissolves. For example, wages in Connecticut have a priority, taxes have a priority, contributions from employment have a priority. You don’t have a priority scheme. It seems to me you ought to. I don’t know if you wish to go back and draft a priority scheme.

CHAIRMAN FRANCK: I know that if you ask a question that way, the committee response will be no. But if you ask
whether there is a scheme or why they don’t have one, they will answer that question.

COMMISSIONER HOWARD J. SWIBEL (Illinois): The current Uniform Partnership Act simply puts creditors ahead of other partners and does not go into any further detail. We thought we would leave that to other law.

COMMISSIONER OSSEN: Would the committee consider taking from the corporation law the scenario of priorities scheme for payment to creditors?

COMMISSIONER HARRY J. HAYNSWORTH, IV, (Illinois): I know the model act has no priority list in it, the Model Business Corporation Act. I am unclear as to what specific states have, but I know the model act does not have one.

MR. DONALD J. WEIDNER (Reporter): If I could respond further. In the Partnership Act, the present Partnership Act, there was a distribution scheme. We reviewed that and argued it at some length. What we concluded, among other things, was that the priorities scheme that they listed, after listing creditors first, just didn’t make any sense. They had a hierarchy, those owing to partners other than for capital and profit, those owing to partners in respect to capital and in respect to profits and so forth. We decided that sort of the modern accounting concepts that we have included in this act really set aside that sort of old time vocabulary. We did look at this and decided not to set
up the priority, recognizing, in particular, that in the case of 
partner third party capacity transactions, a partner is also a 
lesser, lender and so forth, that there might be equitable 
subrogation.

CHAIRMAN FRANCK: Their answer is they have no 
priority for creditors, and they intended not to have a 
priority.

COMMISSIONER DAVID S. WALKER (Iowa): There is a 
provision in the Revised Uniform Limited Partnership Act which 
speaks to an order of distribution. You may want to consider 
that. I don’t know of any in the corporate law that is by 
statute.

The second point, it doesn’t make a real difference in 
many partnerships whether capital contributions should be repaid 
before profit or profit before capital contributions. I guess 
that is mooted by your scheme now.

CHAIRMAN FRANCK: Commissioner Willoughby.

COMMISSIONER W. JACKSON WILLOUGHBY (California): I’d 
like to use Commissioner Langrock’s example of the horse, 
without getting into the question of how many partners there 
might be. But I am little confused between the provisions of 
Section 808(b), which provides for the settlement of the 
partnership accounts upon the winding up and the provisions of
Section 802(c)(2) and (3), which seem to indicate that you, have a cutoff on the very day that you submit the notice.

And here is my question to the committee. Using Commissioner Langrock’s horse again, let’s say that we have a partnership, the horse is the asset, and one of the partners gives notice of dissolution of the partnership, that he wants to withdraw, and then the horse goes out and wins a million dollar race and there is a huge purse. Does the withdrawing partner share in those winnings because the race took place after he gave his notice?

And the reverse of this is that a few days after he gives the notice, the horse dies, and the horse had a substantial value on the day that he gave the notice.

I wonder if the committee could clear up that confusion for us.

CHAIRMAN FRANCK: Response from the committee.

MR. DONALD J. WEIDNER (Reporter): My understanding of Section 802 and how it applies is that on the first part he would not share in the winnings. But on the second part, unless the death was a result of the carrying on of ordinary transactions -- that is, if the horse died from natural causes as opposed to participating in that race, that he would share in the loss.

....
COMMISSIONER BYRON D. SHER (California): Commissioner Willoughby and I constructed that question together. It seems to me the answer to the second question points out the unfairness of not allowing the partner who gives notice not to participate in management. I wouldn’t take the horse who dies case, but I would take the normal operations of a business, and the reason the notice was given is because one partner thinks his other partners are doing a bad job in just the ordinary running of the business. And during that 90-day period, they have the right to continue to run it, to buy goods and sell, they continue to do it, they continue to lose money, the partnership’s value decreases. And it seems to me that M. Willoughby’s question points up the problem with 802 and why Commissioner Langrock’s motion should have been adopted.

CHAIRMAN FRANCK: I see no one else seeking recognition on this section.

I will return to Section 802. Commissioner Langrock, I have good news, the committee has accepted your amendment. Line 12, Page 122 will now read: “(a) Except as provided in subsection (b), a partnership of more than two persons is not dissolved,” and continues on with the text.

They have accepted your motion, Commissioner.

COMMISSIONER PETER F. LANGROCK (Vermont): I am speechless.
CHAIRMAN FRANCK: We proceed now to the reading of Article 9. ...

COMMISSIONER HARRY J. HAYNSWORTH, IV, (Illinois):

"SECTION 901. CONVERSION OF PARTNERSHIP TO LIMITED PARTNERSHIP.

"(a) A partnership may be converted to a limited partnership pursuant to this section.

"(b) The terms and conditions of a conversion of a partnership to a limited partnership must be approved by all the partners or by a number or percentage specified for conversion in the partnership agreement.

"(c) After the conversion is approved by the partners, the partnership shall file a certificate of limited partnership which satisfies the requirements of [Section ______ of the State Limited Partnership Act] and includes:

"(1) a statement that the partnership was converted to a limited partnership from a partnership; and

"(2) its former name; and

"(3) a statement of the number of votes cast by the partners for and against the conversion and, if the vote is less than unanimous, the, number of percentage required to approve the conversion under the partnership agreement.

"(d) The conversion takes effect when the certificate of limited partnership is filed or at any later date specified in the certificate."
“(e) A partner who becomes a limited partner as a result of the conversion remains liable as a partner for an obligation incurred by the partnership before the conversion takes effect. If the other party to a transaction with the limited partnership reasonably believes when entering the transaction that the limited partner is a general partner, the partner is liable for an obligation incurred by the limited partnership within 90 days after the conversion takes effect. The partner’s liability for all other obligations of the limited partnership incurred after the conversion takes effect is that of a limited partner as provided in the [State Limited Partnership Act].”

....

CHAIRMAN EDWARD I. CUTLER (Florida): I do not know the extent to which the committee has already considered a question of mergers between a partnership and another kind of legal entity, like a corporation. There is a reference in the comment to at least two states now, Delaware and Mississippi, and I believe there may be more by now, which do indeed provide for mergers between different types of legal entities. Delaware, of course, is always on the leading edge of these things.

If there is going to be a change in the Uniform Partnership Act and mergers ought to be considered, I think now is the time to do it. And I question whether or not it would
take a lot of draftsmanship to provide for mergers between partnerships and corporations as well at least in those states that want to do it, and perhaps it ought to be optional. Has the committee considered the extent to which it would require any real difficulty of drafting?

COMMISSIONER HAYNSWORTH: As originally proposed, we authorized cross entity mergers. Now, of course, we are just dealing with conversions here. But cross entity mergers were originally proposed. The Drafting Committee concluded after looking at that that there were significant problems with the cross entity proposal for two reasons. One, as a practical matter, in a number of states where this issue has come up, there has been great concern expressed by members of the bar that you may be affecting other statutes, these other entity statutes, and there is a reluctance to approve any kind of merger statute because of that.

Secondly, the Drafting Committee members concluded that we didn’t want to be in a position of having a situation arise where you had to look at all the other permutations that could take place. For example, where does it go. Do you say in the Partnership Act that a partnership can merge with a corporation, and then what is the impact of that on the corporation code if it doesn’t have a cross authorization?
So, we concluded that we wanted to get some safe harbor provisions for both conversions and mergers, and that we had to limit it to the partnership mergers and conversions at this time.

COMMISSIONER CUTLER: What do you think will happen in those states that consider revising the partnership act but that already have provisions for --

COMMISSIONER HAYNSWORTH: Then they would adopt non-uniform provisions relating to Article 9.

COMMISSIONER CUTLER: I guess it’s too much of a job is what I think I hear.

....

COMMISSIONER CUTLER: I have one more question which arises out of the comments, and that is the reference on Page 143 near the bottom to the provision that the internal affairs of a partnership agreement may be amended to say they’re to be governed by the laws of a designated jurisdiction. I failed to raise this question in an earlier comment dealing with an earlier section where there is a reference to adopting the law of another jurisdiction. If I remember it correctly, it said “any other jurisdiction,” or it sounded like that.

I think that it’s a mistake in policy to state even in a comment that parties to a contract can pick the law of any jurisdiction that they want to, except in limited circumstances.
For example, must there be a reasonable relationship to the other jurisdiction selected. And I think it may vary with the type of contract. If I am not mistaken, the restatement deals specifically with that issue. And I would at least caution that the comments do not state it so generally.

COMMISSIONER HAYNSWORTH: ... Commissioner, if I might say, the intention was to make it fairly broad because we could think of no policy reason why a partnership couldn’t come from another jurisdiction to a state that had enacted RUPA and to use that as a means of conversion because it would give them a same harbor way of doing it, whereas in their own jurisdiction they may not have such a possibility.

COMMISSIONER H. LANE KNEEDLER, III (Virginia):
Commissioner Cutler, I gather you’re suggesting that we be careful that we incorporate the general conflict of laws principles when a contract selects a particular jurisdiction as the governing law, that those rules which include the reasonable relationship with the state chosen be recognized, and that we’re not saying we intend to wipe out that --

COMMISSIONER CUTLER: Correct. That is my only point.

....

COMMISSIONER ELLEN F. DYKE (District of Columbia):
When a partnership is changed from a general partnership to a limited partnership, pursuant to the section of this act, will
the property that is held by the partnership automatically change in terms of, for example, a deed -- will something else have to be put of record to show a different ownership, or will this happen automatically as it would in a merger, for example, by operation of law?

COMMISSIONER HAYNSWORTH: Commissioner, if you’ll look at Section 903, it says that it is exactly the same partnership as previously existed. There is no change in the status of the partnership as far as property records and such are concerned.

COMMISSIONER DYKE: You might want to put something in the comment because, for example, in the District of Columbia, the change from a general partnership to a limited partnership would trigger a transfer tax.

COMMISSIONER HAYNSWORTH: When we get to 903 you can look at it. We tried to make that as clear as we could. We figured we couldn’t control the state recording people. They can tax for whatever reasons they want to, and there wasn’t anything we could do to actually stop them. We tried to make it as clear as possible that it is the same entity, nothing has happened but a minor internal reorganization.

....

COMMISSIONER PETER F. LANGROCK (Vermont): One more problem with 809, and I have a motion, and I do it because I think the chair prefers it that way. Be added a separate Section
(4), which would read -- and I don’t take this as a final draft. 

"However, a partner giving notice shall not be liable in tort for actions by the remaining partners after giving notice." Let me give you the example --

CHAIRMAN FRANCK: Is that a motion?

COMMISSIONER LANGROCK: Yes, it is. I will hand it up to you. Section (4), “However a partner, giving notice shall not be liable in tort for actions taken by the remaining partners after giving notice.” And I mean by liable and tort to third parties should be there.

The problem I have -- let me give you a situation where three people own an airplane. One of the partners says: This airplane isn’t safe. I don’t want it flown any more.

And the other two partners say: The hell it is. And they go out and the partnership is dissolved. During that 90-day period, the other two partners fly the airplane and somebody is killed.

I don’t know how the partner who was acting responsibly, trying to prevent a tragedy, can protect themselves from liability during that period of time. And it seems to me that that is against public policy to allow -- to have that person held liable in a tort situation when that person is the only responsible party. You can carry that through in other tort matters as well. And I think we have been talking about this
matter in terms of contractual liabilities. 808 tries to deal with those, but doesn’t deal with tort matters.

I am willing to give the motion up there, let it lay on the table, if there is response to it now or give some thought to it.

CHAIRMAN FRANCK: I prefer, Commissioner, that you hand that motion up and that we defer consideration until this act is on the floor again on that motion.

It occurs to me as I hear you talking that there are some questions that if I could participate, I would want to ask, and I am sure the committee would want to look at that and consider it carefully. It will be brought back by the committee. I will ask the committee to print up your motion with whatever materials they’re going to distribute when we come back, with its response, either that they accept, if they do, and if they don’t, they will be able to give the reasons why, and we will then proceed with the debate on that motion.

COMMISSIONER GEORGE BUXTON (Tennessee): I might suggest to Commissioner Langrock that he take a look if that might not fit better in 703(a), instead of his, suggestion in 802.

....

COMMISSIONER HARRY J. HAYNSWORTH, IV, (Illinois): “SECTION 902. CONVERSION OF LIMITED PARTNERSHIP TO PARTNERSHIP.
“(a) A limited partnership may be converted to a partnership pursuant to this section.

“(b) Notwithstanding the provision to the contrary in a limited partnership agreement, the terms and conditions of a conversion of a limited partnership to a partnership must be approved by all the partners.

“(c) After the conversion is approved by the partners, the limited partnership shall cancel its certificate of limited partnership pursuant to (Section _________of the State Limited Partnership Act).

“(d) The conversion takes effect when the certificate of limited partnership is canceled.

“(e) A limited partner becomes a partner as a result of the conversion remains liable only as a limited partner for an obligation incurred by the limited partnership before the conversion takes effect. The limited partner is liable as a partner for an obligation of the partnership incurred after the conversion takes effect.”

....

COMMISSIONER MILLARD H. RUUD (Texas): My question is with respect to subsection (e) and the term “obligation incurred.” There is not any help in the comment for that. Let me put the case, the partnership makes a contract to deliver goods and their specifications for the goods in the contract. Does the
obligation occur at the time of the making of the contract? Now, a cause of action would not arise for the failure to deliver goods that conform to the specification of the contract, of course would not arise until the delivery of goods, the nonconforming goods. It would, of course, extend the liability of the -- well, it would cut both ways of the impact on the person going from being a limited to a general partner. You have similar problems with torts maybe. But using “obligation” instead of some other term like “cause of action” or “claim” in the contract setting does raise the problem. I don’t have a good solution for you. I will put you another general case --

CHAIRMAN FRANCK: ... Response from the committee.

MR. DONALD J. WEIDNER (Reporter): The time of the contract is what we meant. If you’re a general partner at the time the contract is entered into, you remain liable as a general partner.

COMMISSIONER RUUD: I would comment that the delivery occurs after the person is -- you put it that it was a general -- after the person was now a limited partner -- at that time had no control over the performance of the contract. That is something that occurs at the time of the delivery of the goods. Do you see my problem?

MR. WEIDNER: I see your problem. But to the extent you’re suggesting a different substantive outcome, I guess I
disagree. Your obligation under our act is that every partner when the contract is undertaken is joint and severally liable for the performance of that obligation and you’re not relieved of that obligation merely by converting your general partnership into a limited partnership.

COMMISSIONER RUUD: Take a contract to supply goods over a very long period of time. The contract is made in 1992, and it is to run until the Year 2000. You change your status in 1993. You mean the liability would extend under that contract with respect --

MR. MERRILL (California State Bar): I would suggest, if you switch that analogy to a lease and look at the potential for abuse, if the general partnership could sign a lease for 20 years, and the following week convert to a limited partnership and cut off all future liability because the delivery of the premises hasn’t accrued for that period, it would be a problem.

Secondly, I would note that this rule applies to a dissociated partner also. And the general rule is that you can’t like a rat leave the sinking ship to avoid liabilities that you incurred while you were a partner.

CHAIRMAN FRANCK: Their answer is that they have drafted it the way they would like it to be.

COMMISSIONER RUUD: Okay.

....
COMMISSIONER HARRY J. HAYNSWORTH, IV, (Illinois):

“SECTION 903. EFFECT OF CONVERSION; ENTITY UNCHANGED.

“(a) A partnership or limited partnership that has been converted pursuant to this article is for all purposes the same entity that existed before the conversion.

“(b) When a conversion takes effect:

“(1) all property owned by the converting partnership or limited partnership remains vested in the converted entity.

“(2) all obligations of the converting partnership or limited partnership continue as obligations of a converted entity; and

“(3) an action or proceeding pending against the converting partnership or limited partnership may be continued as if the conversion had not occurred.”

....

COMMISSIONER WILLIAM C. GARDNER (District of Columbia): “SECTION 904. MERGER OF PARTNERSHIPS.

“(a) Pursuant to a plan of merger approved as provided in subsection (c), a partnership may be merged with one or more partnerships or limited partnerships.

“(b) The plan of merger must set forth:

“(1) the name of each partnership or limited partnership that is a party to the merger;
“(2) the name of the surviving entity into which the other partnerships or limited partnerships will merge;

“(3) whether the surviving entity is a partnership or a limited partnership and the status of each partner;

“(4) the terms and conditions of the merger;

“(5) the manner and basis of converting the interest of each party to the merger into interests or obligations of the surviving entity, or into cash or other property in whole or part; and

“(6) the street address of the surviving entity’s chief executive office.

“(c) The plan of merger must be approved:

“(1) in the case of a partnership that is a party to the merger, by all the partners or number, or a number or percentage specified for merger in the partnership agreement; and

“(2) in the case of a limited partnership that is a party to the merger, by the vote required for approval of a merger by the law of the state or foreign jurisdiction in which the limited partnership is organized and, in the absence of such specially applicable law, by all the partners, notwithstanding provision to the contrary in the partnership agreement.
“(d) After a plan of merger is approved and before the merger takes effect, the plan may be amended or abandoned as provided in the plan.

“(e) The merger takes effect on the later of:

“(1) the approval of the plan of the merger by each party to the merger, as provided in subsection (c);

“(2) the filing by each party to the merger of any documents required by statute to be filed as a condition to the effectiveness of the merger; or

“(3) any effective, date specified in the plan of merger.”

....

COMMISSIONER ELLEN F. DYKE (District of Columbia): If you have a partnership or a limited partnership that is in another jurisdiction which has not passed this act and that partnership wants to merge with one in the state where this act has passed, is it your feeling that under Section 904(c)(2) that you can effectuate that merger without enabling legislation in foreign state?

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER HARRY J. HAYNSWORTH, IV, (Illinois): That was the intent. Probably the better way of doing it would be to have the foreign limited partnership merge into the partnership
in this particular jurisdiction. But it was the intent that that would authorize that.

COMMISSIONER DYKE: What would happen in the state where the partnership certificate was put on record? In the foreign state, you have a partnership that exists there. In this state, where you have effectuated a merger, you have a new partnership that exists. What happens to the old one out there? And if it’s been merged, what happens to the land, et cetera, that was in name of that partnership out there by operation of law in this state? We have changed all of that law in the other state that has not passed this act?

COMMISSIONER HAYNSWORTH: They would have to file the termination statement, put people on notice that that partnership was out of existence. Section 905 deals with the effect of the merger. And I think it would perhaps be appropriate to wait until we get to that before --

CHAIRMAN FRANCK: Commissioner, do you want to wait until we read Section 905?

COMMISSIONER DYKE: Well, I am suggesting that when you look at this section, (c) (2), you might find that it’s just as simple as saying that all the partners have to agree and it’s a fait accompli, that something may have to be stated in the comments that this is not going to necessarily effectuate a
merger if you don’t have enabling legislation in both jurisdictions.

COMMISSIONER HAYNSWORTH: And that I think will be in a comment. That is a danger. We simply couldn’t do anything to prevent that from occurring.

CHAIRMAN FRANCK: Thank you, Commissioner.

COMMISSIONER HAYNSWORTH: That’s the reason I suggest that normally what you do is to do the reverse merger.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER CURTIS R. REITZ (Pennsylvania): Under subsection (e)(1) and (2), the merger takes effect on an act of a party. Don’t you mean to require here that the act be by all parties, that all parties have approved, all parties have filed? You don’t want a seriatim approval each time each party does something, it’s after they have all done it.

COMMISSIONER HAYNSWORTH: That is correct, Commissioner. I think it’s just the wording. We would accept the “all parties to the merger.”

CHAIRMAN FRANCK: They accept that as a suggestion to change the wording. I assume they will report back when they do on what wording they have adopted.

COMMISSIONER HAYNSWORTH: I think the Commissioner suggested all parties, so that is --
CHAIRMAN FRANCK: Line 6 would be filing by all parties?


CHAIRMAN FRANCK: Okay. By all parties instead of each party. That change will have been made. I want the floor to understand that. Line 4 on Page 147 has been changed by striking the words “each party” and substituting “all parties” in that line. Now, what happens on Line 6?

COMMISSIONER HAYNSWORTH: Line 6, the same change.

CHAIRMAN FRANCK: Line 6, we strike “each party” and insert instead “all parties.” And those two changes will be deemed to be part of the black letter.

....

COMMISSIONER WILLIAM C. GARDNER (District of Columbia): “SECTION 905. EFFECT OF MERGER.

“(a) When a merger takes effect:

“(1) every partnership or limited partnership that is a party to the merger other than the surviving entity ceases to exist;

“(2) all property owned by each of the merged partnerships or limited partnerships vests in the surviving entity.
“(3) all obligations of every partnership or limited partnership that is a party to the merger become the obligations of the surviving entity; and

“(4) an action or proceeding pending against a partnership or limited partnership that is a party to the merger may be continued as if the merger had not occurred or the surviving entity may be substituted as a party to the action or proceeding.

“(b) The [Secretary of State] of this State is the agent for service of process in an action or proceeding against a surviving foreign partnership or limited partnership to enforce an obligation of a domestic partnership or limited partnership that is a party to a merger. The surviving entity shall promptly notify the [Secretary of State] of the mailing address of its chief executive office and of any change of address. Upon receipt of process, the [Secretary of State] shall mail a copy of the process to the surviving foreign partnership or limited partnership.

“(c) A partner of the surviving partnership or limited partnership is liable for:

“(1) all obligations of a party to the merger for which the partner was personally liable before the merger;

“(2) all other obligations of the surviving entity incurred before the merger by a party to the merger, but those
obligations may be satisfied only out of the property of that entity; and

“(3) all obligations of the surviving entity incurred after the merger takes effect.

“(d) If the obligations incurred before the merger by a party to the merger are not satisfied out of the property of the surviving partnership or limited partnership, the partners of that party immediately before the effective date of the merger shall contribute to the amount necessary to satisfy that party’s obligation to the surviving entity, in the manner provided in Section 808(c) as if the merged party were dissolved.

“(e) A partner of a party to a merger who does not become a partner of the surviving partnership or limited partnership is dissociated from the entity, of which that partner was a partner, as of the date the merger takes effect. The surviving entity shall cause the partner’s interest in the entity to be purchased under Section 701. The surviving entity is bound under Section 702 by an act of a partner dissociated under this subsection, and the partner is liable under Section 703 for transactions entered into by the surviving entity after the merger takes effect.”

....
COMMISSIONER GARDNER: “SECTION 906. STATEMENT OF MERGER.

“(a) After a merger, the surviving partnership or limited partnership may file a statement that one or more partnerships or limited partnerships have merged into the surviving entity.

“(b) A statement of merger must contain:

“(1) the name of each partnership or limited partnership that is a party to the merger;

“(2) the name of the surviving entity in which the other partnerships or limited partnership were merged; and

“(3) the street address of the surviving entity’s chief executive office and of an office in this State, if any; and

“(4) whether the surviving entity is a partnership or limited partnership.

“(c) Except as provided in subsection (d), for the purposes of Section 302, property of the surviving partnership or limited partnership which before the merger was held in the name of another party to the merger is property held in the name of the surviving entity upon filing a statement of merger.

“(d) For the purposes of Section 302, real property of the surviving partnership or limited partnership which before the merger was held in the name of another party to the merger
is property held in the name as surviving entity upon recording a certified copy of the statement of merger in the office for recording transfers of that real property.

“(e) A filed and, where appropriate, recorded statement of merger, executed and declared to be accurate pursuant to Section 105(e), stating the name of a partnership or limited partnership that is a party to the merger in whose name property was held before the merger and the name of the surviving entity, but not containing all of the other information required for subsection (b), operates with respect to the partnerships or limited partnerships named to the extent provided in subsections (c) and (d).”

CHAIRMAN FRANCK: Seeing no one seeking recognition on this section, we proceed to a reading of Section 907.

COMMISSIONER GARDNER: “SECTION 907. NONEXCLUSIVE. This article is not exclusive. Partners or limited partnerships may be converted or merged in any other manner provided by law.”

CHAIRMAN FRANCK: Seeing no one seeking recognition on that section, we proceed to a reading of Article 10.

In the judgment of the chair, all the sections of Article 10, except 1006, are boilerplate. Without objection, they will not be read. I will ask Commissioner Macey to read Section 1006.
COMMISSIONER MORRIS W. MACEY (Georgia): “SECTION 1006. APPLICATION TO EXISTING RELATIONSHIPS. (a) Except as otherwise provided in this section, this [Act] applies to all partnerships in existence on its effective date that were formed under the [State] Partnership Act or any predecessor statute providing for the formation, operation, and liquidation of partnerships.

“(b) This [Act] does not impair the obligations of a contract existing when the [Act] goes into effect or affect an action or proceeding begun or right accrued before this (Act) takes effect.

“(c) A judgment against a partnership or a partner in an action commenced before the effective date of this [Act] may be enforced in the same manner as a judgment rendered before the effective date of this [Act].”

....

COMMISSIONER PETER F. LANGROCK (Vermont): I’m not quite sure what Section, (b) intends. Is this a separate statutory duty or designation or does it attempt here to put what the constitutional limitations are under the impairment clause, contract impairment clause?

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER H. LANE KNEEDLER, III (Virginia): The latter I believe, Peter.

COMMISSIONER LANGROCK: This bothers me. Using the --
CHAIRMAN FRANCK: We’re going back to the horse.

[Laughter]

COMMISSIONER LANGROCK: Horse obligation. I have a deal now where I can get out of this and I don’t want the horse’s leg broken. I am not a constitutional scholar in terms of this clause at all. I get a different feeling about whether those clauses in the partnership, as I understand it, which have been imposed by law beforehand, are now amended by this act and if that doesn’t fall into the impairment clause. Is there anybody who has taken a serious look at it from a constitutional standpoint and feels competent to give me some advice one way or the other?

MR. DONALD J. WEIDNER (Reporter): I think what we’re doing is providing a default agreement when no other agreement can be proven. And I think the objection that you have in 802 is that you think that it’s basically second guessing the decision of -- you’re saying the default agreement is in contravention of the agreement and an abrogation of the agreement, and yet the assumption of the statute is what we’re really doing is finding the agreement for you when you haven’t made any other agreement.

COMMISSIONER LANGROCK: I think that goes back to my first question. If you read this as saying right now I have a contract under statutory law, the old Partnership Act, which
allows me to deal with a horse, and I have not written into that the provisions of 802 or any of the other provisions. If this says I keep those obligations, that is fine. If it says, no, we’re going to impose under Section (a) all of those, but only subject to constitutional limitations, I think you get a different result. And I certainly want the first one.

COMMISSIONER H. LANE KNEEDLER, III (Virginia):
Commissioner Langrock, I don’t know whether this helps, but if you look at the language on Page 155 in the comment, the excerpt from the ABA report that is there, our attempt was to codify their suggestion, that the revised act doesn’t apply and prior law continues to apply to the extent that the application of the revised art would impair any contract existing at that time. But to make it clear that we’re not intending to impair a contract, but the particular test would be that applied by a court using the impairment of contracts, case law. Now, if that is true, how does that affect -- I mean, maybe that means that we need to review subsection (b). But if that is the intended result, how does that affect your comment?

COMMISSIONER LANGROCK: I guess what it says to me is I had better be a constitutional lawyer and a hell of a lot brighter than I am to deal with a simple partnership problem. And I am wondering whether you would have any resistance to having this brand new concept of a 90-day waiting period take
place only in connection with contracts that are entered into
after the date of the statute.

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER HARRY J. HAYNSWORTH, IV, (Illinois): I
think that we would need to take a look at that. This is a
fairly difficult issue to deal with. Normally the ruling
statutes, like the corporate statutes, when they’re amended, the
normal rule is that they would apply automatically. And if
you’re going to accept something, you need to do so
specifically. So, you are raising the issue. When I went
through it, I looked at it on the basis -- the normal rule is
that it would be exempt unless it created some kind of unfair
surprise or hardship. You’re raising the issue that this could
create an unfair surprise and hardship.

COMMISSIONER LANGROCK: Certainly we could go back to
802, and as it calls for, suggest a limitation that this
provision only applies to future contracts.

COMMISSIONER HAYNSWORTH: I am suggesting that we will
take a look at that.

....

COMMISSIONER EDWARD I. CUTLER (Florida): Before lunch
can I just deal with two minor items?

....
COMMISSIONER CUTLER: ... Going first to subsection (b), which was just discussed, I suggest that the words “does not” should be changed, either “is not intended” or “shall not” or “must not,” whatever.

Then referring back to subsection (a) and a subject I had raised previously, the question is how would this apply to contracts created under the common law before a state had adopted the Uniform Partnership Act, and there are many such partnerships. And I think that the word “formed” on Line 19 would need to be changed, because such common law partnerships were not formed under the prior UPA. Could we say “were governed by”? Would that not accomplish the same purpose?

CHAIRMAN FRANCK: Response from the committee.

The point that is raised is that (a) as now drafted does not refer to partnerships formed under the common law, it excludes them.

COMMISSIONER HARRY J. HAYNSWORTH, IV, (Illinois): It was not intended -- it was intended that it would apply to those that were formed, even if there was no statute

CHAIRMAN FRANCK: Then it’s a matter that the committee formulate language --

COMMISSIONER HAYNSWORTH: Yes. We need to formulate language that takes care of -

....
COMMISSIONER CUTLER: I think the words “were governed by” instead “formed under” would do it. As you pointed out to me previously, the UPA governs previously formed partnerships under the common law. But that does need to be changed one way or the other.

MR. DONALD J. WEIDNER (Reporter): Yes, it does.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER MILLARD H. RUUD (Texas): Referring to subsection (b), contract obviously refers to the partnership agreement. Does it refer to other contract with third parties?

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER RUUD: There may be some changes of liability and so on under contracts made before the act.

COMMISSIONER HARRY J. HAYNSWORTH, IV, (Illinois): The act does not affect [third party agreements]. It specifically says you can’t vary the rights of creditors. And the act itself, the only place that it specifically addressed significant changes in creditors was with respect enforcement of a judgment, and that was the reason for that exception.

COMMISSIONER RUUD: I would suggest to the committee that you strike the words in Line 22 and 23, “impair the obligation of contract existing when the act goes into effect.” I read that provision to mean more than merely preserving the constitutional impairment of contract protections you find in
state and federal constitutions and leave that out, and then the constitutional protection is still there, and you may call it to their attention. I gather in 103(b) there may be some new iron clauses that don’t exist in the present Partnership Act.

CHAIRMAN FRANCK: Commissioner, the committee has already agreed to revisit Section (b), and I assume that they will take your comments into consideration when they do that.

Commissioner.

COMMISSIONER JOHN P. BURTON (New Mexico): The retroactivity of that act is the part that I am going to have the most difficulty getting adopted in my state, and I suspect that most of the Commissioners will. If the committee is wedded to the idea of retroactivity, and I don’t know enough about it to know whether you should be or should not be, notwithstanding the position of the ABA, but if you are wedded to it, please give us some help in the comments as to why this is necessary because that is the section that is going to get a non-uniform amendment in every state, I will guarantee you, unless there is a good reason not to.

Thank you.

CHAIRMAN FRANCK: I think the reference has already been made that the comments here are to help the Conference understand how we got to where we are and that there will be other comments drafted when the act in the black letter is
adopted that will explicate the black letter, and they will take that into consideration.

Commissioner.

COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut): Just in connection with that subject, if the committee wanted to look at an alternative uniform act where this subject of retroactivity has been dealt with in the comments in the Common Interest Ownership Act, there is an opt in provision for preexisting condominiums that might want to take advantage of the new statute, and that might be one place for you to look.

CHAIRMAN FRANCK: Commissioner Kneedler, you have an announcement to make?

COMMISSIONER H. LANE KNEEDLER, III (Virginia): Thank you, Mr. Chairman. Two announcements. First, I want to remind you that copies of the ABA’s letter, the letter from the ad hoc ABA committee on RUPA, letter dated March 17th, on Section 404, on the duties of loyalty, good faith, et cetera, there are copies on the back table. I would encourage those of you who have this particular section as an interest to pick up a copy of that letter and read it. It was very illuminating for us a committee. I hope you would find it to be so as well.

Secondly, we said we were going to meet as a committee, and we are this afternoon, so that those who want to come by and make comments on 404 can. ...
CHAIRMAN FRANCK: Mr. President, the Committee of the Whole rises and reports that it has had under consideration the revised Uniform Partnership Act, has made progress and asks leave to sit again.

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NINTH SESSION
UNIFORM PARTNERSHIP ACT
MONDAY, AUGUST 3, 1992

Mr. Michael Franck of Michigan, presiding.

CHAIRMAN FRANCK: ... We’re now going to go back to consideration of the Uniform Partnership Act and the changes that the committee has made and not made in response to the discussions on the floor.

Let me say to the Committee of the Whole first of all that since the committee left the podium on Friday, they have literally, almost literally spent all of the time between then and now working on these changes to respond to your concerns, to the extent they felt they could, and to make the changes consistent with the existing act.

For the purposes of the reporter and for you, I’m going to ask that the committee and the advisers and all those up here once more so you know where they are and who they are, beginning with my far left.

COMMISSIONER K. KING BURNETT (Maryland): Burnett from Maryland, division chairman.


COMMISSIONER ROBERT H. CORNELL (California): Cornell of California, member of the committee.

COMMISSIONER FRANCIS J. PAVETTI (Connecticut): Pavetti, Connecticut, member of the committee.

COMMISSIONER H. LANE KNEEDLER (Virginia): Kneedler, Virginia, chairman of the committee.

MR. DONALD J. WEIDNER (Reporter): Weidner, Tallahassee, reporter.

MR. JOHN W. LARSON (Reporter): Larson, Florida, assistant reporter.

MR. ED MERRILL (ABA Adviser): “Doc” Merrill, California State Bar.

COMMISSIONER THOMAS L. JONES (Alabama): Tom Jones, Alabama.

COMMISSIONER MORRIS W. MACEY (Georgia): Macey, Georgia.


MR. ALLAN DONN (ABA Adviser): Alan Don, Virginia, ABA representative.

CHAIRMAN FRANCK: Thank you. Now, we have discussed -- I have discussed that with the chair, the manner of presentation that would make the greatest amount of sense and make it more
intelligible for the floor. And we’ve concluded that the best way to do this is for the chair to advise you of their deliberations with respect to each article, article by article, and to read, then, the changes within that article that are in the materials that have been distributed to you. And once we’ve completed an article, we will then go on to the next article and all the way through until we reach the end of the act.

So, Mr. Chair, will you proceed to discuss the committee’s deliberations on Article 1.

COMMISSIONER H. LANE KNEEDLER (Virginia): One minute, Mr. Chairman.

CHAIRMAN FRANCK: The committee chair has just asked me, and I want to advise you, I have authorized the reading of only the pertinent changes where they appear. However, any commissioner who feels that there’s a need to read portions of a section in which a change appears other than those portions where that change actually appears, we will do that as a matter of right upon the request of any commissioner.

....

COMMISSIONER KNEEDLER: Thank you, Mr. Chairman. Before we begin, I also want to say thank you to Corrine Svoboda and Susan Bileoux, who is Bion Gregory’s secretary, for the terrific job they did late last night and early this morning putting the finishing touches on this document. So, Corrine and
Susan, thank you very much. We wouldn’t be here without that hard work. We appreciate it.

Section 101. What I’m first going to do in a section where we made changes, I’ll tell you what they were briefly. If there are other things that we didn’t do, I’ll mention them as well.

101, Page 1 of the handout, Amendment 1, Line 14, we added “federal or” to take care of the question that came up from the floor of what if the bankruptcy was under some special bankruptcy rules other than Title 11, so we made it a comparable order under federal or state law.

The amendment at the bottom of the page, deleting subsection (4) was read to you previously when we appeared on the first.

The other changes on Page 2 are renumbering of the subsections now, that Paragraph 4 of the definition of partnership is removed, down to Line 25 on Page 2, “any of” is added. That’s merely a technical amendment.

With regard to items that we considered and did not.

....

COMMISSIONER KNEEDLER: There were several things that we reviewed and decided not to address. One had to do with, in the definition of partnership agreement on Page 2 of the amendment, Line 1. Apparently there was some discussion at the
floor before I arrived about a reference to course of dealing or
course of performance. There will be a reference to them in the
comment, making it clear that that’s a method of proving the
agreement, but we did not want it in the definition of the
agreement.

Several times towards the end of the act issues were
raised with regard to the use of the term “judicial decree,” a
question about whether we ought to use judgment. And we will
have in the comment and make it clear, we’re not going to define
judicial decree, or we would prefer not to. We will make it
clear that judicial decree includes an arbitration award, and
also we will address the issue of whether the judgment has to be
final or not. And it was our judgment that that’s a matter of
other state law.

With regard to the definition of person, we will make
it clear in the comment that that includes limited liability
companies.

And finally, with regard to whether we needed a
definition of writing so as to respond to new technological
changes, we will make that clear in the comment. For example,
whether electronic documents or electronic conveyances are
permissible, that that’s a matter of other state law.

That’s it, Mr. Chairman.

....
COMMISSIONER PATRICIA FRY (North Dakota): Yes.

Friday of North Dakota. In subsection (3) on distribution, I pointed out at our earlier discussion of this that the language in the partner’s capacity as a partner could have an unfortunate meaning given the fact that that language is frequently used to indicate fiduciary’s taking on behalf of a beneficiary.

I think that changing the word “in” to “on account of” the partner’s capacity as a partner would handle it, but it is clear from your provisions on distribution elsewhere in the statute that this is that partner’s distributive share and they’re not taking it to hold for the partnership.

I’d like the committee to change that word “in” and be interested in the response of the committee.

CHAIRMAN FRANCK: Response from the committee. Does the committee know exactly where this change is going?

COMMISSIONER KNEEDLER: I assume, Mr. Chairman, this is on Page 1, Line 17, the word “in.”

COMMISSIONER FRY: That’s correct.

CHAIRMAN FRANCK: Give them a minute to talk it over. The committee says they have looked at it. They indicate they’re not willing to make that change. So, if you want to pursue it, Commissioner, would you make a motion.

COMMISSIONER FRY: So moved.
CHAIRMAN FRANCK: The motion -- state the motion, please.

COMMISSIONER FRY: The motion in subparagraph (3) of Section 101 on Line 17 is to change the word “in” to the phrase “on account of.”

CHAIRMAN FRANCK: The motion is in Section 101, Line 17 of the revised materials, to strike the word “in” and to substitute the words “on account.”

COMMISSIONER FRY: “On account of.”


COMMISSIONER FRY: I think I did. I’m concerned that the language can be misconstrued to hold that the distribution goes to the partner as some sort of fiduciary for the entity, and I don’t believe that was the sense that the committee intended at all.

Therefore, my motion is designed, I hope, simply to clarify the committee’s intent with respect to that definition.

CHAIRMAN FRANCK: The committee did not agree to accept that change. May we have a response from the committee as to why they resist that change.

MR. DONALD WEIDNER (Reporter): The basic concept is a very old one. It goes back to at least the 1840’s, and the essence is the hat the individual is wearing. He’s either
acting in his or her capacity as a partner or in some other
capacity, and you wouldn’t say one is acting -- you could say
one is acting on account of his own capacity. So it’s not a new
concept with us, and I guess we’re hesitant to involve it
without thinking it through the accounting rules that we have in
here.

CHAIRMAN FRANCK: Seeing no one else seeking
recognition on the motion, you have the right to close,
Commissioner.

COMMISSIONER FRY: Thank you. And I must say I’m not
terribly wedded to my language so much as to the idea. My
concern is, as I indicated before, that the sections in which
the word “distribution” is used indicate that the partner is
receiving the partner’s distributive share after a dissolution
or even without a dissolution shares that go to the partner that
are that individual’s.

I understood from the comments of the committee at our
prior session that they wanted to make it clear that these
things are going to the partner not as a result of perhaps the
partner having made a loan to the entity by way of salary or
anything else like that. I believe that the language that is
used, particularly in a court accustomed to using phrasing
dealing with somebody’s capacity as a fiduciary might have the
very unfortunate and unintended meaning, and therefore my motion
is designed to come up with language that will make quite clear to people as specialists or not in the partnership field in the future that this is a distributive share.

CHAIRMAN FRANCK: The motion before the house is on, Line 17, Page 1 of the sheets distributed this afternoon, to strike the word “in” in Line 17 and to substitute for the word “in” the words “on account of.”

As many as are in favor of the motion, please say “aye.”

As many who are opposed, please say “nay.”

The “nays” appear to have it, the “nays” do have it, the motion is defeated.

....

COMMISSIONER H. LANE KNEEDLER (Virginia): Thank you, Mr. Chairman. The next change is in Section 102. It appears at the bottom of Page 4, Line 25, adding the words “who received the notice.” That was a suggestion received from the floor and is merely added for clarifying purposes.

One thing we addressed and did not include in this section, however, we did address it later, we were asked to comment on whether a filed statement was constructive notice. If you will wait until 303(f) you’ll see we address that issue in 303(f).

....
COMMISSIONER KNEEDLER: Mr. Chairman, the changes for 103 appear on Page 5 of the amendments, Lines 18 through 24. They are new. You haven’t seen them in the prior reading. They result from the floor discussion, and it’s an effort to respond to concerns expressed by the floor with regard to excluding certain fiduciary duties from the partnership agreement.

I would like to ask that we wait until we get to 404 for the details, but this does set forth those parts of the partnership agreement that are nonwaiveable.

CHAIRMAN FRANCK: Do you want to read those changes, please? Read those sections. I’d like you to read those sections.

....

COMMISSIONER KNEEDLER: Page 5, Line 12. “(b) A partnership agreement may not:” -- Line 18, (3), “eliminate the duty of loyalty under Section 404(b); “(4) limit the liability of a partner for intentional misconduct or knowing violation of law under Section(d); (5) eliminate the obligation of good faith and fair dealing under Section 404(e).”

CHAIRMAN FRANCK: I will accept comments at this point. However, if some of you want to wait until we get to Section 404, you will not, by waiting until then, have lost your right to comment on Section 103.

Commissioner.
COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut): Commissioner, I would move to amend 103(b)(4) on Line 20 to make it clear that the partnership agreement may not limit the liability of a partner for gross negligence or reckless conduct.

This ties in with the language on Page 20 and 21 of the amendments in which the partner’s duty of care under the draft is limited to gross negligence or reckless conduct, intentional misconduct or knowing violation of law. And the effect of the two, it seems to me in my reading is to permit the partnership agreement to limit the liability of a partner who is grossly negligent or who engages in reckless conduct.

CHAIRMAN FRANCK: Commissioner, let me restate your motion to be sure that I understand it and the floor understands it. I understand your motion to be that at the end of Line 20 on Page 5, we insert the words “gross negligence,” comma, excuse me, “gross negligence or reckless conduct,” comma, so that sub (4), if the motion carries, would read: Limit the liability of a partner for gross negligence or reckless -- for grossly negligent, I suppose it should be --

MR. DONALD WEIDNER (Reporter): Mr. Chairman.

CHAIRMAN FRANCK: Yes.

MR. WEIDNER: I think the easiest way to express the intent of his amendment would be simply to say: Limit the liability of a partner under Section 404(d).
CHAIRMAN FRANCK: Is that acceptable to you, Commissioner.

COMMISSIONER BREETZ: That would be acceptable to me.

CHAIRMAN FRANCK: But the thrust of the amendment is to bring in gross negligence and reckless conduct.

COMMISSIONER BREETZ: That’s correct.

....

COMMISSIONER H. LANE KNEEDLER (Virginia): Mr. Chairman, it could just be: Limit the liability of a partner under Section 404(d).

CHAIRMAN FRANCK: All right. Limit the liability of a partner under Section 404(d).

Does everyone understand the motion? You’ve spoken to your motion already. The committee does not accept that motion, I assume?

COMMISSIONER KNEEDLER: No we do not, and I wonder if the commissioner would be willing to postpone that motion with no prejudice until we got to 404 because I have a feeling we’re going to have a number of questions on that. It seems to me that it is more appropriate to deal with that issue there.

COMMISSIONER BREETZ: Fine.

CHAIRMAN FRANCK: The motion is withdrawn for now. It will be renewed when we get to Section 404.
Seeing no one seeking recognition, we proceed to Section 105.

COMMISSIONER KNEEDLER: Mr. Chairman, the major change in 105, which is amendment No. 4 appearing on Pages 6 and 7 of the handout, is 105(b). 105(b) responds to a comment made from the floor. Old Section 105 said that only certified copies could be filed. We were told, and I think rightly so, that you probably can’t limit what the recorder records, tell the what to file or not file, so we have dealt now in this rewritten section on the effect of a recorded statement not being certified.

The amendment at the bottom of the page, Line 23, was a suggestion from the floor, a clarifying amendment. The amendments on Line 25, 26 were read to you previously.

....

COMMISSIONER KNEEDLER: Article 2. The first change is in Section 202, Page 8 of the amendments, subsection (a). The change was read previously. Subsection (b), any predecessor law, I believe it said “predecessor statute” before, was to respond to a comment to the floor to make sure that we picked up prior law, not just the UPA, but the common law as well.

Subsection (c)(3) on Page 9. A suggestion was made with regard to prima facie evidence. We decided after some discussion not to change that particular statute. We had changed the whole thing in an earlier draft and received quite a
bit of criticism, not just on prima facie evidence, but on a number of points both from the floor and from outside commentators, so the committee decided to leave it alone. Prima facie evidence may be a little outdated, but it certainly is language used in much case law and many state statutes.

The other item is subsection (e), is new language and our response to a suggestion we received from Judge Burdick that we make it clear that this act deals with general partnerships and general partners.

CHAIRMAN FRANCK: Comments on Section 202. Commissioner.

COMMISSIONER BRUCE A. COGGESHALL (Maine): On Line 15 on Page 8, the term "any predecessor law," does that mean any predecessor law of this state or of this or any other state?

CHAIRMAN FRANCK: Response from the committee?

COMMISSIONER KNEEDLER: You’re suggesting that we ought to change statute to law on 13. I think predecessor law means of this state, and of the comparable, it ought to be law rather than statute in Line 13, which would take care of your concern, right?

COMMISSIONER COGGESHALL: Correct.

COMMISSIONER KNEEDLER: I’m sorry. 16.

COMMISSIONER COGGESHALL: Or say "any comparable statute or predecessor law of another jurisdiction." Either way.
CHAIRMAN FRANCK: What’s the committee’s preference?

COMMISSIONER KNEEDLER: Commissioner, we would accept that, deleting “a,” the word “a” on Line 15 and change “statute” to “law” on 16.

CHAIRMAN FRANCK: All right. Would you read sub (b) as it will now appear as the committee has accepted it so the floor can digest that and make any comments they want to.

COMMISSIONER KNEEDLER: 202(b) would read: An association created under a statute other than this [Act], any predecessor law, or comparable law of another jurisdiction is not a partnership.

....

COMMISSIONER KNEEDLER: Article 3, Section 301, beginning on Page 10 of the handout. The only change is on Page 11, Line 2, striking “all of.” And that was a stylistic point.

....

COMMISSIONER KNEEDLER: Section 302, beginning on Page 11 of the handout, the only change was a suggestion made from the floor to delete “even,” the word “even” on Line 16.

We also were asked to look at whether the reference to Section 303 on Line 7 should be to 303(d) and (e). We considered that suggestion and decided that the words “subject to the effect of” on Line 6, and Amendment 7 on Page 11 of the handout, picked up (d) and (e), and we were not clear whether...
damage would be done in some other way if we specified (d) and (e) in the introductory phrase.

CHAIRMAN FRANCK: So you kept it the same.

COMMISSIONER KNEEDLER: Kept it the same.

....

COMMISSIONER KNEEDLER: Mr. Chairman, first addressing -- this is Section 303, beginning on Page 12 of the handout. There are several changes.

The change on Page 13, Line 16 and 17, was a suggestion, I believe, made from the floor. The change on Line 20 was to pick up -- we had an incorrect reference -- was to correct it to 105(c).

The change on Line 23 was made from the floor.

The change on Lines 25 and 26 is to pick up the new subsection (f) I’m going to mention in just a moment.

Moving to subsection (f) on Page 15. Subsection (f) is a new section. It states affirmatively that filing is not a constructive notice except for the statement of dissociation or the statement of dissolution, and then only to the extent set forth in Sections 704 and 806, and effectively that means it’s effective after 90 days.

Mr. Chairman, if I may mention a couple of things that we addressed but did not respond to in the statute.
First with regard to, on subsection 303(d)(1) that appears on Page 14, and specifically at Line 6, we are asked about “gives value,” whether we would add “or enters into a legally binding commitment to give value.” We said we would include that in a comment, and I just wanted to assure the commissioner we looked at it again and think it’s more appropriate in the comment.

We were asked to look at the five years in what is now 303(g) on Page 15. Our answer is that the time limit selected, five years, is to parallel the life of financing statements.

Mr. Chairman, there was a change that was to have been made that I am just told was not picked up. On Page 13, Lines 3 and 4, the original language was to be reinserted, so it would read: 303(a). A partnership may file a statement of partnership authority which: (1) must include: (iii) the names and mailing addresses of all the partners or of an agent appointed and maintained.

CHAIRMAN FRANCK: That parallels the reference in sub (b) below.

COMMISSIONER KNEEDLER: That’s correct.

COMMISSIONER DONALD JOE WILLIS (Oregon): Thinking as a trial lawyer, who may have to try one of these things, what happens if you’ve got a limitation of authority filed and because of the sophistication of the person you’re trying to
show has actual knowledge of that limitation from any source, does this effectively preclude you from proving, amongst other things, that person actually knew of the filing requirement, actually had repeatedly, you know, gone to the secretary to look at filings on limitations?

Is it that type? That kind of concerns me, that you may have --

CHAIRMAN FRANCK: Let’s get a response from the committee.

MR. DONALD WEIDNER (Reporter): No. The person who has actual knowledge of the certificate is bound by that actual knowledge.

COMMISSIONER WILLIS: Okay. But perhaps -- what if a person just becomes consciously ignorant of inquiring? I’m positing this. Could you show -- I mean, would it never be admissible to simply show the filing and then show that you’re talking about a person who may be a lawyer who has a very high knowledge of practice in this area, has repeatedly checked and had people read to them or get copies of these certificates and they just remain consciously ignorant? Can you just -- would that be admissible at all to try to show knowledge?

CHAIRMAN FRANCK: The response from the committee.

MR. ED MERRILL (ABA): No.
COMMISSIONER WILLIS: It seems you may want to say simply by the act of filing is not itself sufficient to put him on the notice.

CHAIRMAN FRANCK: Give the committee a chance to think about this. Somebody from the committee, please.

MR. DONALD WEIDNER (Reporter): New Section F at Page 15 of your handout is intended to express that result.

COMMISSIONER WILLIS: It would not be admissible?

MR. WEIDNER: Where we say “except as provided in subsection (e), “which is the subsection that gives effect to the statement, “a person not a partner is not deemed to know of a limitation on the authority contained in this statement.”

MR. ED MERRILL (ABA): I think I can help here, too.

CHAIRMAN FRANCK: Please state your name.

MR. MERRILL: Merrill. Sorry. If you look at 301, which is the general exception to the apparent authority rule, that exception applies in two cases, which were clearly and carefully chosen. One is to know, which is actual cognitive awareness, which I believe your example said the person did not have. The other case is receive notice, which in the definition is a defined term, which means a notice has been delivered to the person’s place of address where he carries out business.

So, if I understand your question properly, the guy is really a dufus and should have really known, but he didn’t --
COMMISSIONER DONALD JOE WILLIS (Oregon): No, that’s not the example. I’m talking about the guy who is exceptionally sophisticated, has a very high suspicion that there is no authority, and he knows he can check there because he does it every day, and refuses to do it because he may think he’s got you or something. That’s the problem.

MR. MERRILL: We have tried -- because that is such a difficult proof question, we have drawn the line that you must establish cognitive awareness or delivery of the notice, actual delivery of the notice to undercut apparent authority.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut): I have a related concern. One of the changes that you made in Section 105(b) is to state that a recorded statement on the land records that’s not certified doesn’t have the effect provided for recorded statements in the act.

When I read that in conjunction with your new sub (f), I think I’m following up on the prior commissioner’s thoughts, if someone had actual knowledge, because he looked at the land records, of a limitation on authority, but because of a glitch, it wasn’t certified, I read (f) to say you can’t charge that person with knowledge, even if he has actual knowledge, because, (f) says, a person not a partner is not deemed to know, and
you’ve got 105 that says if it’s not certified, it doesn’t have the effect.

    It seems to me that you couldn’t possibly intend that outcome.

CHAIRMAN FRANCK: Let’s get a response from the committee.

MR. DONALD WEIDNER (Reporter): The new language in 105 provides that if it is not first recorded with the -- filed with the Secretary of State and if a certified copy is not then filed with the land records, that the operative provisions of Section 303 will not take effect. That is not the same as saying that the person would not be bound by actual knowledge. Our rule is that the person who has actual knowledge of that instrument is bound by it.

COMMISSIONER BREETZ: Is the committee willing to put a comment into the section to make clear that actual knowledge always overrides?

CHAIRMAN FRANCK: They indicate they’re willing to do that.

MR. ED MERRILL (ABA): That appears in 303 -

....

COMMISSIONER EUGENE A. BURDICK (North Dakota): I’d like to go back to 302 for just a moment, Page 11, Line 16. You struck the word “even” and left the remainder of that clause.
I don’t understand the purpose of the remainder of the clause that you’ve left in. Does this mean that the paragraph applies to --

CHAIRMAN FRANCK: I’m sorry. Commissioner, would you repeat where you’re at, please.

COMMISSIONER BURDICK: Page 11, Line 16.

CHAIRMAN FRANCK: Yes.

COMMISSIONER BURDICK: Does this mean that the provision applies only if the name of the partnership is not shown or is not indicated? It seems to me that the entire clause ought to go if you’re going to drop the word “even.”

MR. WEIDNER: The change was made because at our -- I believe at our last session, Commissioner Coggeshall pointed out that if the name of the partnership is indicated, then you can have a -- then, by definition, earlier definition, it is property held in the name of the partnership.

And so we deleted the reference to the word “even” so that now the property that is defined in this subsection has a state of title in which the name of the partnership is not indicated so that it is not in the name of the partnership.

COMMISSIONER BURDICK: Well, it’s still in the name -- it may be in the name of the individual partners, but they mention in there somewhere that it’s the XYZ partnership. You
still want to give them the authority, even though it’s mentioned.

MR. ED MERRILL (ABA): Well, the authority is provided --

CHAIRMAN FRANCK: Please state your name.

MR. MERRILL: Merrill. The authority to convey is provided in that case where the XYZ partnership name is mentioned in (a)(1). Okay? And it can be conveyed --

COMMISSIONER BURDICK: No. That’s where it’s held in the name of the partnership.

MR. MERRILL: But the definition of “held in the name of the partnership” includes to -- Joe and Harry as the XYZ partnership. That is one of the clarifications of the act.

MR. WEIDNER: Commissioner, Section 204(b) defines when property is held, quote, in the name of the partnership. And because of the reaction on this floor last year, we expanded that concept to include a conveyance in which there is simply an allusion to the name of the partnership.

COMMISSIONER BURDICK: So now your position is that this paragraph applies only if the name of the partnership is not indicated, is that right?

MR. WEIDNER: Yes.

COMMISSIONER FRANK W. DAYKIN (Nevada): On Page 14 at Line 6, the committee just assured us that a comment to the
effect that a binding commitment to give value would be the equivalent of giving value is sufficient.

I have less faith than the committee in the efficacy of a comment. I asked the best authority that I could find quickly, the Uniform Commercial Code. For this act does not define giving value or the like, therefore I assume we fall back on the Uniform Commercial Code, and that authority was in some doubt as to the truth of that statement. Couldn’t say it was wrong, couldn’t say with certainty that it was right.

And so, as Oliver Cromwell once said to the bishops of the church of Scotland, I beseech you to be bethink you that yee may be wrong.

CHAIRMAN FRANCK: Thank you, Commissioner.

Commissioner.

MR. DONALD WEIDNER (Reporter): How can you resist that?

COMMISSIONER SANDRA S. STERN (New York): I’d like to reiterate what has been said about subparagraph (f). The conception problem I’m having with it is that historically record notice has always functioned as constructive notice. And what we’re saying here, if I understand it correctly, is that it is neither actual knowledge nor a notice, neither does it have any effect upon one who should have looked but didn’t. And I’m wondering if courts will not read some purpose into this that we
don’t see now, and further wondering if some consideration has been given or might be given to some process whereby the partnership can do what you would do if there was a cloud on title, something to remove the cloud on the line of authority so that if a partner wishes to file statements that will bring the -- bring activity to a halt, that the partnership can resume again.

Perhaps it could file another partnership certificate, but then after that point, there would always be a question of, did the partners who filed this really have authority to file it?

CHAIRMAN FRANCK: Response from the committee, although any suggestion the committee might be willing to accept, they’ll have to accept now because this act will not come before the Conference again.

Response from the committee.

....

MR. MERRILL: I’m sorry. Merrill. I’m not sure I understood all of your question, but basically we’ve had a choice of protecting the creditor or protecting the partners against bad acts of their own partners. We have adopted one on the committee we have called the “know your partner” rule, which is generally, we have favored the creditor. And that is the reason that we have gone for a bright line test of limitation on
authority in Section 301. So that if -- we are not putting the creditor to the burden of should have known of the limitation. Is that responsive?

COMMISSIONER SANDRA S. STERN (New York): No. I’m speaking here really of protecting the partnership. That is, if there is any question about it, a limitation on authority, even though it says here, as I understand it, that it is not constructive notice, somehow I think that the doubt will paralyze the ability of the corporation to move and to enter into significant transactions. Nobody is going to want to take that risk if there is any doubt.

CHAIRMAN FRANCK: Further response from the committee? Well, Commissioner, they apparently have no response at the moment.

Do you have a motion to make on this point?

COMMISSIONER STERN: No. I don’t think I do.

CHAIRMAN FRANCK: I’m sorry.

COMMISSIONER STERN: No. I don’t think I do.

CHAIRMAN FRANCK: I’m going to recognize --

MR. DONALD WEIDNER (Reporter): Commissioner.

CHAIRMAN FRANCK: Just one second. Are you going to answer this last comment?

MR. WEIDNER: Yes.

CHAIRMAN FRANCK: Please do. This is the reporter.
MR. WEIDNER: I’m sorry. Weidner. I’m wondering if I can see if I understand the sense of your motion. Would it be addressed if we said in (f) except as provided in subsection (e) and Section 704 and 806, comma, and then leave the text that you have and insert in lieu thereof: The mere filing of a statement containing a limitation on the authority of partner does not constitute constructive notice to a person not a partner.

COMMISSIONER SANDRA S. STERN (New York): Yes, that’s much clearer to me. Yes.

CHAIRMAN FRANCK: Would that solve your problem, is the question, Commissioner.

COMMISSIONER STERN: Yes, I think so.

CHAIRMAN FRANCK: Okay. Is the committee willing to accept that language?

MR. WEIDNER: Can we consult?

CHAIRMAN FRANCK: Yes, your can consult for a moment, sure.

We’re going to give the committee a few minutes to think this over.

COMMISSIONER DONALD JOE WILLIS (Oregon): Mr. Chair?

CHAIRMAN FRANCK: Commissioner Willis.

COMMISSIONER WILLIS: While the committee is huddling --
CHAIRMAN FRANCK: I don’t think while they’re up here doing something else, any comment you make now they’re not going to hear it. Let’s just hold it for just one minute. They think they’re solving one of the problems you raised as well.

COMMISSIONER WILLIS: Subject to getting that done, I have a motion to make to help with some language to see if they like that better.

CHAIRMAN FRANCK: Will the committee tell me where they are now at this point on this issue.

All right. The committee hasn’t agreed yet.

Commissioner Willis has a motion on this point?

COMMISSIONER WILLIS: Yes. What the committee suggested sounds like it would probably solve the problem, and I couldn’t keep up with the language that quickly.

The motion I would make and I ask the committee to consider is this, and that’s on Line 8, after the word “partner,” add these words, “merely because it is” -- “is” -- then go on with the text -- “contained a the file statement.”

CHAIRMAN FRANCK: Merely because it is what?

COMMISSIONER WILLIS: Merely because the limitation is, and then go ahead with the word “contained” as is in the text, so Line 8 would read: Partner merely because the limitation is contained in a filed statement.
That language might work a little better than the language you were talking about because it avoids the use of constructive notice in the statute.

CHAIRMAN FRANCK: All right. Let me ask the members of the committee to please sit down for just a minute and to stop conferring and to listen to Commissioner Willis’ motion which he is suggesting as an alternative solution to the problem before us.

Will you repeat your motion, please?

COMMISSIONER WILLIS: Yes. The motion is, on Line 8, after the word “partner,” to add the words “merely because the limitation is,” then go ahead with the text as is, “contained in a filed statement.” That entire line would then read: Partner merely because the limitation is contained in a filed statement.

CHAIRMAN FRANCK: Commissioner, would that solve your problem?

COMMISSIONER SANDRA S. STERN (New York): Is there a reason not to use the words “constructive notice”?

[Committee responds “Yes, yes”]

COMMISSIONER STERN: Because they are not defined?

CHAIRMAN FRANCK: The committee has stayed away from that term.

COMMISSIONER H. LANE KNEEDLER (Virginia): We have studiously avoided the term “constructive notice.” If you look
at the definition of notice, the way we have defined notice includes concept of constructive notice, but we want very much to avoid the use of the term.

CHAIRMAN FRANCK: So, would the substance of your concern be solved by the acceptance of this motion?

COMMISSIONER STERN: Yes, I think so.

CHAIRMAN FRANCK: All right. And the committee accepts that formulation?

All right. Then, again, to repeat, the change in (f) is on Line 8, Page 15, after the word “partner,” you insert the words “merely because the limitation is,” and then continue with the line as it is printed.

Are there further comments on this section?

Seeing no one seeking recognition, we proceed to Section 304.

COMMISSIONER H. LANE KNEEDLER (Virginia): Thank you.

CHAIRMAN FRANCK: Thank you, Commissioners.

COMMISSIONER KNEEDLER: Section 304, Page 15 of your handout, beginning at Line 16. The new language is on Lines 18 and 19 and is a suggestion made from the floor. No further comments.

....
COMMISSIONER KNEEDLER: Section 307 begins on Page 16, Line 3. The change in the title was a suggestion made from the floor.

The change on Line 8, Page 17, was a committee change that was read previously. And the change on Line 12 was a suggestion made from the floor.

Mr. Chairman, one thing that we were asked to think about is in Section 307(d)(2), at the bottom of Page 16, the question was whether there ought to be references to other than Title 11 of the United States Bankruptcy Code. We looked at that. In our judgment, a partnership is an entity and would be treated under Title 11. The feeling was that no further reference is needed.

CHAIRMAN FRANCK: Seeing no one seeking recognition, we proceed to the changes in Section 308.

COMMISSIONER KNEEDLER: 308, beginning at the bottom of Page 17. The change on Line 23, deleting “spoken or written,” was in response to the floor comment about new technology. Also, my earlier comment about the comment on writing will include in new technology is to remain here.

On Page 18, the changes on both Line 4 and Line 23 were suggestions that were made from the floor to change it from “gives credit” to “enters into a transaction,” which obviously is broader and gives greater protection to third parties.
The change on Line 17 was a committee change that was made during our deliberations today. It comes from the existing Uniform Partnership Act.

The change on Page 19, Line 11, changing “reflect” to “indicate,” was a suggestion made from the floor.

CHAIRMAN FRANCK: Okay. There’s a change on Line 23 on Page 18.

COMMISSIONER KNEEDLER: I mentioned that one, Mr. Chairman. The one on Line 4 and Line 23 are the same, to change “give credit” to “enters into a transaction,” providing further protection for third parties.

CHAIRMAN FRANCK: And the change on Line 1 on Page 19 is a style change?

COMMISSIONER KNEEDLER: The change in Line 1, Page 19 is a style change, yes, sir.

CHAIRMAN FRANCK: Seeing no one seeking recognition, we proceed to a consideration -- well, are there any matters you want to bring to the attention of the Conference with regard to Article 3?

COMMISSIONER KNEEDLER: Yes, Mr. Chairman. With regard to Section 309, liability of incoming partner, it was suggested that we rewrite this section to make it clear that the new partner is not really liable, since he is liable only to the extent of his -- he is liable only to the extent of his interest
in the partnership. We did look at rewriting it, decided ultimately not to. What we decided what we wanted to do is to keep the old Uniform Partnership Act structure and the case law that’s gone on along with it.

CHAIRMAN FRANCK: Thank you. Seeing no one seeking recognition on that point, we proceed to Article 4.

COMMISSIONER KNEEDLER: Mr. Chairman, the first section I want to comment on is Section 403. It’s not in the amendment sheets. We have no change to offer, but we were asked about the treatment of a dissociated partner under 403, and we just want to make it clear, as I think we said, but we couldn’t remember, on the floor previously, that we’ll put in a comment that a dissociated partner is treated as a partner, not former partner for the purposes of this section.

CHAIRMAN FRANCK: We proceed to Section 404, which is the section which has -- to which Section 103, which we to some extent passed over before, is relevant.

COMMISSIONER KNEEDLER: Correct. And Commissioner Breetz’ motion would be germane at this point. I would suggest that we finish our discussion of the substance and then see what it is that we want to waive or not waive.

Section 404, beginning on Page 19, general standards of partners conduct. The first thing we did, at the bottom of
that page, Lines 19 to 21, were deleted in response to a suggestion made from the floor on.

On page 20, the “or appropriation” is new from the committee’s deliberation.

The changes on Lines 8 and 9 are new, to make it clear when it is that this duty applies.

The same is true with the change on line 13. Note the differences there. And we wanted to make it clear that this duty to refrain from competing does not apply during the wind-up stage. And again I’ll refer you to 603, which we’ll get to in a moment, that addresses that more directly.

The changes to subsection (c), Line 16 to 20, are merely a different way of saying the same thing. They can identify the specific types or categories of activities that do not violate the duty of loyalty. There was the feeling that using the term from being breaches was awkward, so we changed it.

Subsection (d) deals with the duty of care. It was suggested that we try not to write it in the negative. I believe Commissioner Perlman made that suggestion, or someone did, in any event. We think the way it is now written is better than it was before, but as I’m sure Commissioner Breetz will suggest to us, the hierarchy is this, that as it is now written, there is no duty not to be negligent. There is a duty not to be
grossly negligent, reckless, to engage in intentional conduct or knowing violation of law. When it gets to the waiver provision, we say that you can waive gross negligence but you can’t waive recklessness, intentional conduct or knowing violation of the law.

[Chorus of “noes” from the committee]

COMMISSIONER H. LANE KNEEDLER (Virginia): I’m sorry. Waive gross negligence and recklessness but not intentional misconduct or knowing violation of the law. And I’m sure we’ll come back to that hierarchy in a moment.

On (e), we added on lines -- Page 21, Lines 6 and 7, “fairly and” -- “exercise any rights fairly and in good faith.” And then the next line, the obligation of good faith and fair dealing, we don’t intend any separate concept. If we’re going to have the concept of good faith and fair dealing in Line 7, we thought we needed to use the word “fairly” in Line 6.

And then on Lines 15 and 18, we changed -- this is a stylistic matter -- “loan and loans” to “lend and lends.”

That’s the only comments, Mr. Chairman.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER DAVID S. WALKER (Iowa): I would like to address 404(d).

CHAIRMAN FRANCK: “D” as in dog?
COMMISSIONER WALKER: 404(d). Do you want to take it in order and go back to (a)?

CHAIRMAN FRANCK: No. I wanted to make sure what we were talking about.

COMMISSIONER WALKER: I want to make a motion -- I know my motion has been previously considered and rejected by the committee. If I might speak briefly to the floor in advance of the motion. I am concerned --

CHAIRMAN FRANCK: I prefer that you state the motion and then speak to the motion.

COMMISSIONER WALKER: The motion would be to amend 404(d) in a way that would state positive content for the duty of care.

The motion is this. 404(d). In the management and conduct of the partnership business, partner’s duty of care to the partnership and the other partners requires the partner to act, sub (1), with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and sub (2), in a manner the partner reasonably believes to be in the best interest of the partnership.

Continuing with the motion. A partner shall not be held liable for violation of the duty of care unless the partner’s action or failure to take action constitutes gross
negligence, recklessness, intentional misconduct, or knowing violation of law.

My reasons for making this motion --

CHAIRMAN FRANCK: Okay. Do you have that motion in writing?

COMMISSIONER WALKER: I do and I have submitted it to the committee before.

CHAIRMAN FRANCK: Okay.

COMMISSIONER WALKER: The language relies upon the Model Business Corporation Act adopted nearly 25 years ago by the American Bar Association’s Corporate Banking and Business Section. It has been enacted in the revised Model Business Corporation Act. There isn’t a business statute of which I am aware in the last 25 years that hasn’t given positive content to the duty of care.

Most recently, the American Law Institute just two and a half months ago capped ten years of study, reviving and relying upon affirmative language to express the duty of care.

I am concerned that we will be seeing -- the Conference will be viewed as having repudiated language with which lawyers and business people and courts have been familiar and which we have been using for a quarter of a century and to cast the duty of care in only a negative fashion.
I believe the Conference language will be seen as crabbed, negative, and reactionary. I think this is language with which we are all familiar, the content of which does not vary from what I understand the committee’s intention to be, which is, one, to protect the business judgment of partners, and two, not to make one liable for what could be construed as ordinary negligence.

I don’t think this is mischievous or loose language. I think it gives positive content. And I don’t believe that the Conference ought to go on record as stating the duty of care in only this negative, fearful language, which is, frankly, expressing to me a fear of what courts might do with language that they have been applying and lawyers have been working with for a quarter of a century.

CHAIRMAN FRANCK: Thank you, Commissioner. The chair is laboring under the same disability as the Conference is. We don’t have a copy of the motion. I’d like to have that before I ask the committee for a response.

COMMISSIONER WALKER: I gave it to Chairman Kneedler yesterday at the morning session.

A COMMISSIONER: Read it again, would you?

CHAIRMAN FRANCK: That’s what I intend to do. The motion, if I have the correct portion of this document before me, would be to change (d) in its entirety to read and I’ll do
this once quickly and then give you a chance the second time to take it down, but I want you to have the sense of the thing.

In the management and conduct of the partnership business, a partner’s duty of care to the partnership and the other partners requires the partner to act, sub (1), with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and sub (2), in a manner the partner reasonably believes to be in the best interest of the partnership.

Paragraph. A partner shall not be held liable for violation of the duty of care unless the partner’s action or failure to take action constitutes gross negligence, recklessness, intentional misconduct, or a knowing violation of law.

I will now read it more slowly so that you can take it down.

This is an important issue, and I think you ought to have the language before you before you hear the committee’s response.

This is (d). In the management and conduct of the partnership business, a partner’s duty of care to the partnership and the other partners requires the partner to act, colon, sub (1), with the care an ordinarily prudent person in a like position would exercise under similar circumstances,
semicolon, and sub (2), in a manner the partner reasonably believes to be in the best interest of the partnership, period.

Then paragraph, returning to the text of the section. A partner shall not be held liable for violation of the duty of care unless the partner’s action or failure to take action constitutes gross negligence, recklessness, intentional misconduct, or knowing violation of law.

That is the motion before the house. I will ask the committee to respond to the motion which it has previously considered and rejected.

COMMISSIONER H. LANE KNEEDLER (Virginia): Mr. Chairman, I first want to say at the outset, make a couple of comments, then I’m going to ask our reporter, Don Weidner, to respond, and then Harry Haynsworth, and there may be other members of the committee who want to respond as well.

First, Commissioner Walker, I wanted to say I couldn’t find it originally. We certainly had it, and there is something that Mr. Walker said -- I want to make it clear to the floor, not only have we considered this several times in the past, Commissioner Walker was with us yesterday, we did consider it again. We have rejected it for reasons that Don and Harry will explain in a moment. But I just wanted the floor to be assured that this is something that we did consider and, for reasons you will hear, decided to reject.
MR. DONALD WEIDNER (Reporter): A couple of comments. First of all, the issue we’re dealing with here is, No. 1, the duty of care, not the duty of loyalty, which I consider very different, and No. 2, the rights of the partners as among themselves for breach of the duty of care in the partnership.

The language that you set out is language from Model Business Corporation Act, Section 8.3. As our commentary indicates at Page 63, that was the language that we used to have in our draft, except that what your language does is take away with your second statement what you give with your first statement.

Your first statement says that the partners have a duty of care to use the care of an, quote, ordinarily prudent person. Your second sentence then says, however, the partners -- the partner shall not be liable for -- unless the -- for a failure to adhere to the duty of care unless its conduct constitutes gross negligence, recklessness, et cetera.

So, your rule has a gross negligence standard. It simply first promises a prudent person’s standard and then takes it away. The committee decided that we’d rather not promise something that we’re going to take away. If we’re going to impose a gross negligence standard, we just say it very directly, and that’s what we do.
Secondly, I would say that I think the issue in a partnership, in a general partnership, is different than the issue in a corporation. And I know Harry Haynsworth may want to speak to this in a moment. But in a corporation, part of the reason of imposing a duty of care on a manager is to give that person incentive to properly conduct her own affairs and to properly monitor the affairs of other people. We felt that in a partnership, with each partner unlimitedly personally liable for their own behavior and for the behavior of those under her, that there was sufficient incentive there such that the need for the protection of third parties was not affected by this duty. Therefore, the issue is simply what is the agreement among the parties? And we’ve decided that the agreement among the parties was to insure themselves against loss.

Let me give you an example. First time I raised this with a doctor, trying to figure out if the doctors thought of it differently. A doctor responded to me: Well, does that mean if I drop a set of vials in my lab that I -- because I am negligent -- that I get docked for all those vials? Isn’t that the ordinary kind of negligence that we all engage in and in which my partners should share? It is my turn today, and it will be their turn tomorrow, and the default agreement among us ought to reflect that. And again, we’re dealing with a default rule here, so it says if you want to be responsible, hold your
partners responsible immediately and directly for any act of their negligence, then you can put that in your partnership agreement.

....

COMMISSIONER DAVID S. WALKER (Iowa): Briefly to respond to the reporter. The language in the first portion of my amendment is what courts have been interpreting and what I understand the committee and the reporter to be relying upon in expressing a gross negligence standard.

Were it me, I would put that into the contents. I think your point was to protect the reasonable exercise of business judgment and particularly the business judgment rule which in your comments you say you leave to the courts to continue to develop.

The point remains that you have no positive content. There’s nothing that informs people in business who are partners of one another that they have a duty of care, only to refrain from gross negligence.

I believe, too, there is a difference, of course, between corporations and partnerships and directors and partners, but the governing standard in closely held businesses, whether it is a partnership or a corporation, has been that those in control owe one another a duty of care. They may carve out areas in which they will not expose themselves to claims.
Your example is not negligence, it’s a predictable human mistake. I would not call that negligence, and that’s not responsive.

I don’t want to debate. I know the committee --

MR. DONALD WEIDNER (Reporter): Commissioner, if I could -- Weidner again --

CHAIRMAN FRANCK: Just a second, please. ...

COMMISSIONER JOHN H. LANGBEIN (Connecticut): I’d like to suggest an amendment to it.

CHAIRMAN FRANCK: That’s probably appropriate at this time. Go ahead.

COMMISSIONER LANGBEIN: I’m troubled at having the default rule be gross negligence without more. What struck me as appropriate about this motion was the first branch, the first paragraph, which imposes the ordinary duty of care.

What I’d like to suggest is that the second paragraph of the language should be spelled out as an optional electable gross negligent standard, as an optional default standard. In other words, we authorize the gross negligence standard, but we do not have it as the default standard of the statute. It’s one thing -- it is one thing to, have a clear understanding that people may elect to have a low standard of care among themselves. It’s quite a different thing to have that be the general rule for relatively unsophisticated people.
So, accordingly --

CHAIRMAN FRANCK: So, the sense of your -- do you have a worded amendment?

COMMISSIONER LANGBEIN: I don’t have a worded amendment.

CHAIRMAN FRANCK: The sense of your amendment would be that the act in this section would make the waiving of the ordinary negligence standard a waiveable standard.

COMMISSIONER LANGBEIN: I would have the second paragraph of Commissioner Walker’s language be revised to say that the partners by agreement --

CHAIRMAN FRANCK: May.

COMMISSIONER LANGBEIN: -- may arrange --

CHAIRMAN FRANCK: That’s what I was trying to convey.

....

CHAIRMAN FRANCK: So, we are now back on the main motion, which is as I read it to you, except that the second part of the amendment now, instead of limiting the liability of the partner where there is no reference to this issue in the partnership agreement to gross negligence, recklessness, intentional misconduct or knowing violation of law, would make the partner liable for a violation of the positive standard, as it has been described, with the understanding that the partnership agreement could raise the limit of liability so that
there would be liability only for gross negligence, recklessness, intentional misconduct, or knowing violation of law, but if there were no agreement in the partnership agreement on that, no provision in the partnership agreement on that point, it would be a violation of the ordinary standard of care.

Does everybody follow me, with me up to now? All right. That’s the motion that we are now discussing.

Is there a speaker against that motion? Back of the room.

COMMISSIONER STANLEY PLETTMAN (Texas): I believe I’m against the motion. I would like a point of information from the reporter. The Model Business Corporation Act, does it or does it not have a statement that limits liability for breach of the standard to gross negligence?

CHAIRMAN FRANCK: Response by the reporter.

COMMISSIONER HARRY J. HAYNSWORTH, IV (Illinois): Can I answer that, Don?

....

COMMISSIONER HAYNSWORTH: The model act has a provision, as does Delaware and the corporation codes of most countries now, of most states today, that state that you can have a provision in your charter that allows directors not to be liable for anything other than intentional wrongdoing, which is what we have here when you parse it all out between 103 and 404.
COMMISSIONER PLETTMAN: Then I support the committee’s result based on that. I think that that ought to be our default rule.

CHAIRMAN FRANCK: Further speakers on the motion. Commissioner.

COMMISSIONER BRUCE A. COGESHALL (Maine): I was prepared to speak in favor of the motion until Langbein’s amendment. I think the motion as originally made some sense in that it imposed the same duty among the partners as they have to the whole -- the rest of the world, but let them share among themselves any loss that would result from ordinary negligence.

But now, with the Langbein amendment, all of the partners that don’t even think about this, all of the partnerships that don’t think about this and don’t have written partnership agreements, don’t have agreements on sharing of risk, are going to be subject to an ordinary -- among themselves -- an ordinary care rule and all be suing each other for damages resulting from violations of ordinary care.

I think that’s a big mistake. I think the rule ought to be as the commissioner stated originally, that they have a duty of ordinary care among themselves, but that any loss resulting from a violation of this duty of care is shared among themselves and not imposed solely upon the partner that violated that duty.
CHAIRMAN FRANCK: Commissioner.

COMMISSIONER PETER F. LANGROCK (Vermont): I think the commissioner from Texas is incorrect regarding the model business act. Isn’t it true that unless there is provision waiving the, or saying that you contract out of ordinary negligence into the section, that the ordinary negligence statute would be involved?

COMMISSIONER HAYNSWORTH: Yes, sir. You have to have a charter amendment. That’s what I thought the question was directed to.

COMMISSIONER LANGROCK: The commissioner from Texas indicated that the default rule was different. It’s Langbein’s motion that brings us into conformity with the model business act in terms of an opt-out and a default relationship, as I understand it.

CHAIRMAN FRANCK: Commissioner Haynsworth.

COMMISSIONER HAYNSWORTH: Yes. The answer to the question would be “yes.”

CHAIRMAN FRANCK: All right. Commissioner.

COMMISSIONER ROGER C. HENDERSON (Arizona): I don’t know if this supports or if it’s in opposition to Commissioner Langbein’s motion, but much of this in a way is a tempest in a tea pot, partly on liability to the third party’s side, because there’s going to be usually a liability insurance policy that’s
going to have each partner as a named insured, so there isn’t
going to be this lawsuit among themselves after the liability
insurance company pays off, and there’s going to be no right of
subrogation because you can’t be subrogated against your own
insurer.

If it’s internal losses, dropping the vials or
wrecking the partnership’s car, there’s going to be first party
property insurance, and you’re going to get the same effect.

So, in many ways you’re not going to have these
internal squabbles to start with because of the mechanism of
insurance.

CHAIRMAN FRANCK: Thank you, Commissioner. That was a
statement to assist the Conference in the consideration of this
matter.

I’m going to recognize commissioner Willis. After he
has spoken -- he is the only one seeking recognition on the
floor besides the movant we will hear a final response from the
committee on the motion, and then the movant will have a right
to close, then we’ll bring it to a vote.

COMMISSIONER ‘DONALD JOE WILLIS (Oregon): I speak in
favor of the motion, but for a slightly different reason. I
have struggled through this language for about an hour, and it’s
just so difficult to reconcile what you’ve drafted there in (d),
and particularly when you get over to (e) -- I think that it’s
going to make the whole thing work better, whether you go with the original commissioner’s motion or Langbein’s.

CHAIRMAN FRANCK: Well, the original commissioner’s motion is not on the floor.

COMMISSIONER WILLIS: Even with Commissioner Langbein’s, that’s a far different matter. But, still, I think we have such significant drafting problems, if we don’t get — pass one of these motions, we need to give that further attention. I realize that’s difficult, and I know how hard you’ve worked. But drafting that in the negative -- and I don’t share the committee’s confidence that you can carve out what you call a duty of care, ignore a duty of loyalty, ignore a duty of good faith and fair dealing, and come up with these kind of limitations stated in the negative. I think we have a monster, and the original motion maybe we can revisit if Langbein’s -- but I support the motion.

CHAIRMAN FRANCK: The committee apparently thinks that it’s absolutely necessary that they have more than one speaker to speak on this issue. I am going to let them have two speakers to wind up on this matter. I will let the movant and Commissioner Langbein both speak, if they wish to, in favor of the motion so we balance the speakers. But I believe most of the points have been made, and we need to come to a close. I don’t want to be totally arbitrary, particularly when the
committee has worked on this draft. So, without objection, we’ll proceed to that. You may designate two speakers to speak on behalf of the committee.

COMMISSIONER H. LANE KNEEDLER (Virginia): Thank you, Mr. Chairman. I am going to ask Commissioner Swibel and then our reporter, Don Weidner.

CHAIRMAN FRANCK: Commissioner Swibel.

COMMISSIONER HOWARD J. SWIBEL (Illinois): There’s another piece of background information that the committee has considered for several years and that the entire Conference should consider, and that is that there is not a single jurisdiction, to our knowledge, in this country where a state legislature has imposed statutorily the business judgment rule on general partnerships.

The analogy to the Model Business Corporation Act is a strained one. As we pointed out in our previous comments, the shareholders, for example, in the corporation do not have personal liability. Every partner has personal liability. The expectations of the parties in the general partnership are different than those in the corporation.

The problem we have here is, we’re trying to draft a rule that applies to a variety of situations. There are some people who argue that, for example, those people who are the managing partners of a partnership ought to have a duty which is
similar to those that are imposed upon the directors of corporations.

However, as you see the way the motion is drafted and the way our statute is drafted, there is no distinction made between managing partners and every other partner. We believe that to statutorily impose the business judgment rule in general partnerships would, first of all, be something that would not be enacted throughout the country. The American Bar Association has indicated that this is something that they feel extremely strongly about, that it would be regressive, that it would be something that would not be in keeping with the way partnerships are operated.

In addition to that, the comment, of course, cites a decision from Maine. And it is true that there are some courts which have borrowed the business judgment rule in partnership cases. But it is not true that even in a majority of jurisdictions that the courts have imposed the business judgment rule on general partnerships.

So the motion represents an innovation that is not called for and is not needed.

CHAIRMAN FRANCK: Commissioner Langbein.

COMMISSIONER JOHN H. LANGBEIN (Connecticut): It’s been brought to my attention that the letter from Professor Eisenberg dated July 27 on Page 6 indicates that under the
revised Uniform Limited Partnership Act, the fiduciary duties of
general partners are, in effect, determined by the Uniform
Partnership Act. Therefore, the standard -- this act now is
going to replace the Uniform Partnership Act. Therefore, the
standard that we’re talking about is also going to apply to
limited partnerships.

With respect to the main proposition, I want to say
first that I’m not particularly concerned that we happen to have
a committee of ABA members who are anxious to get this result.
We have had on occasion to differ with ABA panels. We’ve had to
do with the Unincorporated Association Act, I think to excellent
effect, and I think we ought to be doing it here.

I don’t know anything about the dynamics of the ABA
advisory group that’s been sent in here, but I have to say that
I’m not persuaded that because it has the ABA label on it we
ought to follow it if it involves setting out a force of basic
fiduciary expectations that people hold in the conduct of
business affairs.

We’re talking here about what the default structure
ought to be. Everybody is agreed that you can have a gross
negligence standard if you want it. The question is, should you
have to spell it out the way you do in a business corporation
setting? And the argument is that if you don’t, you’re going to
have entrapment and deception of unsophisticated people.
I therefore would ask people to think long and hard before waiving the basic duty of care that is so characteristic of fiduciary relations and business relations in every setting.

CHAIRMAN FRANCK: Mr. Weidner to close for the committee.

MR. DONALD WEIDNER (Reporter): A couple of points. Back to the basic motion of Commissioner Walker. No. 1, it is correct to say that we do not intend to codify any version of the business judgment rule in this section.

It is also correct to say that the statutory language from the Model Business Corporation Act on which your proposal is based is immediately followed by comment that says it in no way attempts to state the business judgment rule as it applies in the context of corporations, intending instead to leave that to development to the case law of the particular jurisdiction.

So, we don’t do anything different than the very language that you’ve proposed insofar as the business judgment rule is concerned.

Secondarily, the question -- I do want to emphasize that the issue here is simply the relations of the partners as among themselves. Perhaps we didn’t state this, as elegantly as possible, but what we say is that you all are close enough, that you share the risk of each other’s ordinary negligence. You’re in it together. You share that risk together. It makes no
sense for us to say, as Commissioner Walker’s amendment does, No. 1, Don has a duty to John to exercise reasonable care, but No. 2, John has absolutely no remedy against Don for Don’s violation of that duty of care.

CHAIRMAN FRANCK: Before I recognize the movant -- Commissioner Langrock, I am not proposing to recognize any further speakers.


CHAIRMAN FRANCK: I’m sorry?

COMMISSIONER LANGROCK: When Commissioner Swibel spoke of the American Bar Association’s position, I take it there is no real position --

CHAIRMAN FRANCK: He was speaking on behalf of a subcommittee, a partnership committee of the Business Law Section.

COMMISSIONER LANGROCK: It’s an ad hoc committee, not the ABA. I just want to make sure that we understand it.

CHAIRMAN FRANCK: Now to close on the motion, the movant.

COMMISSIONER DAVID S. WALKER (Iowa): I would just make two points. Commissioner Langbein’s motion addresses completely the point last made by the reporter, Weidner, in
making the second sentence optional so that it is not the
default rule.

I reiterate, this is familiar language which courts understand to express the business judgment rule. It is not dangerous language that would surprise anybody. Only its repudiation by the Conference would be seen as surprising.

CHAIRMAN FRANCK: Thank you, Commissioner.

I’m going to restate the motion. I would like all of you to listen carefully to how I restate it. I do not want to misstate it and influence the vote by that. This is a question on which there has been a lot of debate. Obviously it is an important question, so let me first make sure I have the motion correctly.

I will read the first full paragraph of the motion. The second paragraph has been changed, and I will state the sense of the second paragraph as I understand it.

The motion is to change paragraph (d) of the section on Page 20 of the handout, so that (d) would read as follows -- pardon me?

COMMISSIONER WALKER: There were a number of people who inquired whether it should read “in the conduct and winding up” on account of earlier language in 404.

I hope it would be seen as friendly and certainly my sense that it -- the duty is in the conduct and winding up.
Commissioners from the District of Columbia and New York and others mentioned that.

CHAIRMAN FRANCK: I think that’s a change for consistency. It does not affect the merits. And I will accept that. It is a change from what I dictated to the Conference floor before, so please note the change.

The motion is to change subsection (d) so it would read: In the conduct and winding up of the partnership business, a partner’s duty of care to the partnership and the other partners requires the partner to act, sub (1), with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and sub (2), in a manner the partner reasonably believes to be in the best interest of the partnership.

The final paragraph of the motion would change -- would provide, excuse me, that that obligation could be changed by agreement by the partners so as to waive liability for ordinary negligence and retain liability for conduct which constitutes gross negligence, recklessness, intentional misconduct, or a knowing violation of law.

Have I correctly stated your motion?

COMMISSIONER WALKER: Yes.

CHAIRMAN FRANCK: Okay. Does everybody in the house understand the motion?
As many as are in favor of the motion, please say “aye.”

As many as are opposed, please say “nay.”

The chair is in doubt. I would like to see the “yes” vote. Just stand for a moment so I can see. All those who voted “yes.” Thank you. Please be seated.

All those who voted “no,” please stand.

The “noes” appear to have it. The “noes” do have it.

The motion is defeated.

Are there any further comments --

COMMISSIONER BRUCE A. COGGESHALL (Maine): Mr. Chairman.

CHAIRMAN FRANCK: -- on Section 404?

COMMISSIONER COGGESHALL: I would like to make the motion that was originally made by commissioner Walker, without the Langbein amendment.

CHAIRMAN FRANCK: The motion that is now on the floor -- I assume that you accept the last change that was made, that (d), if the motion passes, would begin “in the conduct and winding up of the partnership.”

COMMISSIONER COGGESHALL: Yes, Mr. Chairman.

CHAIRMAN FRANCK: With that change, the motion now before us, as I understand it, is the original motion made without the Langbein amendment.
I would hope, because the discussion on the Langbein amendment basically covers the issues on this motion, that we could get to a vote of this motion without unnecessary debate. However, I will permit some debate. Please proceed to argue for your motion.

COMMISSIONER COGGESHALL: Let me speak first on the comments most recently made by Mr. Weidner. He said that what we’re doing here is giving a right and providing no remedy.

Well, he’s absolutely wrong. If you look at Section 601 of the partnership agreement -- of the partnership act, the partnership act says that if a partner consistently violates a duty to the partnership, then you can expel him. And if we’ve -- so, what we’ve done by adding a due care provision here is, we’ve said: If you don’t act with due care to this partnership and to your other partners and in a manner in the best interest of this partnership, we can kick you out. We can’t sue you for damages, and that’s -- we don’t want to sue you for damages. We want to be able to get rid of you.

Now, every partner has got a duty of ordinary care to every person in the world in dealing as a lawyer. And there’s no reason why you shouldn’t have that same duty to his own partners and to the partnership of which he’s a member. The only difference here is we’re saying that if you screw up and it’s
only ordinary negligence, we agree that among ourselves we’re going to share the loss. That’s all this amendment does.

I would urge that this amendment be supported.

CHAIRMAN FRANCK: Thank you, Commissioner. Response from the committee?

MR. DONALD WEIDNER (Reporter): I’m sorry. We do agree with you, that if it’s -- if I followed your last statement, that if it is ordinary negligence to these third parties, then the partners are going to share the loss. That is the rule that we have in our statute, the default rule.

COMMISSIONER COGGESHALL: And that’s the rule of the amendment.

MR. WEIDNER: And that is, I gather now, the rule of the original commissioner Walker proposal. It’s just -- his is just stated differently.

Commissioner Coggeshall, are we understanding each other?

COMMISSIONER COGGESHALL: We’re understanding each other, yes, that there is no liability for ordinary -- no monetary liability for ordinary negligence.

CHAIRMAN FRANCK: I must say that the chair’s understanding is that the amendment makes a change in the proposal by the committee. I would not have allowed the motion
had it simply confirmed the committee draft, and I believe it
does make a change.

COMMISSIONER COGGESHALL: It does make a change. It
imposes an affirmative duty of due care.

CHAIRMAN FRANCK: All right. I will come back to the
committee. Commissioner.

COMMISSIONER EDWARD I. CUTLER (Florida): I remember
the reporter’s response to the original motion before it was
amended. It was that the first part and the second part were
inconsistent. I still think so.

I think that if you follow the committee’s
recommendation, you still have no negation of a duty of a
partner to behave properly and to permit him to be kicked out if
he doesn’t use ordinary care. There’s nothing that prohibits
that in the partnership -- in the committee’s draft.

I think that the two sentences or the two parts of the
motion are entirely inconsistent.

CHAIRMAN FRANCK: Thank you. For the floor, the motion
now before you is a motion as I read it to you word for word
when all of this started, when Commissioner Walker first made
his motion, without the Langbein motion.

I cannot call the question. There are people waiting
to be recognized.
COMMISSIONER TOM R. MASON (Mississippi): It seems to me that the second subparagraph, which deals with the subjective standard that the partner act believe that he's acting in the best interest of the partnership adds nothing and indeed should not be there. It’s subsumed by the ordinary care standard.

I’d like to hear the reasoning of Commissioner Walker as to why he puts the subjective in when we have an objective standard.

CHAIRMAN FRANCK: Commissioner Walker, will you just take a moment to respond to the question. Why is sub (2) in your motion?

COMMISSIONER DAVID S. WALKER (Iowa): It is an effort to accommodate the committee’s draft. I do agree that what is and would prefer only to see in the language of a bill that we would suggest, that we would adopt, would be the first portion. I do believe courts will interpret that and are interpreting similar language in the manner you suggest and the committee expresses. But you’re not -- protects the business judgment rule.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER EUGENE A. BURDICK (North Dakota): I didn’t hear an answer from the committee as to the value of this rule of ordinary negligence when it comes to terminating the partnership or kicking him out.
Do you have some standard like that later on as a basis for expelling the partner who --

CHAIRMAN FRANCK: I went to other commissioners, Commissioner, while the committee was deliberating on its response. I will get back to the committee on its response on this motion.

I don’t see any other commissioners other than the committee and the movant seeking to be recognized. I will let the committee close on its position and then let the movant make a final statement before we take a final vote.

Response for the committee.

COMMISSIONER H. LANE KNEEDLER (Virginia): Mr. Chairman, I want to respond to the motion in two parts. First, what’s been referred to as the first paragraph that has the two subparts -- with the care an ordinarily prudent person in like position would exercise and in a manner the partner reasonably believes to be in the best interest of the partnership.

Two points. One, and I don’t want to be redundant, but I’m afraid maybe we haven’t made the point. It’s been our position that in a general partnership essentially what occurs is we take the risks in being partners of ordinary negligence that’s committed by each other.

Secondly, no one, to our knowledge, and I would ask a member of the committee to correct me if I’m wrong, that no one
imposes this duty of ordinary care or certainly the business judgment rule in the partnership context.

With regard to the two parts, the second paragraph of Commissioner Walker’s proposal, unless I’m reading it incorrectly, is indeed completely inconsistent with the first part. The first part sets up a standard and then says you haven’t violated this duty unless you’re grossly negligent or reckless or intentional in your conduct or knowingly violate the law. And that may just be a drafting problem. But I’m not sure that it is.

The second paragraph in his proposal simply says what we’ve proposed, namely, there is no liability unless there is at least gross negligence. That has been the rule under the UPA. We think it ought to remain the rule.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER EUGENE A. BURDICK (North Dakota): My question is, is there a provision for kicking him out for failure to perform his duties?

COMMISSIONER HARRY J. HAYNSWORTH, IV (Illinois): Yes. May I answer the question? Commissioner Haynsworth.

CHAIRMAN FRANCK: Yes.

COMMISSIONER HAYNSWORTH: And I can read it quickly, Judge Burdick. It’s Section 601, subsection (5), and it will just be very brief. On application by the partnership or another
partner, the partner’s expulsion by judicial decree because, one, the partner engaged in wrongful conduct that adversely and materially affected the partnership business, two, the partner willfully or persistently committed --

COMMISSIONER BURDICK: You’ve read enough so far as I’m concerned.

COMMISSIONER HAYNSWORTH: This is just following the UPA.

CHAIRMAN FRANCK: We’ll have the movant close on his motion. Please proceed.

COMMISSIONER BRUCE A. COGGESHALL (Maine): As I understand the chairman’s response, he says, one, he intended to take the risks of ordinary negligence and spread it among the partners and that an individual partner ought not be saddled with that. That’s exactly what was retained in this amendment. Two, he says that no one imposes a duty of ordinary care.

Well, I would suggest to you that in any partnership that’s ever thought about it, every single partner expects his partner to act with ordinary care. And they do in fact impose it upon each other. Whether or not they expect one partner to come up out of his own pocket in the event he makes a mistake, that’s a wholly different issue. Every single partner in a law firm, in a medical firm, in whatever type of professional firm you can
think of, owes a duty of ordinary care to everybody he deals with, and that ought to include his partners.

    Thank you.

CHAIRMAN FRANCK: Thank you, Commissioner. I am mindful of the fact that I have read this motion in its entirety. It was the original Walker motion. But I’m also mindful of the fact that some people may have come in since I read that.

    Is there anyone here that wants me to read the motion before we vote on it? Hearing no one wanting to read it, we will now proceed to vote on the motion, which is the original Walker motion, if I may describe it that way.

    As many who are in favor of that motion, please say “aye.”

    As many as are opposed, please say “nay.”

    The “noes” appear to have it, the “noes” do have it.

    We proceed with Section 404.

COMMISSIONER DONALD JOE WTLIS (Oregon): Mr. Chairman.

CHAIRMAN FRANCK: Commissioner Langbein.

COMMISSIONER JOHN H. LANGBEIN (Connecticut): Langbein from Connecticut. I’d like to move language on the Section 404(d) at Line 21 to capture the spirit, I believe, of the decision that the Conference has just taken.

CHAIRMAN FRANCK: State your motion.
COMMISSIONER LANGBEIN: I would like in between the letter “D” closed parenthesis and the existing language, beginning “a partner’s duty of care” and so forth, I would like to insert the following sentence. General partners are deemed to assume the risk of ordinary negligence committed by a partner. And then continue on with the language in place.

CHAIRMAN FRANCK: Would you state it again.

COMMISSIONER LANGBEIN: General partners are deemed to assume the risk of ordinary negligence committed by a partner.

Now, the reason for spelling that out is to make it clear that this Conference is not otherwise suggesting that there is no duty of care. The explanation that was given by the committee is one of assumption of the risk, recognizing the underlying concept that there is a duty of care. It seems to me that if that’s the reason, you ought to be willing to go ahead and state it, and that way there’s much less risk of it being inferred that the basic duty of care is not in place.

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER H. LANE KNEEDLER (Virginia): Just a technical point, and not speaking to the motion directly. Would the movant mind if we didn’t use general partners? Other than that one place where we referred to general partners, we have not used the term general partners.

COMMISSIONER JOHN H. LANGBEIN (Connecticut): Well --
COMMISSIONER KNEEDLER: Nor do we in this particular section.

COMMISSIONER LANGBEIN: I don’t know what I think about that. I didn’t put general partners in by accident because I am concerned about limited partnerships. I am not a sophisticate in this area, but my sense is that limited partnerships are sold like securities to a lot of people and that they may need a higher level of protection. But for present purposes, I'd be willing to leave that to the discretion of the committee.

CHAIRMAN FRANCK: Well, that’s not going to -- is it in the motion or is it out of the motion? As understood your response, it was that you were not willing to take it out. So it’s in. So let’s leave it in until somebody else moves to amend or someone else takes care of it.

Commissioner.

COMMISSIONER PETER F. LANGROCK (Vermont): A question to Commissioner Langbein and the committee. If that were accepted, would that mean in the ordinary situation of two partners operating an automobile partnership business, the winding up, that that standard would be replaced and the insurance companies would benefit from it?

COMMISSIONER HARRY J. HAYNSWORTH, IV (Illinois): You’re talking about if they injured a third party?
COMMISSIONER LANGROCK: No. Two partners going down the street. One’s driving. One commits ordinary negligence, the other one is hurt, and they’re going down to the auction of the property.

CHAIRMAN FRANCK: The question, as I understand it, is whether if that provision were in the act, that one partner causing an automobile accident in which the other partner was injured would relieve the second partner of liability for that accident. Is that correct?

COMMISSIONER LANGROCK: Ordinary negligence.

CHAIRMAN FRANCK: That’s the question. I guess the question goes to you, Commissioner Langbein.

COMMISSIONER JOHN H. LANGBEIN (Connecticut): You want my expertise on insurance law? I haven’t clue.

CHAIRMAN FRANCK: The answer is he doesn’t know. Does the committee want to respond on this motion? You have not yet responded on the merits.

COMMISSIONER LANGROCK: I think the question --

CHAIRMAN FRANCK: Just a second. Let me find out if the committee has a response on the merits of this motion.

COMMISSIONER H. LANE KNEEDLER (Virginia): The committee believes the language is not necessary. If we were to adopt it, I’m not sure I like the “deemed to assume” language.
But on the merits of it, we’re opposed. We don’t think it’s necessary.

CHAIRMAN FRANCK: The committee opposes the motion.

Commissioner, one more statement.

COMMISSIONER LANGROCK: I thought I asked a question.

CHAIRMAN FRANCK: Yes, you did.

COMMISSIONER LANGROCK: I don’t think it makes a damn bit of difference whether the amendment or the present motion is or not. I just want to know right now, when it comes up for approval of this act or this whole section that if two partners are driving down the road to an auction to wind up the business and one commits ordinary negligence and the other one is injured, can they bring an action, or does this bar it?

CHAIRMAN FRANCK: Commissioner, I did the best I could. I asked the movant to answer your question. He said he was not able to. I can’t answer it for you. I wouldn’t answer it for you.

MR. DONALD WEIDNER (Reporter): The answer is, he can bring the action against the partnership.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER EDWARD I. CUTLER (Florida): I’m concerned that this motion offers another duty. It says, in effect, there is a duty. If there is a duty, there has to be a result from it, a liability, damages, some consequence,
I think it’s a mistake for us to insert that kind of duty and then continue with the next sentence in the paragraph which says that there’s no liability except for gross negligence and so forth. I don’t see the purpose of it merely to state an abstract duty and no consequences.

CHAIRMAN FRANCK: Thank you, Commissioner.

COMMISSIONER JAMES C. MCKAY, JR. (District of Columbia): I oppose the motion. I think the statement is in the comments and belongs in the comments, should be in the comments, but I think to put it in the black letter creates sort of confusion that has been voiced, and I would oppose it for that reason.

CHAIRMAN FRANCK: Commissioner Langbein, you want to close on your motion? I’m sorry. Commissioner Willis.

COMMISSIONER DONALD JOE WILLIS (Oregon): Willis from Oregon. I question the reporter’s response to the commissioner about the auto accident. How can you sue the partnership without having established a partner’s liability? And the statute just says the partner is not liable to his partner for ordinary negligence.

I think what you’re done is clearly say in that circumstance that passenger who happens to be the partner cannot
bring an action. Can’t sue the partnership unless they are vicariously liable, and the partner’s not liable by statute.

CHAIRMAN FRANCK: Thank you, Commissioner. Commissioner Langbein.

COMMISSIONER JOHN H. LANGBEIN (Connecticut): Simply to explain the purpose of the motion.

CHAIRMAN FRANCK: Excuse me. Excuse me. Please, we really are starting again to have problems up here hearing. I know this has been a long effort on this section. It is, however, an important section. Obviously, the amount of speakers and the time we have taken indicates that this is an important issue. Please pay attention so we can get to a vote.

COMMISSIONER LANGBEIN: I would like to protect the Conference from going on record or being taken to be on record as negativing the basic duty of care that I believe all of us think pertains in this area.

I think that the committee’s articulated rationale is the one that I have tried to capture in this language. I think they ought to put their language where their mouths are. I think that if this is the reason, let’s go ahead and state it so people understand we’re not on record as knocking out the basic duty of decent behavior in commercial relationships.

CHAIRMAN FRANCK: You’ve heard the debate. The motion is to add in subsection (d) a first sentence before the printed
words that appear in the materials before you. That sentence would read: General partners are deemed to assume the risk of ordinary negligence committed by a partner.

As many as are in favor of that motion, please say “aye.”

As many are opposed, please say “nay.”

The “noes” appear to have it, the “noes” do have it. The motion is defeated.

We are back on Section 404. Commissioner Langrock.

COMMISSIONER PETER F. LANGROCK (Vermont): I’d like to propose another motion which would read as follows. At the end of Section D, a sentence, and I just jotted this down, but the concept, and you people could word it any way you want: Nothing in this section shall change the duty of ordinary negligence [sic] to another partner where ordinary negligence is covered by insurance.

....

CHAIRMAN FRANCK: Just a minute, Commissioner. First I want to get your motion down. Nothing in this section shall change the duty of ordinary care -- that’s how far I’ve gotten.

COMMISSIONER LANGROCK: Nothing shall change the -- nothing in this section shall change the duties of -- the duty of ordinary negligence [sic] to another partner --

CHAIRMAN FRANCK: Of ordinary care.
COMMISSIONER LANGROCK: Of ordinary care.

CHAIRMAN FRANCK: Yes.

COMMISSIONER LANGROCK: Where -- excuse me. Ordinary care to another party where such acts are covered by insurance.

....

CHAIRMAN FRANCK: Proceed to speak to your motion.

COMMISSIONER LANGROCK: Do you really -- let me ask you this question. All right. Go back to the automobile insurance situation. Do you want to impose a different standard of a partner driving down the street with his partner than everybody else in our society? Do you want to really raise that to gross negligent because they’re partners?

....

MR. DONALD WEIDNER (Reporter): We believe the way -- the section we were looking for is Section 406(b) (3), which says that a partner may maintain an action against the partnership or another partner for legal or equitable relief to dot, dot, dot, down on Lines 21 and 22 on Page 66, enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.

COMMISSIONER H. LANE KNEEDLER (Virginia): Kneedler, Virginia. It would be on Page 23 of the handout.
CHAIRMAN FRANCK: As I understand the response of the committee, they believe that that section would protect the right of the partner to sue regardless of whether there is insurance, but would protect the right of the partner injured in the automobile accident and asked about to bring suit.

....

COMMISSIONER LANGROCK: I don’t read it quite that way, but I’m happy to have it read that way. But would you make it clear, take a look at that, because you really don’t want to have this happen, I don’t think. With that, I’ll withdraw my motion.

CHAIRMAN FRANCK: Thank you, Commissioner. The motion is withdrawn.

We’re back on Section 404.

COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut): Mr. Chairman, if it were appropriate at this time, I would renew the motion that was deferred.

CHAIRMAN FRANCK: I’ve been thinking it was appropriate for quite some time.

COMMISSIONER BREETZ: You’ll recall and the house will recall my motion with respect to Section 103, and in that section, which is on Page --

CHAIRMAN FRANCK: On Page 5, sub (4).

COMMISSIONER BREETZ: Page 5 of the handout.
CHAIRMAN FRANCK: Your motion, as I recorded it, was that four would be changed, if your motion prevailed, so that on -- Page 5 -- so it would read: Limit the liability of a partner for violation of law under Section 404(d). For violation of Section 404(d). Is that correct?

COMMISSIONER BREETZ: That is correct. If I may put that amendment in the context of the prior votes that have just been had with respect to Section 404, it seems to me that the committee’s view has prevailed with the house, that as a result of this debate and the reading of the section today, the standard of care has been raised so that partners among themselves assume ordinary negligence.

It seems to me that without the amendment that I have proposed, it would be possible for a managing general partner to raise that standard to willful misconduct. It seems to me that none of the debate here has suggested for a moment that it would be appropriate for that to take place. And it’s for that reason that I make the motion, and I’ll reserve further comment until I close.

....

CHAIRMAN FRANCK: Response from the committee, please.

COMMISSIONER HARRY J. HAYNSWORTH, IV (Illinois): What we have adopted, what we have proposed parallels precisely the ability within the corporate context of a director to limit that
director’s liability to the shareholders, which is the parallel that you’re talking about here, the partner to his fellow partners.

Every one of those statutes in existence now allows the directors to limit their liability as far as their actions with respect to shareholders are concerned to conduct that does not involve intentional misconduct or a knowing violation of law. I’m quoting from the Delaware Corporation Code. And there’s a similar formulation in the Model Business Corporation Act, and virtually every state has adopted such statute in recent years.

Now, the effect of that is to say that a director can limit that director’s liability for gross negligence and recklessness. That is true. But that standard is not anything that is unusual. It is the prevailing standard with respect to corporate directors, and we are simply incorporating that standard into the partnership act.

This has to be done by consent of the parties. It is not the standard rule. And certainly there would have to be a burden of proof that that actually had been done to waive this additional level of liability, but this is nothing new or nothing unusual that is being requested. It’s simply to clarify what the present law would be in those circumstances in a statutory fashion.

CHAIRMAN FRANCK: Commissioner.
COMMISSIONER ROGER C. HENDERSON (Arizona): I’m still bothered, and I think there are a significant number of people here that are bothered about this duty of due care. And I would propose the following amendment, 404(d) --

CHAIRMAN FRANCK: No, Commissioner, that is out of order. There is a motion on the floor to amend Section 103. We’re going to have to dispose of that, unless you want to make some amendment to the reference to 404(d) or Section 103. But I will recognize you when we dispose of this motion. We’ll be back on Section 404.

Commissioner.

COMMISSIONER MARION W. BENFIELD (North Carolina): Commissioner Haynsworth, you commented about the corporate rule. That is a corporate rule protecting the directors against shareholder suits?

COMMISSIONER HARRY J. HAYNSWORTH, IV (Illinois): Yes.

COMMISSIONER BENFIELD: What about their liability to the corporation itself?

CHAIRMAN FRANCK: Commissioner Haynsworth.

COMMISSIONER HAYNSWORTH: It’s the same rule. It’s to the corporation or its stockholders.

CHAIRMAN FRANCK: Thank you. Further comment?

COMMISSIONER BENFIELD: Yes.

CHAIRMAN FRANCK: Proceed.
COMMISSIONER BENFIELD: My further comment is that I’m bothered by this ability to contract against gross negligence, and what’s the other, reckless conduct, particularly in the context of limited partnerships, where the buyers of those interests may not have much idea what these basic documents provide.

Maybe the problem could be sufficiently dealt with by providing in a comment that the ordinary contract rules as to unconscionability and contract interpretation apply.

COMMISSIONER HAYNSWORTH: That comment is already in the act and it comes in under Section 104.

COMMISSIONER BENFIELD: Well, I read that comment, and it’s not very helpful on this point. Such a comment ought to be made in the section where the authority is given to limit liability.

CHAIRMAN FRANCK: We’ll have to wait on the comment, commissioner, until we see what the outcome of this motion is.

Commissioner.

COMMISSIONER HAYNSWORTH: The answer would be “yes.”

COMMISSIONER DAVID S. WALKER (Iowa): I’ll make two points in response to Commissioner Haynsworth’s analogy and the committee’s analogy.

The first is that the corporate statutes to which you make reference focus on other corporate statutes which express a
duty of care in the terms that were rejected by the Conference. So, it may not be perfectly analogous.

I think more important, though, the corporate statutes on which the committee is relying only protect directors acting in their directorial capacity. They do not, thus, protect those who are inside directors, those who will active in the employ of the business.

I think that the committee and the Conference ought to focus on that distinction, that the Delaware statutes, one like it, which every state, including Iowa, has adopted are designed to protect outside directors and are not available for protection, as I understand Iowa’s and Delaware’s statute, for the inside director who is actively involved as an officer or an employee.

....

COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut): I ask the floor to consider this issue in two contexts. One, the context of appearing in your legislature to defend how it could be that the Conference would support a managing general partner in a limited partnership and including in the documents that only that managing partner writes, that are probably two inches thick in the offerings that we see in our state, and that are absolutely non-negotiable.
Those of you may have read in the New York Times about the Colonial Realty fiasco in the State of Connecticut. It would be extraordinary if in that litigation they were able to defend on the grounds that, yes, we were reckless, but that’s all right, our agreement at that said it was fine.

The notion that these are partners bargaining one with one another simply is not the reality, and any of you who have represented investing partners in partnerships understand how true that is.

But perhaps more importantly from us as a commissioner’s point of view is the duty that will be imposed upon us to appear before a state legislature and defend this posture to legislators who are properly, it seems to me, trying to achieve legislation that balances the interests of various parties.

This statute, in my view, and certainly in the view of the ABA members who argued for it, is intended to reverse the developing common law of the protection of partners, and as all of their comments made clear, the minority partner is increasingly being protected by the courts in particular cases of security fraud. And this is quite clearly intended by the ABA, as they put it, to avoid this unseemingly litigation, as it was put in the debate that I heard -- better to just simply say limited partners lose than it is to say that it’s all right to
put into a partnership agreement that the managing general partner may be reckless without penalty.

I ask your support for this amendment.

CHAIRMAN FRANCK: Thank you, Commissioner.

COMMISSIONER H. LANE KNEEDLER (Virginia): Point of information. Mr. Breetz may want to respond. This act does not apply -- this act itself does not apply to limited partnerships. It is true that RUPA currently says that general partners will be governed by the UPA, or perhaps it will, with RUPA. There is no doubt that they’re going to be a number of changes that have to be made to the Limited Partnership Act. But the subject before us is the General Partnership Act, and it does not deal with limited partners.

CHAIRMAN FRANCK: All right. You made that point, but that’s directly contrary to the argument that we just heard, so I’m going to let you respond.

COMMISSIONER BREETZ: Let me simply respond by saying that I think that parses it very closely. I think the act is very clear as to the standards that are imposed under Limited Partnership Act as being guided directly by what’s under this act, and I think the comments by the ALI reporter, Professor Eisenberg, speak directly to that point.

CHAIRMAN FRANCK: I’m going to state the motion. The motion is to amend subsection (b) (4) of Page 5 of the handout
so that it would read: Limit the liability of a partner for violation of Section 404(d).

The effect of that must be read with the introductory paragraph. A partnership agreement may not -- the amendment -- limit the liability of a partner for violation of Section 404(d).

As many as are in favor of the motion, please say “aye.”

As many as are opposed, please say “nay.”

The chair is in doubt. Will the “ayes” simply stand for a moment. Thank you. Sit down.

Will the “nayes” please stand for a moment.

Well, the chair remains in doubt. Will the “nayes” sit down and the “ayes” stand. I’m going to ask Commissioners Rae, Henderson, and Wellman to contact -- well, Professor Henderson has left -- Commissioner Cutler, will you count the number of -- sorry. Commissioner Henderson anticipated me. He is already counting. This is the “ayes.” Thank you.

Thank you. Will the “ayes” please sit down and the “nayes” stand, and the same people count them.

The vote is 52 in favor, 49 against. The motion carries.

We’ll go back on Section 404.
COMMISSIONER H. LANE KNEEDLER (Virginia): Mr. Chairman, can you repeat what it was we finally adopted?

CHAIRMAN FRANCK: Four will now read: Limit the liability of a partner for violation of Section 404(d).

Commissioner.

COMMISSIONER ROGER C. HENDERSON (Arizona): Back on 404. The committee has responded to Commissioner Langrock’s point about the bodily injury, the automobile accident, by saying that 406(b) (3) may cover that.

It surely does not the way it’s drafted. But if you are representing to us that your will make an exception for bodily injury and wrongful death cases, that will certainly take care of his problem, and then I think everybody else’s problem would be taken care of, at least to the extent we can get an agreement here, if you go back to Section 404(d) and at the beginning, on Line 21, merely add this phrase, introductory phrase, and I so move.

CHAIRMAN FRANCK: What --

COMMISSIONER HENDERSON: 404(d), Line 21, and that’s on Page 20 of the handout. I move to add this phrase: Unless the partnership agreement requires a higher standard of care, comma, a partner’s duty of, et cetera. That way, at least it’s --

CHAIRMAN FRANCK: Let me have it again. Unless the partnership agreement requires a higher degree of care?
COMMISSIONER HENDERSON: Yes. Unless the partnership agreement requires a higher standard of care, comma, a partner’s duty.

That way people are on notice at least insofar as the act is concerned that if they want to assume or if they want to have a standard of due care, they can put that in the partnership agreement. If they don’t put that in there, then you have the lower standard of care, namely, gross negligence, recklessness, intentional misconduct.

CHAIRMAN FRANCK: The chair is in some doubt at the moment, due partly, I might say, to the temperature at the podium which might be helped if were to be reduced a little bit, but did we not just vote to limit the ability of a partnership agreement to change 404(d)? Then it seems to me that your motion is --

MR. DONALD WEIDNER (Reporter): We can’t lower the standard.

CHAIRMAN FRANCK: All right. That’s fine. Proceed with your motion.

COMMISSIONER HENDERSON: Now, earlier in the act, you have said that you cannot waive intentional wrongdoing or violations of law. So, this gives you a full range here. If you want to have ordinary care, suppose you could have strict liability. It doesn’t say -- it just says a higher standard of
care than what you’ve put in the act. I think that would take
care of a lot of the concerns. If you’re going to take care of
the bodily injury case over in 406, then what’s wrong with that?

CHAIRMAN FRANCK: Thank you, Commissioner. We will get
a response from the committee and find out if they think that’s
okay or if they think something is wrong with it.

MR. ED MERRILL (ABA): That was certainly the intended
result under 103. The objection to the comment is that it goes
against the entire scheme of drafting of the act to provide that
anything can be done except as specifically prohibited by 103.

It was the clear intent of the committee that a higher
standard, even a higher standard than negligence could be
provided under the agreement, even a standard of strict
liability, if that’s what the partners wanted to provide.

But adding it in this one place raises a negative
pregnant throughout the act that were such a permissive
amendment to allow amendments would be required in each and
every other provision which the committee has clearly intended
be adjusted either upward or downward by agreement.

CHAIRMAN FRANCK: Commissioner Henderson, do you want
to respond? They’re saying that this was their intent, that’s
the way the act was drafted. By putting this reference in only
one subsection, you may create a meaning for the other
subsections you don’t intend. Why don’t you respond.
COMMISSIONER ROGER C. HENDERSON (Arizona): I would merely say in response that I am not sure if you just put it in this one place that it’s somehow going to create a negative pregnant -- that is, if it wasn’t said specifically somewhere else, that somehow it cast doubt on 103.

If you are concerned about that, you can certainly explain it in the comments. But at least it puts on notice the lawyers that resort to this act and the courts that interpret it that they can change this. And this deals with one specific provision that we’ve been debating here for an hour and a half.

CHAIRMAN FRANCK: I don’t think I told the floor the motion. Let me make it clear to you, the motion is to add at the beginning of (d), as it appears on Page 20 of the handout, the words “unless the partnership agreement requires a higher standard of care,” comma, and then proceed with the section as has been printed.

Commissioner.

COMMISSIONER FRANK W. DAYKIN (Nevada): I must oppose the motion for the reason just articulated by the member of the committee. Negative pregnant is not, technically, I think, the right term here. The rule of statutory construction that is being invoked is, in English, that expression of one thing excludes others. If we express this variability here, then we
may indeed be implying, contrary to what the act itself expressly provides, that it would apply elsewhere.

Therefore, I think the amendment would be mischievous at this point.

CHAIRMAN FRANCK: Thank you, Commissioner. Commissioner Henderson, do you want to close?

COMMISSIONER H. LANE KNEEDLER (Virginia): Mr. Chairman, I don’t know whether this will help. The committee doesn’t disagree with the policy and certainly would be willing to have it in the comment both to 404 and indeed perhaps to 103. Our concern is in the statute itself, and I thought I understood Commissioner Henderson to say that a comment would satisfy him.

CHAIRMAN FRANCK: Let’s see if it does.

COMMISSIONER ROGER C. HENDERSON (Arizona): I didn’t say that, but I don’t think it’s worth fighting about if you will put it in the comment.

CHAIRMAN FRANCK: Thank you. The motion is withdrawn. The committee agrees to put the point into comment.

We’re back on Section 404. Commissioner.

COMMISSIONER PETER F. LANGROCK (Vermont): Section (b) (3), the anti-compete provision under 802. As I understand it, if we had a law partnership and the dissolution was under 802, it would be a 90-day non-compete situation. I think that
violates or potentially violates various canons, and I think it’s a wrong result.

CHAIRMAN FRANCK: The committee has discussed that. I’ll let them respond as to the effect of this section in that provision on law partnerships. COMMISSIONER HARRY J. HAYNSWORTH, IV (Illinois): Well, this section could not affect the code of professional responsibility of the model rules. They would trump this section.

CHAIRMAN FRANCK: I think the committee also said they would put a comment to that effect.

COMMISSIONER LANGROCK: I would like to make a motion to add “unless trumped,” and you can figure out the words.

CHAIRMAN FRANCK: I think that motion would be too ambiguous, Commissioner, but they are going to put a reference to that in the comment.

COMMISSIONER LANGROCK: That’s not enough.

CHAIRMAN FRANCK: Well, then, make your motion.

COMMISSIONER LANGROCK: I’ll try and word something. I thought I made it.

CHAIRMAN FRANCK: You asked a question, as I understood it, but you’re free to make a motion.

COMMISSIONER LANGROCK: This section shall not apply to partnerships where anti-competition clauses would not be otherwise approved, or otherwise appropriated.
COMMISSIONER HOWARD J. SWIBEL (Illinois): Commissioner Langrock, you’ve got the same problem under the current partnership acts, and we’re not aware of any jurisdiction where there has been any confusion about this question. This only covers duties qua partners. And if there are either medical or professional ethics that are imposed by other rules or statute, they are not supplanted or replaced by this statutory --

COMMISSIONER LANGROCK: 802 doesn’t exist in the present partnership, the 90-day cooling off period. That is the only thing I am talking about.

CHAIRMAN FRANCK: Commissioner, let me see if I have your motion straight. I have it this way. This section shall -- add to sub (b) (3) -- this section shall not apply to situations in which covenants not to compete would be prohibited by other law.

COMMISSIONER LANGROCK: We’re in a Committee of the Whole. We are trying to solve problems. And to make me draft from the floor really doesn’t help anything. I’d really like to get the committee to figure out if there is a problem here and if they’re willing to attend to it. They can do a much better job.

CHAIRMAN FRANCK: Commissioner, we’re on the final reading of this act, so I’m trying to get some language that will convey to the floor the meaning of your motion. I have
understood your motion to be as I have read it. Now, does that convey the meaning of your motion? If it does, we can proceed. If it doesn’t, please correct me.

COMMISSIONER LANGROCK: Well, we’ll start with that one, and if that doesn’t work, we’ll try another one.

CHAIRMAN FRANCK: The motion before the house is to add a sentence to subsection (b) (3). This section shall not apply to situations in which covenants not to compete would be prohibited by other law.

As I understand it, the committee is willing to put that into a comment but has resisted a motion to put it in black letter, which is why the motion is before you.

Any further comment on the motion?

MR. DONALD WEIDNER (Reporter): Could I have a question, please? Is your concern that when a member of a law partnership says “I quit” that our statute says he cannot compete?

COMMISSIONER LANGROCK: For 90 days.

MR. WEIDNER: No. Our statute does not say that. What our statute does, to the contrary, is suspend the covenant not to compete, if you will, as soon as there’s a dissociation. That way, if you look at Page 20, Line 13, precisely to address your situation, we deleted the words “or winding up of” after the
word “conduct.” Would you look at Line 8, and you’ll see that the --

COMMISSIONER LANGROCK: You’re moving Line 8 where?

MR. WEIDNER: I’m sorry. By contrast, if you just read Line 8 on Page 20, you see that that duty applies, quote, in the conduct or winding up of the partnership business, whereas down on Line 13, the language you're concerned with, the duty not to compete, that applies only in the conduct of the partnership business and not in the winding up.

The short of it is, other rules in here explicitly say as soon as you say I dissociate, you can compete with the partnership, and they specifically provide that in the 90-day window you’re concerned about in Section 802, the partner is treated as a dissociated partner with the consequence that he can compete.

MR. ED MERRILL (ABA): Section 603(b) specifically provides that result. Further under Section 104, we have reserved that other principles of law continue to apply. So, that the professional rules would not be trumped by the partnership act.

CHAIRMAN FRANCK: Let’s find out.

COMMISSIONER LANGROCK: I’ll withdraw my motion.

CHAIRMAN FRANCK: The motion is withdrawn. We’re back on Section 404. Commissioner.
COMMISSIONER LEON M. McCORKLE (Ohio): Page 21, Line 6 and 7, we added language. Fairly and fair dealing do not seem to me to be parallel. I offer for the committee’s consideration that they change fair dealing to fairness in Line 7 and perhaps change its location so that Line 7 reads, starts with fairness and goods faith. And it seems to me, one, as I said the two are not parallel.

CHAIRMAN FRANCK: Well, let’s see what the committee’s response is before you argue it. Response from the committee. The suggestion is what “fairly” in Line 6 and “fair dealing” in Line 7 appear not to reference the same concept, and therefore you ought to make some changes to avoid that result.

Response from the committee.

COMMISSIONER H. LANE KNEEDLER (Virginia): Dean Haynsworth may want to add to this, but my understanding of it was, we had good faith in there by itself. There is a lot of case law out there that talks about good faith and fair dealing. We therefore decided we ought to, since it’s in the case law, incorporate both terms. Once we did that, it just didn’t make sense, and the sentence that ends on Line 6, to say just “in good faith,” so we put in fairly and in good faith. But it was the concept to incorporate good faith and fair dealing.

Commissioner Haynsworth. Do you want to add to that?
COMMISSIONER HARRY J. HAYNSWORTH, IV (Illinois): Yes. The cases, at least in the partnership area that have used that term, either say “good faith” or they say “good faith and fair dealing.” And so we’re trying to make sure that the two were linked.

MR. ED MERRILL (ABA): Also the restatement of contract uses the term “good faith” and fair dealing.”

COMMISSIONER LEON M. McCORKLE (Ohio): Then my suggestion is to parallel Line 6.

CHAIRMAN FRANCK: The suggestion is to parallel the two terms. Are you going to make a motion or -- no motion.

....

COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut): Excuse me, Commissioner. At the risk of incurring the chair’s wrath -- Breetz from Connecticut.

....

COMMISSIONER BREETZ: On subsection (c), you’ve created an ability of the partnership or the managing general partner to identify specific types of categories of activities that don’t violate the duty of loyalty.

When we were drafting the condominium act, we had a similar problem, which was, how should the developer warrant existing real estate in a building that’s being converted, an
old apartment building that was being converted to a condominium?

The basic rule that we stated in that act was you must warrant the whole building, but you can exclude from that warranty specific types or categories of the systems in the building.

What has happened in practice in my state is that the developers have said, we exclude from the warranties all mechanical systems, all exterior surfaces, and all foundation components.

Now, the effect of that is to reverse completely the warranty. And it was for that reason that I asked the question the other day of whether or not one could exclude from this duty of loyalty, for example, the acquisition of property in the same town.

It seems to me that an easier way to handle this might be to delete (c) and add the duty of loyalty to sub (e) so that the duty of loyalty may not be eliminated but you can, by agreement, determine standards by which the performance is measured so long as not manifestly unreasonable. And it’s that manifestly unreasonable hook that I’d like to insinuate into (c) and if that’s acceptable to the committee, I’d be happy with it, and if not, I’m prepared to move it.
COMMISSIONER HARRY J. HAYNSWORTH, IV (Illinois): This is not acceptable to the committee.

CHAIRMAN FRANCK: Dean Haynsworth is responding for the committee. The committee has discussed this.

COMMISSIONER HAYNSWORTH: Yes. Extensively. And that is not acceptable to the committee.

COMMISSIONER BREETZ: I’d like to move that subsection (c) be amended to include a limitation on the exclusion of categories of activities, to limit those categories to ones that are not manifestly unreasonable.

CHAIRMAN FRANCK: The motion before us is to amend sub (c) on Page 20 of the handout to provide, in substance, that the exclusion of specific facts or categories is limited, provided for in that section, is limited to those that are not manifestly unreasonable.

Is that your motion?

COMMISSIONER BREETZ: That’s correct.

CHAIRMAN FRANCK: Now response from the committee, which has considered this issue, as to why they believe it would not be wise to accept that amendment. ...

COMMISSIONER HAYNSWORTH: The committee’s rationale is that those terms are well understood terms in the partnership world, and that to impose a not manifestly reasonable test here in this particular standard as opposed to the good faith and
fair dealing would simply make it subject to too much uncertainty with respect to any type of exclusion that was drafted.

And the attempt here was to be very clear that you had to mention a specific type of activity that you were going to compete with, like a real estate business, and you could not simply write out all of your duty of loyalty.

We were trying to make this so as you have at least some reasonable safe harbor without making it so unindefinite that it would create difficulties in terms of being able to give legal opinions and being able to have some reasonable assurance that a particular exclusion was valid.

CHAIRMAN FRANCK: On the motion. Commissioner.

COMMISSIONER BRUCE A. COGGESHALL (Maine): As I read this section, the partners can delete from the duty of loyalty as many different categories of activities as they can possibly think of. Is that correct?

COMMISSIONER HAYNSWORTH: If they are categories as opposed to simply the complete duty itself, yes.

COMMISSIONER COGGESHALL: So, we could say that one of the categories is competing with the partnership.

COMMISSIONER HAYNSWORTH: No.

COMMISSIONER COGGESHALL: That’s not a category?
COMMISSIONER HAYNSWORTH: it would have to be something like with respect to real estate transactions.

COMMISSIONER COGGESHALL: Okay. So if I’m in a law partnership, I can say we’ll delete from the agreement the prohibition against competition in the practice of law. You’d say that I can do that?

COMMISSIONER HAYNSWORTH: That you could compete or you could not?

COMMISSIONER COGGESHALL: That I could specifically say I’m going to delete from the duty of loyalty the prohibition against competing with this firm in the practice of law.

COMMISSIONER HAYNSWORTH: The answer to that would be “yes,” that you could have --

COMMISSIONER COGGESHALL: So that cuts out the guts of the loyalty obligation.

COMMISSIONER HAYNSWORTH: There are lots of partners that practice in more than one law firm, and that in and of itself would constitute a waiver of that right. There are partners, there are several lawyers that are partners in more than one law firm.

COMMISSIONER COGGESHALL: I guess the point is, without going through a whole list of examples, I can, if I properly define what it is I am excising from this duty, I can really
eliminate the whole duty -- as long as I’m specific enough. Isn’t that what that section says?

COMMISSIONER HAYNSWORTH: The answer back to you would be then, in that event, the case law, if you were -- it amounted to virtually stripping it away altogether, the case law would be that that would not be enforceable, that it’s got to be something that’s --

...  

COMMISSIONER COGGESHALL: I would just say I think what Commissioner Haynsworth just said the case law would do is precisely what Commissioner Breetz’ motion seeks to do.

COMMISSIONER JOHN P. BURTON (New Mexico): I speak in opposition to the amendment. I think it’s quite common these days for partners to want to be able to compete with one another. It is quite common to draft partnership agreements and joint venture agreements to specifically tailor a partnership for this particular deal or that particular deal, and you want -- these are people who are going to be engaging in other deals.

This provision just seems to allow what’s going on already. There is no mischief going on with that that I know of. And to introduce some kind of a manifestly unreasonable standard I think would be a step back to the dark ages of partnership law.

CHAIRMAN FRANCK: Commissioner, are you on the motion?
COMMISSIONER CARL H. LISMAN (Vermont): On the motion. My sense is that in light of Commissioner Haynsworth’s comment, that (c) doesn’t do what he suggested it does. I concur that an artful drafter can strip away in the context of the purpose of the partnership every duty of loyalty. And I think that’s what (c) intends to do. I think that’s wrong. I think that if people want to use an investment vehicle and they choose to use the partnership form, we ought not to convert the partnership to the law of corporations. I think that’s what all of this section tends to do. I’m very troubled by being able to wash away the duty of loyalty.

CHAIRMAN FRANCK: Thank you, Commissioner. Commissioner Rae.

COMMISSIONER MATTHEW S. RAE (California): I am in favor of the motion. All the argument I’ve heard this session, during some meetings of the Drafting Committee, our prior floor session, indicates that the real concern about being able to exempt something has to do with competition. If it were drafted that way, probably wouldn’t have any problems. But, what bothers me is that as so drafted, it applies to all aspects of the duty of loyalty so that I could identify as a specific category that I don’t have to comply with the duty to account to the partnership for my activities, to pick just one out of the sheet here.
I think that (c) is unnecessary, because in each one of the categories of the duty of loyalty you may violate that duty with the consent of the other partners. And that’s where we ought to have it, with their consent. If the partners know what I’m going to do, then it ought to be all -- and they say it’s all right, then it ought to be all right. But the idea of (c) apparently is in the very beginning of the partnership to say that I don’t have to exercise item by item any of the duties of loyalty.

If we’re worried about competition, let’s just limit it to competition. But right now I think that the proposal is a good one. I’m in favor of the motion.

....

CHAIRMAN FRANCK: The right to close is waived. The motion before the house is to amend subsection (c) on Page 20 of the handout so that the authority to eliminate by agreement specific types or categories of activities is further limited by the concept that those limitations may not be manifestly unreasonable.

....

I believe the “ayes” have it. The committee would like to meet with you for some specific language to implement the sense of the house that was conveyed by the motion, and also probably to whip you, but I don’t know about that.
COMMISSIONER JOHN H. LANGBEIN (Connecticut): At the end of 404(c), on the present Line 20 of the handout, I suggest addition of the following sentence. The person alleging that the duty of loyalty was -- sorry -- that the duty of loyalty was modified by agreement bears the burden of proving the modification by clear and convincing evidence.

COMMISSIONER LANGBEIN: I am concerned about the intrinsic inadequacy of the words “specific types or categories,” that phrase, on Line 18. There is no way to get that to be much more particular.

On the other hand, that bears a great deal of freight in the committee’s thinking. Because what you’re saying is that this specificity requirement is the real source of clarity to prevent people from being deceived in particular in limited partnership transactions.

Therefore, what I am groping for with this language, and I have no particular devotion to particular language but to the idea is the notion that the responsibility for clarity is upon the party asserting the waiver of the underlying duty of loyalty. And I hope that my language approximates that. I, of course, welcome any modification.

....
COMMISSIONER H. LANE KNEEDLER (Virginia): Mr. Chairman, I’ll make a response, and there may be someone that wants to add to it. This is one that we specifically considered. I understand Professor Langbein’s concern. We finally determined not to increase the burden of proof here. There are a number of other instances in the act where similar arguments have been made for a higher burden, and we decided not to have a higher burden here than elsewhere.

MR. ED MERRILL (ABA): I want to emphasize that we do agree with the basic proposition that the burden is on the party asserting the limitation to prove it. So, we just don’t agree with the clear and convincing evidence standard. We believe that the preponderance standard should apply.

CHAIRMAN FRANCK: Commissioner Langbein, you have the right to close.

COMMISSIONER JOHN H. LANGBEIN (Connecticut): The clear and convincing evidence standard is a way of warning everybody involved of the seriousness of abrogating the most fundamental of all fiduciary duties, namely, that of loyalty. Since you are abrogating it and the standard by which you allow its abrogation is one which you all concede to be extremely difficult to particularize, namely, the specific types or categories language, surely the way to achieve the purpose that I think we’re in agreement on is to move from substance to procedure and
put a higher burden on the party trying to assert that the duty of loyalty has been waived.

This is a very conventional step. It’s a very easy burden to discharge when the instrument is clear, and therefore the effect is to put the onus on the drafter of the instrument to spell out that abrogation of the duty of loyalty with great detail and clarity, and that, in turn, will have the protective purpose that's needed, especially in these limited partnership situations.

CHAIRMAN FRANCK: Thank you, Commissioner.

The motion before the house is to amend subsection (c) on Page 20 of your handout by adding the following sentence at the end of the subsection. A person alleging that the duty of loyalty was modified by agreement bears the burden of proving the modification by clear and convincing evidence.

As many as are in favor of the amendment, please say “aye.”

As many are opposed, please say “nay.”

The “nayes” appear to have it. The “nayes” do have it.

....

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COMMISSIONER H. LANE KNEEDLER (Virginia): Mr. Chairman, I had not mentioned what the changes are [to Section 405]. It’s on Page 22 of the handout, beginning at Line 3. The amendments are merely to respond to comments on the floor. No other comments.

COMMISSIONER KNEEDLER: Mr. Chairman, the changes to 406 on Page 22, Lines 13 and 14, are to respond to a comment from the floor. The committee would also like the floor to know that with regard to 406(c), Page 23, Line 13, talking about time limitations, we reviewed the issue of whether we needed to address the issue of laches in the statute and decided we did not, that we would address it in the comment.

CHAIRMAN FRANCK: Then proceed with Section 503.

COMMISSIONER KNEEDLER: Section 503, beginning at the bottom of Page 23 of the amendments, the first change on Line 22 at the bottom of Page 22 is merely a style change. The change on Page 24, Line 14, response to a comment from the floor. We have no further comments.
COMMISSIONER KNEEDLER: Mr. Chairman, the only thing I would raise, we were asked to review the priority question in 504, partners transferable interest subject to charging order, Pages 77 and 78 of the draft that is in your notebook. We have done so and have said that we do not intend to address the priority issue here. It would be left to other law. Apparently there's not a whole lot of law out there now, but it would be left to other law, we thought it should not be addressed in this statute.

COMMISSIONER KNEEDLER: We did review with regard to Section 601, Section 602, Mr. Chairman, and it appears in the amendments at Page 25. Section 601 does not. We were asked to review the issue of whether if in a partnership agreement there was a 30-day notice requirement whether that constituted a variation of the partner's right to withdraw under Section 103. We continue to believe what we said the other day, namely that it is not a restriction on the right -- the power to withdraw. It might constitute a breach of the partnership agreement. We will make that clear in the comments.

COMMISSIONER KNEEDLER: Section 602, partners wrongful dissociation. The change at the bottom of Page 25 -- I'm sorry.
The change on Line 12, Page 25, was read to you previously. It’s a committee change.

The one at the bottom of Page 25, Line 21, is a stylistic change. You may remember, Mr. Chairman, the other day there was some question from the floor about whether the title of this, and I suppose indeed the whole subject matter of this section, was correct. It talks about the partner’s wrongful dissociation. The question was what happens not now to the partner who does something wrongful, but to the partner who is treated wrongfully by the other partners. Our answer to that is not addressed and wasn’t intended to be addressed in Section 602. That is addressed, however, by the remedies that are granted to a partner in Section 406. We were asked to review that and we have.

....

COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut): Could the chair explain what the relationship is between Section 405, which talks about the partner’s liability to the partnership, and subsection (b) of Section 602 which appears at Page 25, Line 21. I read 405 to be the general statement of liability. And it seems to me that the standard in 602(b) is perhaps a different standard, and I didn’t know whether that was the committee’s intention.

CHAIRMAN FRANCK: Response from the committee.
MR. DONALD WEIDNER. (Reporter): The intent of Section 602 is to set up a special liability for damages that are caused by the very act of dissociation itself. And that’s the language -- the operative language of Section 602 was in 602(b).

COMMISSIONER BREETZ: Why is that different than the standard that is in 405, which is general liability for the breach of the agreement or the violation of a duty causing harm.

....

COMMISSIONER HARRY J. HAYNSWORTH (Illinois): It was an attempt -- the example, one of the examples we used is you have a term partnership. One of the partners gets out, which he has the right to do. The partnership at that point is negotiating a loan or something of that nature. And as a result of the withdrawing partner withdrawing, the loan falls through for some reason and causes damage to the partnership. But it was to be sure that we had picked up that kind of damage as being a special kind of damage purely because he dissociated, not because he breached the partnership agreement, you know, in the ordinary carrying on of the business of the partnership.

COMMISSIONER ROBERT H. CORNELL (California): Commissioner, I think you’re right. It’s the belt and suspenders. And the reason for it, I think, is to highlight the fact that we can’t stop someone from exercising the power to dissociate, but that’s not necessarily the right to dissociate.
And so if the person exercises that power without the right, they have liability for it. And that was just to point it up. But you’re absolutely right, it would be a breach of the agreement. It is covered in the other section, but we did want to highlight it.

COMMISSIONER BREETZ: It’s my understanding that the committee intends that the standard be the same under both, but this is a highlighting. Is that fair?

COMMISSIONER HAYNSWORTH: Yes.

....

COMMISSIONER KNEEDLER: Section 603, Page 26 of the handout, effect of partner’s dissociation. The amendments appear on Lines 12 to 16. What the new language is is in response to some concerns expressed to the floor with regard to what happens to various duties under Section 404 when there is a dissociation. The reference to -- what it says is: Partner’s duties under Section 404(b) (1). (b) (1), that’s the partnership opportunities duty. (b) (2), that’s acting as an adverse party. (2), which is the duty -- excuse me, and (d), which is the duty of care, continue only with regard to matters or events that occurred before the dissociation. And we want to make clear that Section 403(b) (3), which is the duty not to compete, terminates upon dissociation.

....
CHAIRMAN FRANCK: Proceed with Section 702.

COMMISSIONER KNEEDLER: Mr. Chairman, the changes in 702, those that appear on Page 27 of the handout, Lines 4 to 10, are merely drafting changes resulting from the using of the little (i)’s. (b) is a response to a comment from the floor, and it addresses the dissociated partner’s liability to the partnership for exceeding his authority after the dissociation.

CHAIRMAN FRANCK: Commissioner, you want to address this?

COMMISSIONER LEON M. McCORKLE, JR. (Ohio): With respect to 702(b), Page 27, Line 11, why is the concept of indemnity rather than liability introduced?

CHAIRMAN FRANCK: Response from the committee. The question is why the reference to Line 11 of (b) is to indemnity rather than liability.

MR. DONALD WEIDNER (Reporter): To make clear that it is not an obligation shared with his fellow partners.

....

COMMISSIONER BRUCE A. COGGESHALL (Maine): I wonder if on Page 27, Line 10, if the committee would consider adding after 704 “or Section 303 (e).” Now, I understand that I can get there if I follow the path that the ABA representative pointed out to me yesterday, but it’s kind of difficult. If you look over at 704(b), it says “for purposes of Section 702 and 703(b),
a person not a partner is deemed to have notice." And that’s really the only time those terms are used in 704 and you’ve got to trace back to 303(e) to get to that conclusion. And it seems that it just makes it easier to read and to get to that conclusion if you had that language, those words there.

CHAIRMAN FRANCK: The question is whether the committee would consider adding at Line 10 on Page 27 to (iii), after the word “Section 704” the words “or Section 303(b).” Response from the committee.

COMMISSIONER KNEEDLER: That’s fine. We accept that.

CHAIRMAN FRANCK: The committee will add that. Add that, please, in your materials. Line 10, Page 27, strike the period after “704” insert “or Section 303(b),” then be followed by a period.

COMMISSIONER KNEEDLER: 303(e).

CHAIRMAN FRANCK: 303(e). I’m sorry, I misheard.

....

COMMISSIONER PETER F. LANGROCK (Vermont): I assume in section (b) we’re really talking about any net loss, that the loss would be balanced off any gain that might be made by the obligation incurred by the partner, the dissociated partner. Am I right in that regard?

MR. DONALD WEIDNER (Reporter): Yes.
COMMISSIONER LANGROCK: Maybe just a comment to that because it could be read that there are losses that are not balanced in the profits.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut): With respect to the question with regard to (b) as to whether or not a difference between liability and indemnification in (b), not a subject in which I have great expertise, but it seems to me that notions of indemnification involve obligations on the indemnifying party that may go beyond normal standards of liability. I’m thinking of court costs, legal fees, those kinds of things which may be swept in under indemnification and might not exist under pure liability standard. I don’t know that. My sense from the response from the reporter was that you didn’t intend a substantive difference by the use of the word “liability” and “indemnification,” and I just didn’t know, whether you had thought about that issue.

CHAIRMAN FRANCK: Let’s see what the committee has to say about it.

COMMISSIONER KNEEDLER: Are you suggesting on Line 11 you change “indemnify”, to “shall be liable to”?

COMMISSIONER BREETZ: Well, if you intend the same result, then my instinct is to use the same word.
CHAIRMAN FRANCK: The original question was asked why you don’t say that rather than indemnity, and now the point is being made that indemnification might involve more than ordinary liability or amounts other than ordinary liability. That’s the issue before us.

COMMISSIONER KNEEDLER: We would accept changing “indemnify the partnership” to “shall be liable to the partnership for any loss caused.”

COMMISSIONER BREETZ: Thank you.

CHAIRMAN FRANCK: They’ve accepted, and will you mark in your materials at Line 11, Page 27, sub (b), strike the word “indemnify,” substitute the words “be liable to.” And on Line 12, after the word “partnership,” put in the word “for,” so the beginning of (b) would read “a dissociated partner shall be liable to the partnership for any loss,” and strike the word “against.” Line 12 reads “partnership for any loss caused to the partnership,” et cetera.

I see no one else seeking recognition with respect to 702, proceed to 703.

....

CHAIRMAN FRANCK: The committee suggests that on Line 11, instead of the word “shall be,” because of the other changes, stylistically it should be “is liable to.” And without objection from the floor, we will make it “is liable to the
partnership for any loss caused to the partnership." Is that correct?

MR. DONALD WEIDNER (Reporter): Yes.

....

COMMISSIONER KNEEDLER: Mr. Chairman, on Section 703, the major changes at the bottom of Page 27 Lines 22 to 25, what we do is address the concern from the floor of what liability the dissociated partner has after dissociation. What it does is make it clear that the liability is limited to (b), which deals with contractual liability. In short, it addressed Commissioner Langrock's problem about tort liability.

With regard to the other changes, change on, Page 28, Line 6 and 7 is stylistic, as are the changes in Lines 8 through 13.

We accept the addition of "and Section 303(e)" at the end of Line 14, and have no further comments.

CHAIRMAN FRANCK: I think it should be "or "Section 303(e)" to parallel the change.

....

CHAIRMAN FRANCK: On Line 14, Page 28, strike the period after, "704, " add the words "or Section 303(e)," and then put the period.

Commissioner.
COMMISSIONER PETER F. LANGROCK (Vermont): I appreciate what you’re trying to do on the tort liability. I’m just wondering if “obligation” is the best word.

CHAIRMAN FRANCK: Where are you, Commissioner?

COMMISSIONER LANGROCK: I’m on Page 27, Line 23. It just seems to me that obligation sort of rings in contract rather than in a tort situation. And it may be that a comment can handle it. I haven’t come up with a better word. What you’re trying to do is to prevent the airplane example I gave you the other day. There may be a better word than “obligation.” I don’t think of that in terms of obligation, but rather in terms of potential liability or something.

CHAIRMAN FRANCK: Comment from the committee?

COMMISSIONER HOWARD J. SWIBEL (Illinois): Commissioner Langrock, we looked at that question, today and concluded that the current Partnership Act uses the words “obligation” and “liabilities” interchangeably. They seem to be using “liabilities” mainly in the sections dealing with accounting. But it is our understanding that the word “obligation” in the current act is construed and interpreted as broadly as possible to cover every type of obligation arising either in contract or tort. It certainly is our intention, we’d be pleased to do put it in a comment if you think that would be useful.
COMMISSIONER LANGROCK: It may be. The only words I could come up with, “obligation” or “tort liability,” but if “obligation” encompasses it, that would be a destructive -- (d) is a very strong comment to make sure it’s clear.

CHAIRMAN FRANCK: They’ll agree to put it in the comments.

....

COMMISSIONER KNEEDLER: 704, Page 29 of the handout, the change on Line 9 is a stylistic change responding to a floor comment. The change on Lines 13 to 16 was read previously by the committee.

CHAIRMAN FRANCK: We proceed then to Section 802.

COMMISSIONER KNEEDLER: Mr. Chairman, I’m going to ask Commissioner Swibel to take Section 802. This is a section that he has been shepherding for us for some time now. This, along with Section 404, I think it’s fair to say was what took up a great deal of our time over the past two days. I’d ask Commissioner Swibel to walk us through Section 802.

....

CHAIRMAN FRANCK: Proceed, Commissioner Swibel, with Section 802.

COMMISSIONER HOWARD J. SWIBEL (Illinois): Section 802, Page 29, we had accepted the suggestion of Commissioner
Langrock that this section be limited to partnerships of more than two persons. That’s reflected on Line 21 of Page 29.

We’ve made a change on Page 30, which is consistent with our policy decision to put the dissociated partner during this 90-day period in virtually the same position that he or she would be in had this Section 802 not existed.

CHAIRMAN FRANCK: You’re referring to the change on Line 7?

COMMISSIONER SWIBEL: The Line 7 change is something we read from the floor yesterday, I believe. I’m referring to Lines 18, 19 and 20. And the references are thereto a dissociated partner’s liability under Section 702(b) and 703(b).

CHAIRMAN FRANCK: Okay.

COMMISSIONER SWIBEL: And the additional changes we made on Page 31 are to accomplish the proposition that the partner is going to get the benefit of any profits during the 90-day period and is only going to be charged with any losses to the extent of the profits. So, he will not be faced with liabilities.

CHAIRMAN FRANCK: This was in response to floor comment about the partner not being -- the dissociated partner not being able to participate in the management of the partnership during the 90-day period.

COMMISSIONER SWIBEL: Yes.
COMMISSIONER BRUCE A. COGGESHALL (Maine): On Page 31, Line 5, I’m not sure that it’s clear what profits from transactions during the period means. Wouldn’t it make sense to say just profits earned during the period?

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER SWIBEL: Yes, that would be -- that’s the meaning.

CHAIRMAN FRANCK: You’re going to accept the language?

COMMISSIONER ROBERT H. CORNELL (California): I’m not sure that would work because you could be earning money -- let’s say that the remaining partners decide to cool the business and they’re just collecting money during that period of time, whatever it may be. There may be profits, but they, don’t occur because of the transactions that took place during that time.

COMMISSIONER COGGESHALL: Commissioner Cornell, my concern is that you’re limited to profits from transactions during the period, and there may well be prior transactions that you’re continuing to earn profits from, and I think the intent is that that partner continue to earn -- to share in those profits. And really it’s profits, maybe not earned profits derived during the period, but it certainly shouldn’t be limited to transactions that happened just during that 90-day period.

COMMISSIONER CORNELL: Well, the partner has dissociated. The question is it may be sometimes we won’t know
if it’s a winding down or just on a hold basis, whatever it may be, because the other partners are somewhat at risk during that period of time. Actually, his cut-off time and the termination of what his share in the partnership is is on the day that he dissociates. So, now you have a continuing period in which he does not share in the losses and should not share in the profits to the degree that transactions occur.

COMMISSIONER COGGE SHALL: Let me just give you an example, Commissioner, if I could. I performed some legal services 60 days ago. I sent out a bill for those services, and the services are complete. And as is common these days, I don’t get paid on time. I finally get paid during the 90-day period. Does the dissociated partner who was a partner when the services were performed share in those profits or not share in those profits? As now formulated, he would not.

MR. DONALD WEIDNER (Reporter): Commissioner, the concept that the committee had in mind when it adopted this rule was that you will have in effect a separate count from the transactions that took place during the period. Now, again, this is the period after the person has dissociated, after the person has accrued a right to liquidate the business. We are suspending that right for 90 days. And in that suspension, we are taking away this person’s management powers. The compromise we have struck, in part to satisfy the people yesterday who said
he shouldn’t be cut out of profits for that period is as follows, we’ll take that period separately, that period in which his management rights are suspended, we’ll allow him to share in profits for that period, but he must also share in losses for transactions during that period. So, any losses incurred during that period, in your hypothetical, would not go against your prior victory that you earned, in effect, while you still had management rights.

COMMISSIONER COGGESHALL: Well, I --

CHAIRMAN FRANCK: Commissioner, just one second. We’ve now had three or four exchanges between you and various commissioners. The response from the committee seems to be that they’re satisfied with the language that they have. I will give you some time to formulate a motion if you care to make one. There are at least two other speakers who seek to be recognized. I’ll come back to you if you want to make a motion.

COMMISSIONER COGGESHALL: I don’t want to make a motion. But I’m not sure that the question has been answered. I’m not arguing with the committee. I’m just trying to find out what they, intend. Do you intend that you share only in transactions, that the transaction occurred in that 90-day period.
MR. WEIDNER: Negative. I see the drafting problem. He is going to share in the profits from transactions before the period and during the period.

COMMISSIONER COGGESHALL: That’s the point.

MR. WEIDNER: But this language is in here because we want to segregate the profits and losses that occur for transactions during that period and say that he shall not be liable for any losses beyond the profits incurred during that period.

COMMISSIONER COGGESHALL: But at the beginning of Line 5, it’s not transactions, it’s not, profits only from transactions that occurred in that 90-day period, it’s profits that are earned in that 90-day period. It’s what you just said I think. Is that right?

MR. WEIDNER: I see your problem.

CHAIRMAN FRANCK: I’ve let the further colloquy go because you have acknowledged some kind of drafting problem. Let’s see if the committee can come up with a drafting solution to the problem they seek.

....

All right. They’re going to work on that drafting problem. They see the problem. They’re going to try to work on a solution, but in the meantime we will continue with the floor
comments with the rest of the committee not working on that solution.

All right, Commissioner, go ahead.

COMMISSIONER DYKE: Gentlemen, I have a question on (c)(2). During this 90-day period --

CHAIRMAN FRANCK: (c)(2).

COMMISSIONER DYKE: I’m not quite sure I understand (2) the way it’s written now. The second part of it, but is not liable for contributions for and must be indemnified by the other partners against any partnership liability incurred by another partner. That has nothing to do with winding up. Does this mean that if during this period there are substantive obligations to third parties that are incurred that the dissociated partner will be liable to third parties, and what you’ve given him is an indemnification right back from his other partners which might, be useless, so you’ve taken away his management and he’s out there with other partners, with his partners doing all kinds of things in the field, they may not have a cent to their name, using him and his credit to do whatever they’re doing, in effect, and he is now liable and you’ve given him an indemnification?

CHAIRMAN FRANCK: Commissioner Swibel.

COMMISSIONER HOWARD J. SWIBEL (Illinois): Let me explain how that works. In the absence of this section, a
dissociated partner is liable to third party creditors who rely on the partner being part of the partnership unless the third party creditor has actual notice. So, for a dissociated partner to protect him or herself, again, regardless of whether, there’s a Section 802, he has to try to give notice to third party creditors.

COMMISSIONER R. DYKE: But he’s not taking part in management, he may not even know.

COMMISSIONER SWIBEL: That’s right. If in the absence of this section, when a dissociated partner gives his notice and the winding up period is commenced, the partners do have liability for obligations that are incurred in connection with the winding up process. That is the law any way.

COMMISSIONER DYKE: But this is for liabilities that have nothing to do with winding up, No. 1. And No. 2, the law today does not have a 90-day waiting period where the partner who wants out is, in fact, captive of this partnership for 90 days, no say in anything that’s going on, and yet personally liable to the rest of the world for everything that’s going on.

COMMISSIONER SWIBEL: That’s right. And he is not liable for obligations that are incurred on a going concern basis. That’s what this section says.

COMMISSIONER DYKE: And how do you read that?
COMMISSIONER SWIBEL: He is not liable for contributions for any partnership liability that is not appropriate for winding up the business.

COMMISSIONER DYKE: I understand he is not liable to contribute to the partnership for his other -- or to the other partners, but he is going to be nailed by a third party who is going to sue him. Now, if he has to pay because he’s the monied partner, I don’t understand what he gets out of this section except an indemnity that may mean nothing. I mean, the if that’s what you want, just say that’s what’s happening. The problem here is many partnerships, and the ones that work with every day, there usually aren’t equal partners. They are usually a money partner and a partner that’s providing some kind of a service, some kind of an expertise. And when these things go down the tubes, the money partner wants to stop what’s going on. And what you’ve got here is a captive money partner that may be liable to the rest of the world and have an indemnification from people that he knows can’t pay him.

COMMISSIONER SWIBEL: Under the current law, as I said earlier, under the current law, the money partner is captive in the same way for any liability that is incurred after dissociation to a third party, who relies on him being part of the partnership. And we carried forward that rule in Section 703(a) where we say a dissociated partner is not liable for a
partnership obligation incurred after dissociation, and that would include the partner under Section 802, except in the limited circumstances under (b), which is on Page 28 of the handout. And in that situation, for a two-year period, any dissociated partner, which is the current law, will be liable to a third party who relies on the dissociated partner being part of the partnership unless there is actual knowledge that that third party has that the person has left the partnership. That is the law now.

CHAIRMAN FRANCK: Now, I’ve let you continue, Commissioner, because I know this is an important issue. It was raised during the first reading -- not the first reading, but the reading the other day.

A COMMISSIONER: Mr. Chairman.

CHAIRMAN FRANCK: Just one second. And this is where the committee stands. And if anybody is unhappy with that, as you appear to be, Commissioner, at this point we’ll have to have a motion to cure the problem as you see it.

....

COMMISSIONER LAMB: Never, correct. Generally you’re right, generally.

Page 31, Line 5 --

CHAIRMAN FRANCK: Page 31, Line 5, proceed.
COMMISSIONER LAMB: Why not say profits from income earned during the period.

CHAIRMAN FRANCK: Excuse me, Commissioner, they’re working to draft a solution to that section. Let’s wait to hear what they have to say.

....

MR. DONALD WEIDNER (Reporter): The latest solution is on Page 31, Line 1, the first word insert “with respect to transactions during the period,” comma, and then continue with the language. And then at the end of Line 4, delete the word “from,” and Line 5, delete the word “transactions during the period.”

CHAIRMAN FRANCK: Your suggestion is --

MR. WEIDNER: On Line 6, delete the two commas.

CHAIRMAN FRANCK: The suggestion is that in subsection (3), Page 31, we insert at the beginning of the subsection “with respect to transactions, during the period,” comma. We then continue the subsection as it is printed in the handout until we get to Line 4, we strike from Line 4 the last word “from,” we strike on Line 5 the first four words “transactions during the period.” We strike on Line 6 the two commas.

The sections as it is proposed to be revised would read: “With respect to transactions during the period must be credited with the share of any profits but shall be charged with
the share of any losses only to the extent of profits credited for the period.”

Is that the committee’s proposal?

MR. WEIDNER: The sense is what we’re doing in this subsection is simply setting up the rules that are peculiar to the 90-day period, and the general rules, as to allocations and profits and losses are in Section 401. And those general rules would apply to the profits and losses both arising from transactions occurring prior to the notice of intent to liquidate.

MR. ED MERRILL (ABA): A similar problem exists with respect to the existing Section 309, which we have continued. And the case law has developed kind of a modified accrual accounting system to equitably allocate those profits to separate those two accounts. And our intention would be that that same type of analysis would apply to this section as is used in the cases under 309.

CHAIRMAN FRANCK: Do I understand the parliamentary situation to be that the committee has accepted that amendment? Has the committee accepted to change subsection (3), Page 31, that was just read to you? Then the parliamentary situation is that that is the section as you must now consider it, and if you
have any comments or motions, they will have to be addressed to subsection (3) at the top of Page 31 as it has been revised and as the reporter and I have read it to you.

Commissioner.

COMMISSIONER MARLIN J. APPELWICK (Washington): I have anxiety about your use of the words “transactions occurring.” I can’t say that I am sure that 401 will take care of it. If I am a managing partner in a partnership and I put together a transaction, I suddenly discover that through the winds of fate, the deal is going to go bad and we’re going to take a big loss. I read this as allowing me then to give my 90-day notice and protect myself from taking the hit on that loss because the transaction may not be completed until that 90-day window. And during that 90-day window, I share in the loss, only to the extent of the profits. Well, there won’t be any profits, therefore I won’t share in any loss. So, on an accrual transaction, even though I may have initiated the transaction, can I run and hide? I don’t think you want that harbor.

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER APPELWICK: I think you’re getting at transactions initiated.

CHAIRMAN FRANCK: Let’s give them a chance to answer.

MR. ED MERRILL (ABA): Let’s look at the dissociation situation. We feel as a policy matter, and I think that it’s
been expressed several times here the example of the crazy partners going out with the unsafe airplane, that the partner, if he sees a transaction coming down the road that is going to result in tremendous personal liability for him, should have a way to protect himself. The situation that you posited is that kind of a situation. Once he’s out, he’s out. He is a dissociated partner then. He does not have the option to come back in after the thing blows over. The partnership is dissolved. And it only occurs, remember, in an at will partnership.

COMMISSIONER APPELWICK: But if this is a three-person partnership, why should the other two partners who may not have knowledge that the transaction is going bad also have the opportunity to protect themselves by getting out before this person gets out to put the transaction together? He won’t have the knowledge to exercise it even though theoretically it’s there. And it doesn’t matter whether it’s a contrived situation or an inadvertent situation.

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER ROBERT H. CORNELL (California): I think the example you gave, there would be a good faith, if you could prove it, that he knew about this, he didn’t tell anyone else and he used that in order to beat everyone else out the front
door or the back door. That would be a breach of good faith and I don’t think he could get away with it on that basis.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER BRUCE A. COGGESHALL (Maine): I thought when I last sat down that the formulation was going to be all profits earned during a 90-day period, less all losses during the 90-day period, but that he wouldn’t be charged with any losses in excess of the earned profits. But I hear you’ve gone back to really what you’ve got right here and said you look only at transactions during the 90-day period. I have no objection to that, I’m just wondering if that’s what you intend.

MR. MERRILL: Could I ask you to clarify what you thought the rule was supposed to be? We believe it is a separate isolation of this period with an accrual of the profits and the liabilities from that period and that the losses will be netted against the profits but not beyond that.

COMMISSIONER COGGESHALL: But it’s only for transactions that the partnership entered into during that period.

MR. MERRILL: That’s correct.

COMMISSIONER COGGESHALL: Okay. That’s what I was trying to get at before, and I got two different answers. That’s fine, I don’t have a problem with that.
MR. MERRILL: That is the result we’re trying to achieve.

CHAIRMAN FRANCK: They are seeking, as I understand it, to isolate the transactions during that period from transactions that occurred before the 90-day notice.

COMMISSIONER COGGESHALL: But if there are profits during that 90-day period from transactions that were entered into prior to the dissociation, those do not enter into the formula.

MR. MERRILL: That is correct. It is a quasi-accrual concept for that period.

CHAIRMAN FRANCK: Commissioner, you are still at the microphone.

COMMISSIONER MARLIN J. APPELWICK (Washington): May I suggest that the reference to transactions then be transactions initiated during the period, I don’t think that was in your, language, as opposed to if you leave it open, I think it can include those that are simply consummated that started before or lingered after or whatnot. I don’t disagree with what you’re trying to do. I’m having problems with fixing the point in time.

CHAIRMAN FRANCK: The suggestion is that you reference (3) with respect to transactions initiated during the period.
What is the committee’s response? We’ll give them a minute to talk it over.

Response from the committee. Commissioner Cornell.

COMMISSIONER ROBERT H. CORNELL (California): There may be a suggestion from the floor for a more elegant way to put it. But one of the problems with transactions initiated during the period is the whole partnership fight, for instance, could arise over whether or not you pull the plug on an ongoing transaction and cut your losses, and it was a transaction that was initiated before the dissociation. What we’re trying to do is if it’s an ongoing obligation that would be proper to winding up, let’s say in the law firm breakup, there are cases that still have to be handled, there are deadlines to be met and so forth, and even though you’re winding up, that’s something you would do. That’s one aspect. But if it’s a new case that walks in the door, it’s another. Or if it’s something that you could stop doing, that’s another case. But I think if we use “initiate during the period,” that’s too limited. We want to bring in, all the transactions that take place during the 90-day or lesser period that are not appropriate to winding up. So, even the continuing, if it’s not appropriate to winding up, would fall within this risk factor with respect to the other partners.
CHAIRMAN FRANCK: They do not accept the word "initiated."

Are there further comments on Section 802?
Commissioner.

COMMISSIONER MARK H. RAMSEY (Oklahoma): The word that disturbs me about your new formulation is "transaction." And it’s, I’m sure, intended to be very broad, but of course that creates all the problems of when it’s triggered and when something is incurred or not incurred. It seems to me that a phrase that’s accepted in the accounting world is "profits or losses incurred," so might that not be a better formulation so that it would read "with respect to profits or losses incurred during the period."

CHAIRMAN FRANCK: The suggestion is that we have subsection (3) begin "with respect to profits or losses incurred during the period rather than transactions." Response from the committee.

I gather the committee accepts that suggestion. Sub (3) will begin, Line 1, Page 31 of the handout, "with respect to profits or losses incurred during the period must be credited," et cetera. Thank you, Commissioner.

....

COMMISSIONER KNEEDLER: Section 804, beginning on Page 31, Line 10, the only changes in 804 were committee changes that
were read previously. I think we have no further comment. Let me check. We have no further comment.

....

COMMISSIONER KNEEDLER: 806, Page 32 of the handout, Line 8, I believe the changes were style only. No other comments.

....

COMMISSIONER KNEEDLER: 807, changes are on Page e3, Lines 15 to 21. There is, Mr. Chairman, one other change. “Liability” has been stricken and “obligation” substituted, therefore we would retain “liability” and strike “obligation.”

CHAIRMAN FRANCK: Line 17?

COMMISSIONER KNEEDLER: Line 16 and 17 would read “Encourage a partnership liability under Section 805(2).” And I would assume that the same suggestion would be made here as previously, that on Line 19 it should read “is liable to the partnership for any loss caused.” We haven’t discussed that, but I think that would be appropriate.

The purpose here is to -- it’s the winding up analog to Section 702(b) for the liability of a partner during winding up as compared to previously liability during dissociation.

CHAIRMAN FRANCK: Page 33, contrary to how it appears before you in the handout, the word “obligation” is not added and the word “liability” is not struck. On Line “partnership
liability under Section 805(2).” On Line 19, the words “shall indemnify” are struck and substituted the words “liable to,” and on Line 20 the word “against” is struck and the word “for” is substituted. Line 19 through 20 would read “partnership business is liable to the partnership for any loss caused to the partnership arising from that liability.”

COMMISSIONER KNEEDLER: That’s correct, Mr. Chairman.

...

CHAIRMAN FRANCK: Then I will recognize the Commissioner from Massachusetts for the purpose of raising his proposed change in Section 601.

COMMISSIONER RICHARD MORNINGSTAR (Massachusetts):
Section 601, subsection (5)(iii).

...

COMMISSIONER MORNINGSTAR: My concern is what I would consider the looseness of the language when talking about you could get a judicial decree to expel a partner who engaged in conduct relating to the partnership business which made it not reasonably practicable to carry on the business in partnership with that partner. The concern that I have is that that kind of language could be used as an end run to kick a partner out of a partnership. For example, if the partner was a dead beat partner, if the partner was doing something to affect the morale of the partnership. I think it would be much more clearer -- I
think that language was okay under the old Uniform Partnership Act when we were talking about dissolution in the case of such conduct, but here we’re talking about expulsion.

I hope what the committee really meant and the language that it would accept would be the partner engaged in conduct relating to the partnership business which makes it not reasonably practicable for the partnership to carry on its business. It seems to me that the issue ought to be when expelling a partner, that not to expel the partner by judicial decree would literally make it impossible for the partnership to carry on its business, not to try and argue, well, you know, we really can’t carry on business with this partner.

CHAIRMAN FRANCK: Are you submitting that suggestion to the committee?

COMMISSIONER MORNINGSTAR: I submitted that in writing, and no action --

CHAIRMAN FRANCK: Apparently the committee has not accepted that. Let’s hear from the committee as to why they don’t accept that.

COMMISSIONER H. LANE KNEEDLER (Virginia): Mr. Chairman, this particular suggestion was submitted to the committee. I cannot say it was discussed in any great detail. We did take, as the Commissioner suggested, the original language, or the language that’s here from the original act, and
we thought it conveyed what we wanted it to convey. I understand what you’re saying.

CHAIRMAN FRANCK: Is there any further answer?

COMMISSIONER KNEEDLER: No further comment.

CHAIRMAN FRANCK: Any other answer from any member of the committee?

COMMISSIONER HOWARD J. SWIBEL (Illinois): I’d just like to make this comment.

CHAIRMAN FRANCK: Commissioner Swibel.

COMMISSIONER SWIBEL: I frankly don’t understand the substantive difference between the language you suggest and the language that is in both the current Uniform Partnership Act and our draft. To say in your phraseology that it’s not reasonably practicable to carry on the partnership business...

COMMISSIONER MORNINGSTAR: For the partnership to carry on its business, and I want to delete the language “in partnership with that partner.” I think the way that it’s worded right now, it’s too easy -- I think it’s vague enough that it could be used as a vehicle, even if proven -- even if ultimately rejected by a court it’s too easy to use it as an excuse to expel a partner on something less than the partnership simply cannot carry on its business.

COMMISSIONER ROBERT H. CORNELL (California): This is only allowable with the judicial decree.
COMMISSIONER MORNINGSTAR: A judicial decree of expulsion. And what you have done, you’ve taken language which originally was involved with dissolution. If it were dissolution, then it wouldn’t matter because obviously that would become the ultimate issue, whether the partnership could continue its business. But now you’re just talking about expulsion, and I think it could turn out to be an escape route. I think that it doesn’t change your meaning or what you intended to make it a little bit clearer by the language that I --

CHAIRMAN FRANCK: Commissioner, we’ve had enough colloquy to make it fairly clear that the committee is not going to accept your --

COMMISSIONER MORNINGSTAR: Then I would make a motion.

CHAIRMAN FRANCK: As I understand it, the motion is on Page 82, (iii), Lines 10, 11 and 12, it would change (iii), if I understand it, and please check me, to read “the partner engaged in conduct relating to the partnership business which makes it not reasonably practicable for the partnership to carry on its business.” Is that your motion?

COMMISSIONER MORNINGSTAR: That’s the motion.

COMMISSIONER KNEEDLER: Mr. Chairman, I understood he kept the language “in partnership with that partner.”

COMMISSIONER MORNINGSTAR: I’m taking that out.
CHAIRMAN FRANCK: I’ll read it once more so that everybody will have it. (iii) would read, if the motion prevails, “the partner engaged in conduct relating to the partnership business which makes it not reasonably practicable for the partnership to carry on its business.”

Is there anyone else who wishes to be heard on this motion who has not yet spoken for or against it?

MR. DONALD WEIDNER (Reporter): Under the UPA, that language which says “with him” instead of “with that partner,” we’ve just changed it to make it gender neutral, is the language for decree of dissolution by court. The section you’re looking at does indeed refer to such judicial decree as resulting in a dissociation, and that is one of the events that we list in Section 801, more specifically Section 801 (5)(2)(i) that says that a partnership is dissolved on such a decree.

CHAIRMAN FRANCK: Commissioner, you have the right to close on your motion.

COMMISSIONER MORNINGSTAR: I’d have to look at Section 801. I would still press the motion on the basis that I don’t think it changes your meaning and I think it makes it a lot clearer.

CHAIRMAN FRANCK: All right. Are you ready for the motion? The motion before you is to change (iii) on Page 82, Lines 10, 11 and 12. If the motion is adopted that subsection
would read “the partner engaged in conduct relating to the partnership business which makes it not reasonably practicable for the partnership to carry on its business.”

As many as are in favor of that motion, please say “aye.”

As many are against, please say “nay.”

The “noes” appear to have it. The “noes” do have it.

The motion is defeated.

COMMISSIONER PETER F. LANGROCK (Vermont): I’m rising further on 601(1). It’s an inquiry to make sure that I’m correct. Do I understand that if I as a partner say I want to dissolve the partnership, a three-person partnership, that I qualify under (1) as dissociating?

CHAIRMAN FRANCK: This is an inquiry going back to Section 601 which is in your book at Page 81.

COMMISSIONER LANGROCK: Let me tell you my dilemma. I read this as you’re in a partnership, you can do two things. One, you can dissociate yourself under 600 series, or you can say “I dissolve it.” When you dissolve it, you run into 802 and all the problems of 802 which go to 603, whatever the other matters are. If, in fact, under 601, you are -- when you say “I want to dissolve it,” you don’t fall into the situation, I think some of your consequences don’t meet. If 601 says when I say I hereby dissolve the partnership, 802 comes in 90 days, if I’m
also under 601 (1), I think everything is hunky dory, but if not, you’ve got some problems.

MR. ED MERRILL (ABA): Commissioner, under 802, it is phrased in such a way that you need not be a dissociated partner to have the protection from liability. I believe the section is worded as if you are a dissociated partner under 703(b). It a subtle difference.

CHAIRMAN FRANCK: Does that answer your question?

COMMISSIONER LANGROCK: Well, it doesn’t yet.

CHAIRMAN FRANCK: Communicate to the committee what you still don’t quite understand.

COMMISSIONER LANGROCK: My basic problem is that 802 is a new creature. And right now under the general partnership law, I can dissolve a partnership, I don’t have to worry about 90 days. 90 days has all sorts of consequences. It has the non-compete, which --

CHAIRMAN FRANCK: Excuse me, Commissioner. I think we’re still having discussion here on your prior point. It’s only going to work if the committee is listening to the comments you are making.

MR. DONALD WEIDNER (Reporter): Can I take a stab at it? I’m trying to answer your question without being at all facetious. I think the most diaphanous of all statements that says that I want to liquidate is not going to do it. For
example, if you say let’s liquidate this partnership, folks, and they say you can’t because you have no right to, and he says, oh, then he’s not out yet. I think the history behind the express will concept implies a deliberate intent to end an association. And so explaining it in terms of the language of the two sections you were referring to, 601 and 801, I would say that the language in 801 is not language of intent to dissolve, but it’s language of express will to terminate the partnership. I think there has to be -- again, there’s common law behind this in the express will -- a sufficient intent to start contracting the relationship.

COMMISSIONER LANGROCK: Maybe I’m not quite as sophisticated. There are three of us who own a horse and I want to get out of it. And one day I say “I dissolve this partnership, I’m through with you.” And the next day -- or the alternative, I say: I withdraw from this partnership.

And I take it the consequences are very substantially different. If you really want that difference, I think you’re making a mistake. It’s not what Commissioner Cornell told me before. I think if you go back and look at what you’ve done under 603(b), dissociation or whether it’s a dissolution. And you go right back into the whole question of covenants, you go back into the question --
MR. WEIDNER: Well, I think those two cases, if you have an expression of a firm intent to get out, then you dissociate under 601, and if it is an at will partnership, then you’re in 801 and have dissolved the partnership. If it is a term partnership, then you have dissociated without causing the dissociation solution.

COMMISSIONER LANGROCK: I’m not worried about term partnership. I’m worried about the magic of language that says --

MR. WEIDNER: By putting both terms in 801, we’ve tried hard to say that we’re not going to require especially a horse person to mince words.

COMMISSIONER ROBERT H. CORNELL (California): Peter, I think you’re right. 801, in the termination of a partner at will, if that’s not spelled out to say that that is a form of dissociation, then we’ve created two classes of partners, and you’re absolutely right and I missed that point.

COMMISSIONER LANGROCK: That’s what my whole problem was before. If you have two classes of partners, then 603, which relates back to 404(b)(3) doesn’t deal with the problems when you’ve got to withdraw under 802.

CHAIRMAN FRANCK: Well, the chair is having a little difficulty here with one of side of the committee trying to explain why the section doesn’t do what the comment says and the
other part of the committee saying that the Commissioner on the floor is correct. I would like two members of the committee to be assigned by the chair to look at this problem and to work on it and then come back and report to us while we go on with deliberation about the rest of the act. We can’t continue on the floor with the committee discussing this among themselves. So, will you assign two members of the committee to work on this?

COMMISSIONER H. LANE KNEEDLER (Virginia): I will.

...

COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut): Excuse me, Commissioner. Do I understand that we’ve completed our consideration of 802.

CHAIRMAN FRANCK: We have completed our consideration of Article 8 and we are now at Section 904.

COMMISSIONER BREETZ: Would it be appropriate at some point to return to 802, if I might, with leave of the chair?

CHAIRMAN FRANCK: If there is no objection from the floor, I will let you return to Section 802.

COMMISSIONER BREETZ: During the interim, between dinner and reconvening this evening, I inquired of some of the advisers as to whether my understanding was correct, that 802 would automatically apply to an existing oral partnership that existed under law today. And I used the example of whether in
1992 my law firm had an oral partnership, and in 1993 the act became the law in the State of Connecticut in its uniform version, whether, in fact, as a result of that, Section 802 would automatically apply to my firm’s oral agreement, and the answer I think was, yes, it would. And I understood that as a result of that, that if my firm wished to avoid the result of 802, we would have to adopt a formal agreement of some form in order to say that our partnership agreement provided otherwise than the default rule in 802. And I understood again that that would be the result.

If that’s the case, it seems to me that there are a lot of partnerships that aren’t as sophisticated, even as my poor little law firm is, and who might therefore as a result of this have the unintended consequence of 802 applying. Now, what’s curious about the default rule to me is that when I sat in on the committee’s deliberations and the committee debated as to why this was a good rule, all of the members present around the table, both commissioners and advisers, said, you know, if I were writing a partnership agreement, I would never write the result of 802. So, we have the curious outcome that the unanimous supporters of this section who would agree that if they were thinking about it would never do it consciously are imposing unconsciously this result on all of the oral partnerships that exist today. And that struck me as a curious
outcome. And I thought perhaps the committee would like to consider the possibility.

CHAIRMAN FRANCK: Let us change your inquiry from a recitation of the historical record and simply ask the committee, if I understand your question correctly, why do they intend that result which is, as you understand, the result of Section 802 on oral existing partnerships, and that question I’ll ask the committee to respond to.

....

COMMISSIONER H. LANE KNEEDLER (Virginia): Mr. Chairman, I am going to ask Commissioner Swibel, who has been handling 802, to address the question.

COMMISSIONER HOWARD J. SWIBEL (Illinois): Commissioner Breetz, we did not view Section 802 as qualitatively different than a whole host of other changes that we’re making in Section 801 to the current oral partnership. For example, under current law, if you die -- excuse me for mentioning that possibility --

....

COMMISSIONER SWIBEL: Under the Uniform Partnership Act, the partnership in which you are organized is dissolved and must be liquidated and your estate is entitled to a pro rata share of the partnership interest. Under, the Uniform Partnership Act as revised, Section 801, that is not the case and your estate will be subject to a statutory buy-out, which is
not something — so there are a whole host of rules in here that are going to be applied to partnerships, and this is just one of them. There’s no reason that we saw to treat this differently than the other rules.

COMMISSIONER BREETZ: I understand that some of those other rules may be just as egregious as this one, but I haven’t thought about those, I was just thinking about this particular one and trying to understand whether there was anything that would cause you all to force me to rewrite, when all of you agreed, as I listened to you, that you would never write it this way if it were your own firm.

COMMISSIONER SWIBEL: We thought it was a good policy to promote the continuity of your law firm’s partnership in the event that somebody wanted to leave and to delay the commencement of the winding up period for 90 days with the protections that we have given in Section 802.

COMMISSIONER BREETZ: Mr. Chairman, taking the Commissioner’s views to be those of the committee, I’ll move that Section 802 not apply to partnerships which existed prior to the effective date of this act, unless the partnership affirmatively adopts the provisions of 802.

CHAIRMAN FRANCK: You’re limiting that motion to Section 802.

COMMISSIONER BREETZ: Yes, sir.
CHAIRMAN FRANCK: The motion is that Section 802 not apply to partnerships that were in existence before the enactment of this act, is that correct?

COMMISSIONER BREETZ: Unless the partnership affirmatively acts, if you will, to opt in to Section 802.

CHAIRMAN FRANCK: You have heard the motion. Is there a response from the committee?

COMMISSIONER HARRY J. HAYNSWORTH (Illinois): Can I just ask some questions of inquiry. Does this mean that the partnership, any partnership would have to affirmatively elect after the effective date of the act to have 802 apply?

COMMISSIONER BREETZ: If they wanted to have 802 apply, yes.

CHAIRMAN FRANCK: The sense of the motion is that 802 would not apply to a preexisting partnership unless the partnership by agreement sought to be made subject to Section 802, is that correct.

COMMISSIONER BREETZ: That is correct, Mr. Chairman.

COMMISSIONER H. LANE KNEEDLER (Virginia): We have a provision coming up in a few minutes, Section 1006, that deals with the application of this statute to existing relationships. It seems to me if that is going to be offered, that would be a more appropriate place.
CHAIRMAN FRANCK: That’s why I asked the question, whether he was going to limit it to this section. We’ve had enough discussion at this point. The issue is before the Conference, and I’m going to rule that we can vote on this motion at this time rather than repeat the discussion all over again when we get to Section 1006.

Seeing no one else seeking recognition on this motion, would you please make your closing statement, if you wish.

COMMISSIONER HAYNSWORTH: I need to ask another question. How does one affirmatively opt in to Section 802? How would that be accomplished?

COMMISSIONER BREETZ: Probably with no more difficulty than opting out of it, which you all think everybody is going to do.

CHAIRMAN FRANCK: Will you make your closing statement, Commissioner Breetz.

COMMISSIONER BREETZ: I will, Mr. Chairman. I think my firm and my partners and I have the right to, whatever expectations we had in reaching whatever agreement we have on this kind of an issue. And since I agree with all of the members of the committee, that thoughtful people would never adopt this section it seems to me that at least we ought to give the default rule the opportunity to adopt the rule that the committee really thinks ought to apply. For that reason, it
seems to me the opt in rule rather than the opt out rule will
conform more readily with the reasoned expectations of those who
are governed by the act. For that reason, I make the motion.

CHAIRMAN FRANCK: The motion before the house is a
sense of the house motion which would probably, if it passes, be
written to Section 1006. But the sense of the house would be if
the motion passes, Section 802 would not apply to partnerships
in existence prior to the adoption of the act unless those
partnerships would, by partnership agreement, place themselves
under the provisions of Section 802.

Does everyone, understand the motion? Are you ready
for the question.

As many in favor of the motion, say “aye.”

As many as are opposed, please say “nay.”

The chair is, in doubt. Will the “ayes” please stand
for a moment.

And will the “nayes” please stand.

The chair is no longer in doubt. The motion passes.

We are back on Section 904.

COMMISSIONER H. LANE KNEEDLER (Virginia): Mr.
Chairman, Section 904, beginning on Page 34 of the handout, the
amendments are on Page 35 Lines 14 to 18, and they respond to a
comment made from the floor.
CHAIRMAN FRANCK: Seeing no one seeking recognition, but before we proceed to Section 906, let me say before anyone comes to a microphone, in view of the hour, I’m going to exercise my authority as chair microphone and ask a question about any of the sections that we are now considering, but unless that commissioner convinces the committee to accept whatever change that commissioner thinks is advisable, I will then after one such colloquy ask that the commissioner make a motion so that the house can decide the issue rather than permit longer colloquy because the hour is getting late and we do want to get through this act, if we can. That should not discourage anyone from raising any point that they believe to be legitimate. It just has to do with how long we are going to spend on those points before we get to an actual motion which will allow the floor to speak.

COMMISSIONER PETER F. LANGROCK (Vermont): Point of parliamentary inquiry. Where do you claim you get that power in the bylaws?

There are certain things you can do, which are limit twice speakers. But what you’ve just suggested I don’t think will either further it or is empowered by the bylaws.

CHAIRMAN FRANCK: Well, I think the bylaws indicate -- I don’t have the section in front of me -- that the chair can suggest to the house that his rulings on the length of the
question will be considered in the amount of time that we allot to the question. And it’s in furtherance of that power that I’ve made that Statement.

COMMISSIONER LANGROCK: I appeal the order or the chair. I don’t think you have the power. I ask the parliamentarian to point to where that is. I read the bylaws tonight. There, are certain things you can do. You don’t have that power, Mike.

CHAIRMAN FRANCK: Well, if we are going to take time on this, we can. You have the right to appeal the ruling of the chair. I have no problem --

COMMISSIONER LANGROCK: I inquire first where you claim the power is from. I’m sorry, Mike. We’re trying to accomplish something here. These are important issues. But if you look at the bylaws, there is a specific power -- it’s not the bylaws, it’s the rules of procedure of meetings of the Conference. You can limit that nobody shall speak twice on an issue. If you invoke, that’s fine.

CHAIRMAN FRANCK: What page is that on, Peter?

COMMISSIONER LANGROCK: 104, Committee of the Whole.

COMMISSIONER H. LANE KNEEDLER (Virginia): Commissioner Langrock, we’ve got two more sections left. One of them is merely a conforming change to a cross reference. There may be
some discussion on 1006 that deals with the impairment of contract issue, but we are almost there.

COMMISSIONER LANGROCK: I’ll withdraw it. Let’s play it by ear as it comes.

CHAIRMAN FRANCK: The authority that I claim is in Section 47.6, Page 106 of the yellow book, subsection (2), which says “subject to any action taken by the Conference under Section 43.2, the chairman may prescribe limits on debate, including the time to be devoted to a particular question and the time to be permitted to each member to speak thereon; no member may speak on the question beyond the limitation prescribed except by unanimous consent.”

Now, you appealed the ruling of the chair. The chair is perfectly willing to have the floor, if it so decides -- excuse me, let me finish my statement. The chair is perfectly willing, because the chair is only the agent of the floor, to have you override the ruling of the chair if you want to spend more time on debating these issues than I have suggested. That will make it possible for you to decide exactly how long you want to spend, which is the only purpose the chair has.

COMMISSIONER LANGROCK: Parliamentary inquiry. If you invoke 47.6, I don’t appeal the chair. That’s not what you said. You invoked certain other extraordinary powers which I think were beyond you, and that’s what I appealed.
CHAIRMAN FRANCK: Well, are you appealing the ruling of the chair or are you withdrawing it?

COMMISSIONER LANGROCK: If you’re saying you’re invoking 47.6 and those procedures, that’s part of the rules, I’ve got no problem.

CHAIRMAN FRANCK: The committee is ready to report on the question that Commissioner Langrock raised concerning Section 601, and this would be a good time to listen to that report.

COMMISSIONER HOWARD J. SWIBEL (Illinois):
Commissioner Langrock, we think that the way to avoid the double track would be in Section 801, which is on Page 110 of the big book, Line 17 --

CHAIRMAN FRANCK: 110 you say?

COMMISSIONER SWIBEL: Yes, Page 110.

CHAIRMAN FRANCK: Thank you.

COMMISSIONER SWIBEL: -- would be to strike the words “or to terminate the partnership,” so that 601 would be parallel to 801, and we’re talking about -- I’m sorry, this is Line 17 on Page 110.

CHAIRMAN FRANCK: And you’re striking what?

COMMISSIONER SWIBEL: Strike the words “or to terminate the partnership.”
CHAIRMAN FRANCK: I assume that is a change the committee has accepted. The committee indicates they have accepted that. Commissioner Langrock, does that solve your problem.

COMMISSIONER LANGROCK: I take it then when somebody says “I withdraw” or I say “I’m out of it,” it doesn’t make any difference.

COMMISSIONER SWIBEL: That’s correct.

CHAIRMAN FRANCK: We’re now on Section 904. Would the chair of the committee proceed with that section.

COMMISSIONER H. LANE KNEEDLER (Virginia): Mr. Chairman, Section 904, Page 34 of the handout, the change is over on -- Page 35, Lines 15 to 18, merely responds to a comment from the floor. We have no further comments.

...

COMMISSIONER KNEEDLER: Section 906, beginning on Page 36 of the handout, the change is on Page 37, Line 8, it is to correct a cross reference. We have no further comments.

...

CHAIRMAN FRANCK: ...

Proceed then with Section 1006. We will keep in mind the fact that the floor has by vote made 802 inapplicable to existing partnerships at the time of the adoption of the act unless those partnerships by agreement make themselves subject
to the provisions of Section 802, and language to that effect will have to be drafted by the committee, but we are aware of that amendment having been adopted by the house.

With that understanding proceed with Section 1006

COMMISSIONER KNEEDLER: Thank you, Mr. Chairman. Two changes, one in subsection (a) on Page 37, Line 22, deletes the word “statute,” adds the word “law.” That’s to be responsive to the earlier comment from the floor that we make sure we’ve swept in both statutory and common law.

In (b), Commissioner Ruud raised the other day whether the -- maybe Commissioner Cutler as well -- whether the language -- this is the impairment of contracts provision, Page 38 the last page of your handout, (b) “this act does not,” it said, “impair the obligations of contract.” The question is whether we intended to impose some duty or requirement over and above the current constitutional impairment of contracts. The answer to that is no. The committee, therefore, changed it to “this act is not intended to and shall not impair the obligations of a contract existing when the act takes effect.” You could argue that there is no need for this particular provision in the act, because the constitutional law with regard to impairment of contracts will be applied anyway. It was our judgment that given the sweep of this act and concerns that individuals might
have about the impairment of existing contracts, we ought to at least address the issue.

CHAIRMAN FRANCK: Commissioner.

COMMISSIONER FRANK W. DAYKIN (Nevada): As originally drafted, the act did specifically treat the nonimpairment. This act does not impair the obligations of a contract. As rewritten, it undertakes to do two things: is not intended to; then a false imperative shall not, which of course simply means does not. Now, if it does not, it doesn’t make any difference what it intended to. Therefore, I will move, as I was invited before we convened here, to strike all of the changes in Lines 1 and 2, restoring the original language.

CHAIRMAN FRANCK: This is 1 and 2 on Page 38, Commissioner?

COMMISSIONER DAYKIN: On Page 38, yes.

CHAIRMAN FRANCK: The motion before us is to strike the changes on Lines 1 and 2 on Page 38, therefore restoring -- I gather you also would move to strike the additions that have been added to those lines is that right? All the changes, yes. You said all the changes.

COMMISSIONER DAYKIN: Yes.

CHAIRMAN FRANCK: The motion is to strike all the changes made on Lines 1 and 2 on Page 38. Is there a response from the committee?
COMMISSIONER HARRY J. HAYNSWORTH (Illinois): Mr. Chairman, as I understand the purpose of the amendment, which was the last one we considered, it was not intended to change the substance of what the section said. The section as it was originally proposed and as the mover proposes is directly from the Uniform Limited Partnership Act, and certainly no objection to changing the language back to the way it was.

CHAIRMAN FRANCK: Therefore the committee accepts the motion?

COMMISSIONER HAYNSWORTH: Yes.

CHAIRMAN FRANCK: The committee accepts the motion. The language on Lines 1 and 2 of Page 38 will be returned to their original language, and the changes on 1 and 2 will be struck.

Seeing no one else seeking recognition -- Commissioner Cutler.

COMMISSIONER EDWARD I. CUTLER (Florida): I would like a chance to refer to a prior section that has not been discussed. It’s not on this particular section.

CHAIRMAN FRANCK: Well, without objection, please proceed.

COMMISSIONER CUTLER: Well, if I may, I’m referring it to a creditor’s rights problem. It’s involved in section 504, Pages 77 and 78 of the big text.
COMMISSIONER CUTLER: The section concludes with a statement that this section provides the exclusive remedy by which a judgment creditor may satisfy a judgment out of the judgment debtor’s transferable interest in the partnership. I think this overlooks the possibility in various jurisdictions that an attachment or garnishment might reach a partnership interest of a partner, and frequently that is a prejudgment remedy. And the judgment when entered carries out the attachment or the garnishment. I think Morris Macey would be better able to explain the details of it. I think that Georgia maybe has had more of a problem than any. But I hate to see a section in a statute that rules out remedies that exist under the laws of other states. So, if it’s not too late, I would like to move a change in subsection (e)

CHAIRMAN FRANCK: State your motion.

COMMISSIONER CUTLER: With this addition, “except to the extent that garnishment or attachment or other existing remedy is allowed in this state.”

CHAIRMAN FRANCK: Will you state your motion again. “Except to the extent of garnishment or attachment” --

COMMISSIONER CUTLER: “Or other remedy is allowed under existing law of this state.”
CHAIRMAN FRANCK: “Is allowed under the laws of this state”?

COMMISSIONER CUTLER: Yes.

COMMISSIONER HARRY J. HAYNSWORTH (Illinois): Mr. Chairman.

CHAIRMAN FRANCK: Just one second. The motion is, the beginning of subsection (e) on Page 78 to insert the clause “except to the extent garnishment or attachment or other remedy is allowed under the laws of this state.” Is that your motion?

COMMISSIONER CUTLER: That’s fine.

CHAIRMAN FRANCK: Response from the committee.

COMMISSIONER HAYNSWORTH: The only thing I would say is that the present act does not contain subsection (e). It was added on the grounds that the case law supported at least with respect to judgment creditors. We’re not talking about other types of claims or causes of action. Another way of accomplishing what you’re trying to do would be simply to delete the section and then leave the comment to explain what the situation is. That would be in conformity with the existing statute.

COMMISSIONER MORRIS W. MACEY (Georgia): Since you specifically referred to me, there has been some split in the committee relative to this. I have been collecting money against partners by garnishing the partnership for years and
years and years. And it really troubled me, to see the word "exclusive remedy" put into this charging order. And I certainly would support either the deletion of (e) or adding to it "except for garnishment, attachments or other collection activities that may be used in the state." I think there may be lots of procedures in lots of states that may enable one to collect from a partnership an obligation owed a partner other than a charging order. I don’t believe we ought to cut that off as a remedy.

CHAIRMAN FRANCK: Commissioner, are you on this motion?

COMMISSIONER FRANK W. DAYKIN (Nevada): Thank you, Mr. Chairman. I offer as a friendly substitute for Commissioner Cutler’s motion a motion to delete subsection (e). That’s the cleanest way.

COMMISSIONER CUTLER: Well, I don’t consider it unfriendly. I’m hoping that subsection (e) has some purpose for being stated as it was. And that even though not exclusive, there is a reason for stating it as a remedy.

CHAIRMAN FRANCK: So you’re going to reject the friendly act and persist in your motion?

COMMISSIONER CUTLER: I think I could take it either way. But I’m hoping if there’s something worth preserving there, the committee will recognize it.
MR. DONALD WEIDNER (Reporter): Commissioner, would it help you if we said “exclusive remedy under this act”? COMMISSIONER CUTLER: No, because I think that would imply that there’s no other remedy under any other law. To say that the only remedy under the Partnership Act is the remedy -- is the only remedy you have as a charging order, it doesn’t allow you to say there may be other remedies outside the act.

MR. WEIDNER: I’m just uncomfortable would rather not strike the whole section because what we’re trying to make clear that under the entity theory, what you’ve essentially got is a share of stock. And you, as the separate creditor of a partner, are confined to getting at that share of stock. And we don’t want to let the separate creditors of one partner come in and best up the partnership business by throwing liens down on the partnership real property or by putting other security interest directly on the partnership assets. So, we want to make it real clear that they’re confined to that share of stock. And that’s the basic thing we’re driving at here.

COMMISSIONER CUTLER: There must be something else in this act --

CHAIRMAN FRANCK: We have another Commissioner seeking recognition on this motion. Not on this motion? I’m wrong. He stepped away from the microphone.

Why don’t you sum up for your motion, then.
COMMISSIONER CUTLER: Even in the case of corporations, there are remedies in various states to reach the stock of a shareholder. In Florida, we can have a writ of execution against stock of a shareholder. I don’t think that this motion would in any way change the rule that you can’t reach the partnership assets. You reach only the interest, and that’s not even the right to be a partner. You reach only the interest of the partner.

CHAIRMAN FRANCK: The motion before the house --

COMMISSIONER ROBERT H. CORNELL (California): Was that the final --

CHAIRMAN FRANCK: That was the closing on the motion. We are now going to take the motion.

COMMISSIONER CURTIS R. REITZ (Pennsylvania): Mr. Chairman, I’m not quite sure I understand the point that Commissioner Cutler was making, but it sounds to me very much like it’s the Kaye Scholer problem where there is a claim against --

CHAIRMAN FRANCK: You said the magic word.

COMMISSIONER REITZ: -- the claim against one or several partners in a law firm and the government came in and seized the assets of the firm. I take it, if I understand Reporter Weidner’s comment, that what he’s concerned about is that in trying to reach the assets of an individual partner that
a firm not be shut down by having something of that kind of an attachment against partnership property that would vastly exceed and perhaps have the dramatic effect as the Kaye Scholer case. If that’s true, we should not be writing into this act now a problem that we’re still trying to solve in other ways on that other front.

CHAIRMAN FRANCK: Since we allowed Commissioner Reitz to have the floor, Commissioner Cutler, I’m going to let you close again.

COMMISSIONER ROBERT H. CORNELL (California): May I make a comment.

CHAIRMAN FRANCK: Yes.

COMMISSIONER CORNELL: I personally would rather see (e) stricken entirely than add the language suggested by Commissioner Cutler, because I think it would send a false message that it was okay to attach the partnership property directly rather than just the interest of the partner. And we would be better off without (e) than to talk about garnishment and so forth and give a message that it was all right possibly to go directly after the assets of the partnership.

CHAIRMAN FRANCK: Now, just a minute, we’ve let other speakers speak and new points have been raised, so I am going to reopen the debate for now. I would like to know, however, whether Commissioner Cornell’s statement represents the view of
the committee because I think the floor is entitled to know that. Does the committee agree with Commissioner Cornell they would prefer to have the section struck rather than the amendment on the floor being considered?

COMMISSIONER HARRY J. HAYNSWORTH (Illinois): This particular provision has been voted on, I would say, approximately six times. And each time it has been a split vote. I would daresay that it probably still would be a split vote.

CHAIRMAN FRANCK: So, this was just Commissioner Cornell’s opinion and argument to the floor. It was not the view of the committee.

Commissioner Miller, are you now on this motion?

COMMISSIONER FRED H. MILLER (Oklahoma): I guess I sat down, Mr. Chairman, because I thought I was missing something, and maybe I still am. But why can’t we reach the desired result that the reporter indicated by writing it something like this: A judgment creditor of a partner or a partner’s transferee may satisfy a judgment against a partner only out of the judgment debtor’s transferable asset in the partnership.

That way you have, in effect, ruled out the Kaye Scholer problem, as I see it, but you haven’t restricted the way you may get at that, whether it be by charging order or any other process that may exist under state law.
COMMISSIONER CUTLER: Maybe they understand creditor’s rights a little better.

I think it’s already taken care of in the act. Look at Section 502. The only transferable interest of a partner in the partnership is the partner’s interest in distribution. The interest is personal property. It’s not an interest in the property of the real estate. It’s just like the shareholder stock in the corporation. And to think that there’s any suggestion at all that the language I proposed would lead people to believe they could go after partnership assets is plainly ridiculous.

CHAIRMAN FRANCK: All right.

COMMISSIONER CUTLER: And I don’t know who on the committee thinks otherwise. But plainly ridiculous, and I think it could easily be covered. The only thing that can be reached is the transferable interest of the partner in the partnership, and that should be reachable by levy, by garnishment, by attachment or by a charging order.

CHAIRMAN FRANCK: Commissioner Cutler stands by his motion. I am going to let the reporter make one more statement, then Commissioner Cutler can close and we’re going to go to a vote.
MR. DONALD WEIDNER (Reporter): I plead guilty having that opinion, ridiculous or otherwise, and had a situation I dealt with just last year in Florida involving banks who took some interest in partnership property, the property had been conveyed to the partnership -- that is, in the names of the individual partners. And the banks were going directly after the undivided interest in the real property of the partnership. I don’t mean this to be cute, but I think that it has been in the black letter law of the UPA since 1914 that you can’t do that. But a lot of people, including banks, as some of the women say: They just don’t get it, they don’t get it. And we’re trying to make it clear here.

CHAIRMAN FRANCK: Commissioner Cutler, whatever you want to say in closing.

COMMISSIONER CUTLER: I don’t want to get back the whole question of the entity theory, but the greatest proponent of the entity theory has been our good reporter. And he’s accomplished that and he’s carried it out in every way throughout the act. As I pointed out to you, Section 502, Page 73, says the only transferable interest of a partner in the partnership is in the partner’s interest in distribution, and the interest is personal property. For any banker now or any bank’s lawyer now to try to get away with reaching the real
estate of the partnership is plainly ridiculous. I wouldn’t even try it myself.

COMMISSIONER CUTLER: And I think there would be no problem with simply eliminating the whole subsection. I think it’s a mistake to do that because I do think people should be encouraged to get charging orders. I think, though, that that should not in any way eliminate existing remedies of a creditor to go against the transferable interest of the partner and the partnership, which has already been defined.

CHAIRMAN FRANCK: The motion before the house is on Page 78, Line 15, insert at the beginning of subsection (e) the following, “except to the extent garnishment or attachment or other remedy is allowed under the laws of this state,” comma, and then the subsection proceeds as it is printed.

As many as are in favor of that motion, please say “aye.”

As many as are opposed, please say “nay.”

The “noes” appear to have it. The “noes” do have it. The motion is defeated.

....

COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut):

With the indulgence of the chair --

CHAIRMAN FRANCK: You have it.
COMMISSIONER BREETZ: It has come to my attention that a number of the members of the committee and the advisers have serious reservations about the extended debate and the result of the debate and the vote we had on limited liability and that a number of them would wish further opportunity to discuss that issue and to consider alternatives to the consequences of the vote that we took that I moved for that I sought successfully before the break with regard to the limitations on liability to the partners expressed in 103(b)(4) appearing on Page 5.

And while it is difficult for me to move for reconsideration, because I don't seek reconsideration, as a personal matter, I think the collegiality of the Conference is such that I would be pleased to offer my fellow commissioners on the committee the opportunity, if the members of the floor would provide them that opportunity, the opportunity to discuss that further. And I would not oppose a request to do that, nor would I oppose the opportunity to meet with them if they so chose this evening to discuss it.

My only consideration is a personal matter privilege, Mr. Chairman. I have my son with me in San Francisco who will leave on Thursday for Wales directly from here. He is here only because I promised him that we could have a walk in the John Muir Woods, and I told him that we would to that tomorrow. Now, I'm willing if the committee would see fit to put this on
relatively early in the morning, I’d be glad to participate in that discussion if the chair, so saw fit.

....

CHAIRMAN FRANCK: But seeing that that’s unlikely -- the scheduling, of course, is up to the president. I understand your offer, and it’s appreciated on behalf of the committee to give them that opportunity to make the case. Once again, I do not think it ought to be done tonight in view of the hour and in view of the fact that the audience in the house is somewhat different ...[from] the audience which was here when the motion was first debated and passed. And the president is here, he has heard the request. The committee has to come back anyway because there are several amendments that were passed in the sense of the house which have to be formulated and brought back before you. We have to come back to this house in any event. And if the president is willing to accept your kind offer, as I’m sure he will be, he will try to schedule it early tomorrow morning and the committee will be ready to do that.

COMMISSIONER BREETZ: Thank you, Mr. Chairman.

CHAIRMAN FRANCK: Mr. President, the Committee of the Whole rises to report that it has had under consideration the revised Uniform Partnership Act, has made progress and asks leave to sit again.

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CHAIRMAN FRANCK: Thank you, Mr. President.

When last we met, we had heard that a motion to reconsider the action taken with respect to Section 103(b)(4), Page 5 of the handout, with the committee amendments, would be offered this morning. I understand the proponent of the change, which was passed by the Conference, and the committee met late last night. I will call on Commissioner Breetz to tell us whether any progress was made.

COMMISSIONER WILLIAM R. BREETZ, JR. (Connecticut): I believe from my perspective that progress was made, and I believe the committee agrees. And I agreed that I would offer the motion for reconsideration of the vote that we took on Section 103(b)(4), and I would make that motion at this time. And I am prepared to explain my intentions in making that motion.

CHAIRMAN FRANCK: The motion is to reconsider the action of the Conference in amending Section 103(b)(4), Page 5 of the handout. If there is no further discussion, the motion to reconsider is requires a majority vote. We know, of course, that since the Commissioner making the motion was the
Commissioner who made the successful motion, that he was the side that prevailed, therefore the motion is in order.

As many as are in favor of the motion to reconsider, please say "aye."

As many as, are opposed, please say “nay.”

The motion to reconsider has been adopted. We are back on Section 103(b)(4).

Commissioner.

COMMISSIONER BREETZ: Thank you, Mr. Chairman. The standard that we agreed to in the vote that was divided on the floor was that the partnership agreement might not limit the liability of a partner under Section 404(d). You will recall after extended debate, we agreed that the duty of care that was stated in (d), which I believe is, generally conceded to be the business judgment of the reasonably prudent man, was limited by the committee, with the approval of the floor, that that standard would be measured by the fact that a partner’s duty of care was limited to refraining from engaging in gross negligence, reckless conduct, intentional misconduct or unknowing violation, of law.

The effect of what we passed on the floor was to prevent the partnership agreement from further reducing that standard of care. We had a good discussion I thought in the
committee. And after two hours, proposed the following language which I will support.

Change the language of (4) to say that the partnership agreement may not unreasonably reduce the duty of care under Section 404(d). It seems to me that the effect of that was to significantly -- and I acknowledge this -- reduce the -- increase the ability of the parties to bargain, but at the same time permit a partner who felt that he had been unreasonably harmed by that to go to court and seek judicial reformation, which I think is the direction that the common law is. It seems to me that that was essence of my concerns. I was prepared to support this amendment. At the same time, I think the committee in our deliberations acknowledged the need for the Conference as a whole to reevaluate the special problems that do occur in the context of limited partnerships. And I understood that there was general consensus, that that issue ought to be reevaluated by the Conference at a later time. And I think that was an important ingredient here, and certainly in my support as we and they moved forward towards something that made sense to both sides.

I would at this time move, Mr. Chairman, that subsection (4) be amended to read: Unreasonably reduce the duty of care under Section 404(d).
CHAIRMAN FRANCK: The motion before us is to amend Section 103(b)(4), Page 5 of the handout so that it would read: A partnership agreement may not unreasonably reduce the duty of care under Section 404(d).

That is your motion, Commissioner?

COMMISSIONER BREETZ: Yes.

CHAIRMAN FRANCK: What is the committee’s response?

COMMISSIONER H LANE KNEEDLER (Virginia): We are in full support of the suggestion.

CHAIRMAN FRANCK: The committee adopts the amendment?

COMMISSIONER KNEEDLER: Yes.

CHAIRMAN FRANCK: Then the section has been amended because the committee has adopted it. However, I will let any Commissioner who disagrees with that result move to amend the section as we now have adopted it.

COMMISSIONER CHARLES W. JOINER (Michigan): I would like to have an expression, if I could, please, of the position of the American Bar Association on this. It was the position of the American Bar Association that was touted around the floor as being the reason why it was necessary to have this motion for reconsideration passed. And I think it appropriate at this time to have that position stated as publicly as possible so that we might know it at this time.
CHAIRMAN FRANCK: Who speaketh for the American Bar Association?

MR. ALLAN DONN (ABA Adviser): First I need to make clear that I am the representative of the American Bar Association to the Conference. However, the American Bar Association has not yet taken any position on this act. The procedure, as I understand it, is that after the Conference acts, it will then be referred to the American Bar Association for consideration. You have heard throughout the proceedings references to the ad hoc committee of the American Bar Association, which is also at this point not expressing the view of the American Bar Association.

Nevertheless, I can say that as the person who has participated in this act since the preparation of the ABA report, beginning in 1984, and participating with this committee throughout its deliberations, I support the provision and I believe that the members of the committee who have been here and met with Commissioner Breetz last night will support this provision.

CHAIRMAN FRANCK: Thank you. There being no one else seeking recognition on this section that I see, we will go by that section, and we committed to the committee last night the task of developing some implementing language, and I will call on the committee chair to report on progress.
COMMISSIONER H. LANE KNEEDLER (Virginia): Thank you, Mr. Chairman. In talking to the President, Dwight Hamilton, it was suggested that for your purposes we walk through the changes that were made yesterday since we do not have a reprinted copy of the amendments today so you’d have all the amendments before you. We worked until almost midnight last night and there obviously wasn’t time to have one typed up and 350 copies printed.

First, I heard someone from the floor say what was the language that we just adopted on 103(b)(4), it will read: Unreasonably reduce the duty of care under Section 404(d).

The next amendment, Mr. Chairman, is on Page 8 of the handout. These are all going to be with one exception to the handout. Page 8 of the handout, Line 15, strike the word “a” after “or” so it’s “or comparable.” Next line, strike “statute” and replace it with “law.”

CHAIRMAN FRANCK: We did that last night.

COMMISSIONER KNEEDLER: That is correct. I was asked to run --

CHAIRMAN FRANCK: I understand. I am just reminding the Conference that this is something we discussed and acted on last night.

COMMISSIONER KNEEDLER: Now, there are couple of style change as we go along, but I am going to skip those. Anyone who
wants to see those, if you’ll get ahold of me, I can give those to you.

The next one is Page 15, Line 8. Commissioner Willis’s motion, after the word “partner” -- again this was last night. After the word “partner” add “merely because the limitation is.” It’s “on the authority of a partner merely because the limitation is contained in a filed statement.”

CHAIRMAN FRANCK: Again, that is action we took last night.

COMMISSIONER KNEEDLER: That is correct.

The next one is Page 20. This is one in which we had a sense of the house motion. We now have the language for consideration, Mr. Chairman. This is Page 20, Line 20, dealing with the duty of loyalty. It was the sense of the house that language concerning the identification of specific types or categories of activities not be unreasonably -- or not be manifestly unreasonable. The language we are suggesting, Page 20, Line 20, put a coma after “loyalty” and add “if not manifestly unreasonable.” Page 20, Line 20, “if not manifestly unreasonable.” And I suppose, Mr. Chairman, since there was no discussion on the specific language, that is open to the floor.

CHAIRMAN FRANCK: This language is intended to implement the substance of a motion that was adopted last night.

Seeing no one seeking recognition, please proceed.
COMMISSIONER KNEEDLER: The next one is, on Page 21, Line 6. It now reads: “The partner shall discharge the duties to the partnership and the other [Act] or under the partnership agreement, and exercise any rights,” it says “fairly and in good faith.” We were asked to look at the “fairly and” language, that it seemed awkward. We indicated we were merely trying to implement the language from the next line, “the obligation of good faith and fair dealing,” et cetera. What we propose is on Page 21, Line 6 of the handout, to strike “fairly and in good faith” and to add “consistent with the obligation of good faith and fair dealing.”

I will read that again. Page 21, Line 6 after the word “rights,” comma, strike the rest of the sentence and insert “consistent with the obligation of good faith and fair dealing.”

CHAIRMAN FRANCK: Again, the point we made last night, that the two references to “fair and, good faith” should be parallel. This is the committee’s effort to implement that desire as expressed on the floor.

Seeing no one seeking recognition, please proceed.

COMMISSIONER KNEEDLER: The next change is on Page 27. This was action last evening. Page 27, Line 10, at the beginning of the line, put “Section 303(e) or.” It reads: Is not deemed to have notice under Section 303(e) or Section 704.”
CHAIRMAN FRANCK: The addition, of the reference to Section 303(e) was adopted last night. This puts it in numerical sequence. That is simply implementing the action taken last night.

Seeing no one seeking recognition, please proceed.

COMMISSIONER KNEEDLER: The next change is in subsection (b) of that same section, Page 27, Lines 11 and 12. Line 11, delete “shall indemnify” and add “is liable to,” next line, delete “against” and add “for.” That section reads: “(b) A disassociated partner is liable to the partnership for any loss,” et cetera.

CHAIRMAN FRANCK: That was adopted last night.

COMMISSIONER KNEEDLER: Yes.

CHAIRMAN FRANCK: Please proceed.

COMMISSIONER KNEEDLER: Page 28 of the handout, Line 14, at the beginning of the line add “Section 303(e) or.” It reads: “is not deemed to have notice under Section 303(e) or Section 704.” That was adopted last evening.

CHAIRMAN FRANCK: Proceed.

COMMISSIONER KNEEDLER: The next change is Page 31, the top of the page, Paragraph (3), the top of the page, at the beginning of the line, delete the word “must” and add “with respect to profits or losses incurred during the period, shall” -- I will do that again. At the beginning of the line, Page 31
of the handout, Line 1, delete “must” and add “with respect to profits or losses incurred during the period, shall,” then down on Line 4, after “profits,” strike “from transactions during the period” on Line 6, strike the commas. I will read the whole paragraph.

CHAIRMAN FRANCK: Please do.

COMMISSIONER LANE: Subparagraph (3): “with respect to profits or losses incurred during the period, shall be credited with a share of any profits but shall be charged with a share of any losses only to the extent of profits credited for the period.”

CHAIRMAN FRANCK: Again, that was a change adopted last night.

COMMISSIONER KNEEDLER: Yes

CHAIRMAN FRANCK: Proceed

COMMISSIONER KNEEDLER: Page 33 of the handout, Line 17, reinsert the word “liability,” strike the word “obligation.” Line 19, this is the same change as previously, strike “shall indemnify.” Page 33, Line 19, strike “shall indemnify,” add “is liable to,” and on the next line strike “against,” and insert “for.” (b) will read beginning on Page 33, Line,15, “a partner who, with knowledge of the winding up incurs a partnership liability under section 805(a) by an act that is not appropriate for winding up the partnership business is liable to the
partnership for any loss caused to the partnership arising from that liability.”

CHAIRMAN FRANCK: Again, that was adopted last night.

COMMISSIONER KNEEDLER: Yes.

CHAIRMAN FRANCK: Please proceed.

COMMISSIONER KNEEDLER: The next change is Page 37”, at the bottom of the page, add new subsection (b). That would require re-lettering the next two subsections. New subsection (b) would read, it’s fairly short, it’s a sentence, but let me read it quickly, then I will read it so you can copy it down.

“(b) Section 802 does not apply to a partnership in existence on the effective date of this [Act] unless the partners agree otherwise.”

Let me read it again, 11(b) Section 802 does not apply to a partnership in existence on the effective date of this [Act] unless, the partners agree otherwise.”

Mr. Chairman, this was an implementation of a 17 motion that passed last night. I will, read it, one more time to make sure folks have it. (b) would now read:

“Section 802, does not apply to a partnership in existence on the effective date of this [Act] unless the partners agree otherwise.”

CHAIRMAN FRANCK: That implements a vote of the Conference Last night, that 802 should not be applied to
existing partnerships unless the partnership agreement so provided. The change includes the renumbering of sections now labeled (b) and (c) on Page 38 to (c) and (d) so that they are in correct order.

Seeing no one seeking recognition will call upon the chair of the committee for a motion.

COMMISSIONER KNEEDLER: Mr. Chairman we still have --

CHAIRMAN FRANCK: I’m sorry, I thought You were through.

COMMISSIONER KNEEDLER: Page 38. There was a motion last night on Lines 1 and 2 to return the language to the original language, and then there is one more from the act in the book itself, Mr. Chairman.

CHAIRMAN FRANCK: All right. Seeing no one seeking recognition on the last -- Commissioner Langrock.

COMMISSIONER PETER F. LANGROCK (Vermont): What did you decide to do on how to deal with the insurance question of two partners in an automobile and the standard of care of ordinary negligence?

CHAIRMAN FRANCK: My recollection from last night was that the committee pointed you to another section which they thought took care of that problem, but I will let them supplement that answer if they want to.
COMMISSIONER KNEEDLER: Commissioner Langrock, there was no further discussion of that last night.

COMMISSIONER LANGROCK: What is your position now on this act? Let give the hypothetical, two partners driving to the auction for the winding up. One, the driver is involved in an accident involving ordinary negligence. Is the passenger able to sue the driver of the vehicle and obviously recover on the ordinary negligence standard.

MR. DONALD J. WEIDNER (Reporter): The answer has to be yes.

COMMISSIONER LANGROCK: Where does one say so in --

MR. WEIDNER: I think you could sue the partnership directly for its responsibility for the acts of one of its partners. In that situation, you may also be able to sue the other driver directly on a duty imposed by other law than the partnership act.

CHAIRMAN FRANCK: My recollection is that and I am no expert on this act but, my recollection is you pointed to Section 406(b)(3) as the authority for that proposition.

COMMISSIONER LANGROCK: I am not concerned about suing the partnership. I am concerned about suing the partner and whether the standard of care that is interposed by this act changes that.
CHAIRMAN FRANCK: Well, the answer I am getting up here, commissioner, is that 406(b)(3) would permit that partner to sue the other partner.

COMMISSIONER ROGER C. HENDERSON (Arizona): I don't believe that can be correct if a partner owes no duty of ordinary care to another partner. Now, you’ve had in mind all along here, and you keep saying we don’t want to impose the business judgment rule, and you’re talking about things that have an economic loss. Commissioner Langrock has raised an issue dealing with bodily injury --

There is no way to sue the partnership if the partner has no duty to exercise due care to the other partner, because there is no vicarious responsibility. You said that, that was taken care of under 406(b)(3). It does not. It talks about enforcing the rights and otherwise protecting interest of the partner, including rights and interests arising independently of the partnership relationship. The hypothetical that Commissioner Langrock has posed is tort liability arising out of a partnership activity, two, partners driving to some partnership activity. You haven’t touched it.

COMMISSIONER DONALD JOE WILLIS (Oregon): I just want to add agreement to what Professor Henderson has just told you. I thought about that further last night and I raised that question --
CHAIRMAN FRANCK: We understand his point. Let’s see what the committee --

COMMISSIONER WILLIS: Well, you have other problems, other examples. What, if you have a small partnership that provides guide service and you don’t have a whole series-of statutory duties for drivers?

In Peter’s example, if I was a plaintiff’s lawyer, I would not mention that he was a partner and sue him for violating the statute or reasonable care of look out, sped and control. I think you are going to need a very strong comment in this section to tell mean good to set that defense up, that he was a partner. That is one thing.

But if you get outside of a realm where you have other bodies of law that impose discreet rules of conduct, I don’t know whether there are outside rules that impose guides that take people hunting if one partner negligently drops a rifle and kills the other. But you got a whole host of these things out here with personal injuries that may flow that are going to create serious problems for people.

So, at a minimum I think you are going to have a very, very strong comment that somehow that is not included. I don’t think you’re there by any means from the language you have --
CHAIRMAN FRANCK: Let’s give the committee a chance to respond.

COMMISSIONER HOWARD J. SWIBEL (Illinois): No. 1, there is no disagreement on the policy. Section 404 purports only to define fiduciary duties of partners and the duty of care that is in that section is a statutory fiduciary duty. In 406(b)(3) we are attempting to make a statement that there are other rights that people owe to each other that are independent of the partnership relationship. If under the law of the jurisdiction you owe a duty to use care toward a guest in your motor vehicle, there, is nothing in this act which is intending to insulate you from liability for injury to a guest. The narrow question is whether or not you are injuring somebody and he has a cause of action under this statute for breach of a fiduciary duty.

CHAIRMAN FRANCK: I assume that the committee has agreed, I think they did yesterday, but they can say again today, that they intend in the comment to 406 to make that point so that it is preserved for those who are not as familiar with the act as the committee is.

COMMISSIONER PETER F. LANGROCK (Vermont): I think you’re making a mistake by not bringing it up into the black letter of the law. I think when you go the legislature you are creating a potential enemy of this at by not having it there in
terms of the American Trial Lawyers Association and any other group that is concerned in this area.

I think when you start changing in the statute the difference between ordinary care and gross negligence and you don’t say anything in the statute, we have many, many states which don’t include the comments in the revised statutes, and I just don’t -- I think this is too important a point for you people to leave it out there hanging when a simple section which would say, you know, this does not deal with bodily injury or wrongful death cases. It is not meant to change that. You can put it any place you want to.

I am not going to make a motion. But I mentioned it yesterday and I mentioned it last night, and I don’t think the answers you’ve given here are satisfactory to me. If they’re satisfactory too you and you think you can deal with that type of lobby in the legislature, so be it.

CHAIRMAN FRANK: Thank you. Commissioner.

COMMISSIONER ARTHUR E. BONFIELD (Iowa): In support of Commissioner Langrock’s comments, I’d like to point out to Commissioner Swibel that Section 404(a) is the one that talks about fiduciary duties. By the time you get down to (d), which is a separate section of that provision, there they are talking about a partner’s duty of care to the partnership and other partners in the conduct and winding up of the partnership
business. That necessarily is, not only, quote, fiduciary duties the way (d) is worded, it clearly covers -- I understand you’re in agreement with the policy, but that is why it seems to me there is clearly a linguistic problem.

CHAIRMAN FRANCK: Seeing no one else seeking recognition, I will call upon the chair of the committee for a motion.

COMMISSIONER H. LANE KNEEDLER (Virginia): Mr. Chairman, we have one other change -- only one change in the -- CHAIRMAN FRANCK: I so want to get out of here on this act that I keep on forgetting you said that. Go ahead.

COMMISSIONER KNEEDLER: We have one change to report in the act itself that is in your notebook. This will be on Page 110, Section 801. The first change is action that was taken last night, and then the committee in reviewing it last night decided the same change needed to be made in another place. It is Page 110 of your notebook, Section 801, Line 17 and 18, to delete “or to terminate the partnership.”

CHAIRMAN FRANCK: That was action taken last night.

COMMISSIONER KNEEDLER: The committee suggests that the same change ought to be made on Lines 23 and 24, to delete “or to terminate the partnership.” This was in response to a discussion with Commissioner Langrock about does it make any difference whether he says “I want out or it’s over,” and the
decision from the floor was that deleting the language “or to terminate the partnership” from line 14 would take care of the problem. We think it needs, to be done in Lines 23 and 24 as well.

CHAIRMAN FRANCK: Does that complete the committee’s changes?

COMMISSIONER: KNEEDLER: Yes, it does.

CHAIRMAN FRANCK: Seeing no one seeking recognition, I call upon the committee chair for a motion.

COMMISSIONER KNEEDLER: Mr. Chairman move that the Committee of the Whole rise, report that it has had under consideration the Revised Uniform Partnership Act, has considered it section by section, has made certain changes in amendments, and recommends that the act, as so amended, be presented to the Conference for a vote by the states for final approval.

CHAIRMAN FRANCK: Seeing no one seeking recognition to speak on the motion, as many as are in favor of the motion, please say “aye.”

Those opposed, please say “nay.”

The motion is adopted.

Mr. President, the Committee of the Whole rises or report that it has had under consideration the Revised Uniform Partnership Act, has considered it section by section, has made
changes and amendments, and recommends that the act, as so amended, be reported to the states for adoption.

---o0o---
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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ON UNIFORM STATE LAWS
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# UNIFORM PARTNERSHIP ACT (199_)

## TABLE OF CONTENTS

### ARTICLE 1. GENERAL PROVISIONS

<table>
<thead>
<tr>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>101. Definitions</td>
</tr>
<tr>
<td>102. Knowledge and Notice</td>
</tr>
<tr>
<td>103. Effect of Partnership Agreement; Nonwaivable Provisions</td>
</tr>
<tr>
<td>104. Supplemental Principles of Law</td>
</tr>
<tr>
<td>105. Execution, Filing, and Recording of Statements</td>
</tr>
<tr>
<td>106. Law Governing Internal Affairs</td>
</tr>
<tr>
<td>107. Partnership Subject to Amendment or Repeal of [Act]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
<tr>
<td>3</td>
</tr>
<tr>
<td>6</td>
</tr>
<tr>
<td>8</td>
</tr>
<tr>
<td>9</td>
</tr>
<tr>
<td>12</td>
</tr>
<tr>
<td>13</td>
</tr>
</tbody>
</table>

### ARTICLE 2. NATURE OF PARTNERSHIP

<table>
<thead>
<tr>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>201. Partnership As Entity</td>
</tr>
<tr>
<td>202. Existence of Partnership</td>
</tr>
<tr>
<td>203. Partnership Property</td>
</tr>
<tr>
<td>204. When Property Is Partnership Property</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>14</td>
</tr>
<tr>
<td>14</td>
</tr>
<tr>
<td>18</td>
</tr>
<tr>
<td>19</td>
</tr>
</tbody>
</table>

### ARTICLE 3. RELATIONS OF PARTNERS TO PERSONS DEALING WITH PARTNERSHIP

<table>
<thead>
<tr>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>301. Partner Agent of Partnership</td>
</tr>
<tr>
<td>302. Transfer of Partnership Property</td>
</tr>
<tr>
<td>303. Statement of Partnership Authority</td>
</tr>
<tr>
<td>304. Statement of Denia</td>
</tr>
<tr>
<td>305. Partnership Liable for Partner's Actionable Conduct</td>
</tr>
<tr>
<td>306. Partner's Liability</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>23</td>
</tr>
<tr>
<td>27</td>
</tr>
<tr>
<td>31</td>
</tr>
<tr>
<td>35</td>
</tr>
<tr>
<td>36</td>
</tr>
<tr>
<td>37</td>
</tr>
</tbody>
</table>
ARTICLE 4. RELATIONS OF PARTNERS TO EACH OTHER AND TO PARTNERSHIP

401. Partner's Rights and Duties ........................................ 48
402. Distributions in Kind .............................................. 53
403. Partner's Right to Information ...................................... 54
404. General Standards of Partner's Conduct ......................... 56
405. Partner's Liability to Partnership ................................. 65
406. Remedies of Partnership and Partners ............................ 66
407. Continuation of Partnership Beyond Definite Term or Particular Undertaking ................................. 69

ARTICLE 5. TRANSFEREES AND CREDITORS OF PARTNER

501. Partner's Interest in Partnership Property Not Transferable . . 71
502. Partner's Transferable Interest in Partnership .................. 73
503. Transfer of Partner's Transferable Interest ....................... 73
504. Partner's Transferable Interest Subject to Charging Order .... 77

ARTICLE 6. PARTNER'S DISSOCIATION

601. Events Causing Partner's Dissociation .......................... 81
602. Partner's Wrongful Dissociation .................................. 88
603. Effect of Partner's Dissociation .................................... 91
ARTICLE 7. PARTNER'S DISSOCIATION WHEN BUSINESS NOT WOUND UP

701. Purchase of Dissociated Partner's Interest ........................................... 92
702. Dissociated Partner's Power to Bind Partnership ..................................... 102
703. Dissociated Partner's Liability to Other Persons .................................... 104
704. Statement of Dissociation ................................................................. 107
705. Continued Use of Partnership Name .................................................... 108

ARTICLE 8. WINDING UP PARTNERSHIP BUSINESS

801. Events Causing Dissolution and Winding Up of Partnership Business ........ 110
802. Dissolution Deferred 90 Days ............................................................ 122
803. Partnership Continues After Dissolution ............................................. 126
804. Right to Wind Up Partnership Business ............................................. 126
805. Partner's Power to Bind Partnership After Dissolution ......................... 128
806. Statement of Dissolution ................................................................. 131
807. Partner's Liability to Other Partners After Dissolution ......................... 133
808. Settlement of Accounts Among Partners ............................................. 134

ARTICLE 9. CONVERSIONS AND MERGERS

901. Conversion of Partnership to Limited Partnership .................................. 141
902. Conversion of Limited Partnership to Partnership .................................. 144
903. Effect of Conversion; Entity Unchanged .............................................. 145
904. Merger of Partnerships ........................................................................ 146
905. Effect of Merger .................................................................................. 148
906. Statement of Merger ............................................................................ 150
ARTICLE 10. MISCELLANEOUS PROVISIONS

1001. Uniformity of Application and Construction ........................................ 153
1002. Short Title ............................................................................................. 153
1003. Severability ......................................................................................... 153
1004. Effective Date ....................................................................................... 154
1005. Repeals .................................................................................................. 154
1006. Application to Existing Relationships .................................................. 154
ARTICLE 1

GENERAL PROVISIONS

Section 101. Definitions.
Section 102. Knowledge and Notice.
Section 103. Effect of Partnership Agreement; Nonwaivable Provisions.
Section 104. Supplemental Principles of Law.
Section 105. Execution, Filing, and Recording of Statements.
Section 106. Law Governing Internal Affairs.
Section 107. Partnership Subject to Amendment or Repeal of [Act].

SECTION 101. DEFINITIONS. In this [Act]:

(1) "Business" includes every trade, occupation, and profession.

(2) "Debtor in bankruptcy" means a person who is the subject of:

   (i) an order for relief under Title 11 of the United States Code or a comparable order under a successor statute of general application; or

   (ii) a comparable order under state law governing insolvency.

(3) "Distribution" means a transfer of cash or other property from a partnership to a partner in the partner's capacity as a partner, or to the partner's transferee.

(4) "Partnership" means an association of two or more persons to carry on as co-owners a business for profit created under this [Act] or a comparable statute of another jurisdiction.

(5) "Partnership agreement" means an agreement, written or oral, among the partners concerning the partnership.
(6) "Partnership at will" means a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking.

(7) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(8) "Property" means all property, real, personal, or mixed, tangible or intangible, or any interest therein.

(9) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

(10) "Statement" means a statement of partnership authority under Section 303, a statement of denial under Section 304, a statement of dissociation under Section 704, a statement of dissolution under Section 806, a statement of merger under Section 906, or an amendment or cancellation of the foregoing.

(11) "Transfer" includes an assignment, conveyance, lease, mortgage, deed, and encumbrance.

**COMMENT**

Section 101(1) is taken from Section 101(1) of the Revised Uniform Limited Partnership Act (RULPA).

Section 101(2) is adapted from RULPA Section 101(2) and must be read in connection with Section 601(6)(l), which provides that a partner is dissociated upon "becoming a debtor in bankruptcy." The ABA Report suggests the new definition of "bankruptcy" only if bankruptcy is no longer a cause of dissolution. Under the Revised Uniform Partnership Act (RUPA), a partner is dissociated upon becoming a debtor in bankruptcy, but the dissociation does not cause a dissolution and winding up of the partnership business.
Section 101(3) is new and was added to clarify the meaning of Sections 401, 502, and 808 and related sections.

Section 101(4) is new and reflects the Conference's Drafting Rule 12 requiring that general definitions be at the beginning of the Act. The term "partnership" is defined here to include only those associations of persons created under this Act (or the comparable act of another jurisdiction). Section 202(a), as now proposed, provides that the association of two or more persons to carry on a business for profit as co-owners creates a partnership, but Section 202(b) then excludes all such associations created under any other statute, including the limited partnership act. This results in a substantive change from the Uniform Partnership Act (UPA) and from prior drafts of RUPA, which did not exclude from the definition of "partnership" those associations created under the limited partnership act. Thus, as used in RUPA, the term "partnership" is restricted to general partnerships and does not include limited partnerships.

Section 101(5) is based on the RULPA Section 101(9) definition of partnership agreement. The RUPA definition includes any agreement among the partners concerning the partnership, including any subsequent amendments. It also includes any agreement among inadvertent partners.

Section 101(6) defines a partnership at will as a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking.

Section 101(7) is the Conference's usual definition of "person."

Section 101(8) broadly defines "property" to include all property, including real, personal, intangible, and mixed, as well as any interest in property.

Section 101(9) is new and is the Conference's usual definition of "State."

Section 101(10) is new. Unless the context otherwise requires, the term "statement" refers to one of the various statements authorized by RUPA to enhance or limit the agency authority of a partner, to deny the authority or status of a partner, or to give notice of certain events, such as the dissociation of a partner or the dissolution of the partnership. Generally, statements must be executed and filed pursuant to Section 105.

Section 101(11) broadly defines "transfer" to include all manner of conveyances, including encumbrances.

SECTION 102. KNOWLEDGE AND NOTICE.

(a) A person knows a fact if the person has knowledge of it.
(b) A person has notice of a fact if the person:

(1) knows of it;

(2) has received a notice of it; or

(3) has reason to know it exists from all of the facts known to that person at the time in question.

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

(d) A person is notified or receives a notice of a fact when:

(1) the existence of the fact comes to the person's attention; or

(2) the notice is duly delivered at the person's place of business or at any other place held out by the person as a place for receiving communications.

(e) Except as provided in subsection (f), notice received by a person who is not an individual, including a partnership, is effective for a particular transaction when the notice is brought to the attention of the individual conducting the transaction, or in any event when the notice would have been brought to that individual's attention if the person had exercised due diligence. Such a person 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 person 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.
(f) Receipt of notice by a partner of a matter relating to the partnership is effective immediately as notice to the partnership, but is not effective in the case of fraud on the partnership committed by or with the consent of the partner.

**COMMENT**

Section 102 (Section 103 in prior drafts) implements the ABA Report suggestion that RUPA draw heavily from the definition and amplification of "knowledge" and "notice" in Sections 1-201(25) to 1-201(27) of the Uniform Commercial Code (UCC). The section adheres closely to the UCC language. Changes were made, however, to achieve gender neutrality, improve clarity and style, and respond to other suggestions. In general, no substantive changes are intended from the UCC concepts.

The time and circumstances under which a notice may cease to be effective are not determined by RUPA.

Section 102(b) is a slightly edited version of UCC Section 1-201(25)(a)-(c). "Notice" replaces the redundant phrase "notice or notification" throughout.

Section 102(c) and (d) are based on UCC Section 1-201(26). The Official Comment to that section provides:

"Notifies" ... 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.

Section 102(e), which defines the time at which a receipt of notice by an organization, such as a partnership or partner that is a corporation, is effective, is based on UCC Section 1-201(27). The Official Comment to that section states:

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 phrase "person who is not an individual," rather than the word "partnership" as used in the previous draft, to include other types of organizations.

Section 102(f) provides: "Receipt of notice by a partner of any matter relating to the partnership is effective immediately as notice to the partnership, but is not effective in the case of a fraud on the partnership committed by or with the
consent of the partner." The addition of this provision to the UCC-based provisions reflects that UPA Section 12 is no longer necessary. Limited partners are not "partners" within the meaning of RUPA. See Comment to Section 101(4).

SECTION 103. EFFECT OF PARTNERSHIP AGREEMENT; NONWAIVABLE PROVISIONS.

(a) Except as provided in subsection (b), a partnership agreement governs relations among the partners and between the partners and the partnership. To the extent the partnership agreement does not otherwise provide, this [Act] governs relations among the partners and between the partners and the partnership.

(b) A partnership agreement may not:

(1) vary the rights and duties under Section 105 except to eliminate the duty to provide copies of statements to all the partners;

(2) unreasonably restrict a partner's right of access to books and records under Section 403(b);

(3) eliminate the obligation of good faith under Section 404(d);

(4) vary the power to withdraw as a partner under Section 601(1), except to require the notice to be in writing;

(5) vary the right to expulsion of a partner by a court in the events specified in Section 601(5);

(6) vary the requirement to wind up the partnership business in cases specified in Section 801(4), (5), or (6); or

(7) restrict rights of third parties under this [Act].

COMMENT

Section 103 was Section 105 in the previous draft. Subsection (a) contains the general rule that RUPA governs relations among the partners and between the
partners and the partnership except to the extent the partnership agreement provides otherwise. Subsection (b) then lists certain rights and duties that are nonwaivable. It is implicit that the corresponding liabilities and remedies under Sections 405 and 406 may not be drafted away.

Subsection (b)(1) is new and provides that the partnership agreement may not vary the rights and duties under Section 105 except to eliminate the duty to provide copies of statements to all the partners. Section 105 specifies the requirements for executing, filing, and recording statements, which are mandatory, except the partners can agree to waive their right to receive copies of all statements.

Subsection (b)(2) provides that the partnership agreement may not “unreasonably restrict” a partner’s access to books and records under Section 403(b). Other information rights in Section 403 are subject to contrary agreement.

Subsection (b)(3) provides that the partnership agreement may not “eliminate” the obligation of good faith under Section 404(d). This makes mandatory the obligation of partners to discharge in good faith their duties to the partnership and their fellow partners under the Act and the partnership agreement. However, Section 404(d) expressly invites the partners to determine the standards by which the performance of the obligation is to be measured.

Subsection (b)(4) provides that the partnership agreement may not vary the power to withdraw as a partner under Section 601(1). This continues the traditional rule that every partner has the power, even if not the right, to withdraw from the partnership at any time.

Subsection (b)(5) provides that the partnership agreement may not vary the right to expulsion of a partner by a court in the events specified in Section 601(5). Section 601(5) refers to a judicial determination that the partner (i) engaged in wrongful conduct that adversely and materially affected the partnership business; (ii) willfully or persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners; or (iii) engaged in conduct relating to the partnership business which made it not reasonably practicable to carry on the business in partnership with that partner.

Subsection (b)(6) provides that the partnership agreement may not vary the requirement to wind up the partnership business in cases specified in Section 801(4), (5), or (6). Section 801(4) provides that the partnership shall be wound upon an event that makes it unlawful to continue the business. Section 801(5) provides for winding up if a court decrees that (i) the economic purpose of the partnership is likely to be unreasonably frustrated; (ii) another partner has engaged in conduct relating to the partnership business that makes it not reasonably practicable to carry on the business in partnership with that partner; or (iii) it is not otherwise reasonably practicable to carry on the partnership business in conformity with the partnership agreement. Section 801(6) provides that, on application by the transferee of a partnership interest, a court may order the partnership wound up (i)
If the partnership term has expired or its undertaking has been completed or (ii) at any time if the partnership is at will.

Subsection (b)(7) provides that the partnership agreement may not restrict the rights of third parties under the Act.

Special mention should be made of the rules regarding conversions and mergers under Article 9. These rules are not mandatory. As expressly stated in Section 907, partnerships may be converted and merged in any other manner provided by law. The effect of compliance with Article 9 is to provide a "safe harbor" assuring the legal validity of such conversions and mergers. Although not listed in Section 103(b) as immune from variation in the partnership agreement, noncompliance with the requirements of Article 9 in effecting a conversion or merger is to deny "safe harbor" validity to the transaction. In this regard, Sections 902(b) and 904(c)(2) require the conversion or merger of a limited partnership to be approved by all of the partners, notwithstanding a contrary provision in the limited partnership agreement. Thus, in effect the agreement can not vary the voting requirement without sacrificing the benefits of the "safe harbor."

SECTION 104. SUPPLEMENTAL PRINCIPLES OF LAW.

(a) Unless displaced by particular provisions of this [Act], the principles of law and equity supplement this [Act].

(b) If an obligation to pay interest arises under this [Act] and the rate is not specified, the rate is that specified in [applicable statute].

COMMENT

Section 104 is based on parts of UPA Sections 4 and 5. Section 104(a) combines the principles of UPA Sections 4(2), 4(3), and 5. The language was originally drawn from the ABA Report at 131, which in turn was based on UCC Section 1-103. At the suggestion of the Conference Style Committee, it was amended to read, "Unless displaced by particular provisions of this [Act], the principles of law and equity supplement this [Act]." The illustrative list of legal and equitable principles set forth in the previous draft, including "the law merchant and the law relative to capacity to contract, principle and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause," has been deleted as redundant. No substantive change is intended.

UPA Section 4(1) is deleted as unnecessary and potentially confusing. The proposition in UPA Section 4(1) is so well established that it is not necessary in the
section. No change in the law is intended by the deletion. See the Comment to RULPA Section 1101.

UPA Section 4(4) and (5) are moved to Article 10 of RUPA to conform to Conference sequence rules. Additional language suggested by the ABA appears in Section 901. See Report of UPA Revision Subcommittee of the ABA Committee on Partnerships and Unincorporated Business Organizations, reprinted in 43 Bus. Law. 121 (1987) [ABA Report], at 131.

SECTION 105. EXECUTION, FILING, AND RECORDING OF STATEMENTS.

(a) A statement may be filed in the office of [the Secretary of State]. A certified copy of a statement that is filed in an office in another state may be filed in the office of [the Secretary of State]. Either filing has the effect provided in this [Act] with respect to partnership property located in or transactions that occur in this State.

(b) Only a certified copy of a statement that has been filed in the office of the [Secretary of State] may be recorded in an office for recording transfers of real property.

(c) A statement that may be filed by a partnership must be executed by at least two partners. Other statements must be executed by a partner or other person authorized by this [Act]. An individual who executes a statement as, or on behalf of, a partner or other person named as a partner in a statement must personally declare under penalty of perjury that the contents of the statement are accurate.

(d) A person authorized by this [Act] to file a statement may amend or cancel the statement by filing an amendment or cancellation that names the
partnership, identifies the statement, and states the substance of the amendment or cancellation.

(e) A person who files a statement pursuant to this section shall promptly send a copy of the statement to every partner and any other person named as a partner. Failure to send a copy of a statement to a partner or other person does not affect the validity of the statement as to a person not a partner.

(f) The [Secretary of State] may collect a fee for filing or providing a certified copy of a statement. The [officers responsible for] recording transfers of real property may collect a fee for recording a statement.

COMMENT

Section 105 is new. It mandates the procedural rules for the execution, filing, and recording of the various "statements" (see Section 101(10)) authorized by RUPA. Thus, it contains most of the procedural requirements pertaining to statements of partnership authority found in Section 303 of the previous draft.

No filings are mandatory under RUPA; in all cases, the filing of statements is optional and voluntary. However, only statements which are executed, filed, and, where required, recorded in conformity with Section 105 have the legal consequences accorded statements by RUPA. The requirements of Section 105 cannot be varied in the partnership agreement except the duty to provide copies of statements to all the partners. Section 103(b)(1).

Subsection (a) provides for a single central filing of all statements. The expectation is that most states will assign to the Secretary of State the responsibility of maintaining the filing system for partnership statements. It should, obviously, be indexed by partnership name. Consideration was given to requiring local or dual filing, but the success of the UCC's central filing scheme suggested a single central filing is appropriate. Although many small, strictly local partnerships remain today, the partnership form is being used increasingly by firms doing business in multiple locations. It was felt that the convenience and efficiency of central filing for multi-location partnerships outweighed the convenience of local filing for strictly local partnerships. Moreover, the policy bias implicit in the RUPA filing provisions is to encourage the use of partnership statements.

Under subsection (a), partnerships transacting business in more than one state must, however, file a copy of a statement in each state since the legal effect accorded to a filed statement by RUPA is limited to property located or transactions
occurring within the state. The filing of a certified copy of a statement originally filed in another state is permitted, and indeed encouraged, to avoid inconsistencies between statements filed in different states.

Subsection (b) provides that only a certified copy of a filed statement may be recorded in the real estate records. The purpose of restricting such a recording to a certified copy is to eliminate the possibility of an inconsistency affecting the title to real property.

Subsection (c) provides that at least two partners must execute any statement filed by a partnership, that is, on behalf of the entity. Statements other than those executed on behalf of the partnership may be executed by a partner or other person authorized by the Act.

Section 303(b)(3) of the previous draft required that a statement of partnership authority be signed by all of the partners (or at least ten, if more than ten). The Drafting Committee no longer believes that the signature of all the partners is necessary to protect the partners and the partnership from unauthorized or improper filings. This conclusion is based on several things: (i) the subsection's new requirement that an individual who executes a statement as a partner must personally declare under penalty of perjury that the statement is accurate; (ii) the requirement in subsection (e) that a copy be sent to every partner; (iii) the right of the other partners to amend or cancel the statement under subsection (d) or to file a statement of denial under Section 304; and (iv) the right to bring suit for damages under Section 406(a) against a partner who breaches a duty to the partnership, including the partner's fiduciary duties under Section 404.

Subsection (d) provides that statements may be amended or cancelled by any person authorized by the Act to file an original statement. The amendment or cancellation must state the name of the partnership so that it can be properly indexed and found, identify the statement being amended or cancelled, and the substance of the amendment or cancellation. A filed amendment or a cancellation has the same operative effect as an original statement, except as otherwise provided. See especially, Section 303(d) (filed cancellation of limitation on authority revives previous grant of authority).

Subsection (e) is drawn from Section 303(f) of the previous draft and provides that a copy of every filed statement must be sent to each partner or person named as a partner. This requirement may, however, be eliminated in the partnership agreement. Section 103(b)(1). Failure to send a copy of a statement to a partner does not affect the validity or effect of the statement as to third parties.

Subsection (f) is new and authorizes the Secretary of State and local recording officers to collect a fee for filing, certifying, and recording statements.
SECTION 106. LAW GOVERNING INTERNAL AFFAIRS. Laws of the state in which a partnership has its chief executive office govern the partnership's internal affairs.

COMMENT

Section 106 is new. It implements the ABA's suggestion that the Act contain an "internal affairs" provision. The ABA Report suggested the following rule:

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.

This suggestion was derived from RULPA § 901, which provides in part:

Subject to the Constitution of this State, (i) the laws of the state under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners . . . .

The Drafting Committee chose instead to look to the law of the state in which a partnership's "chief executive office" is located. This term is drawn from UCC Section 9-103(3)(d). It was chosen in lieu of the state of organization because no filing is necessary to form a general partnership, and thus the situs of its organization is not always clear, unlike a limited partnership which is organized in the state where its certificate is filed. The term "chief executive office" is not defined in the Act, nor is it defined in the UCC. Paragraph 5 of the Official Comment explains:

(a) ... If we bear in mind that our principal question is where certain financing statements shall be filed, two things become clear. First: since the purpose of filing is to allow subsequent creditors of the debtor-assignor to determine the true status of his affairs, the place chosen must be one which such creditors would normally associate with the assignor; ... Second: the place chosen must be one which can be determined with the least possible risk of error. The place chosen by subsection (3) is the debtor's location, which is ordinarily the location of its chief executive office.

(c) "Chief executive office" does not mean the place of incorporation; it means the place from which in fact the debtor manages the main part of his business operations. This is the place where persons dealing with the debtor would normally look for credit information, and is the appropriate place for filing. The term "chief executive office" is not defined in this Section or elsewhere in this Act. Doubt may arise as to which is the "chief executive office" of a multi-
state enterprise, but it would be rare that there could be more than two possibilities. ... The subsection states a rule which will be simple to apply in most cases. ... 3 U.L.A. (Master ed. 1981) at 122-23.

The UCC rationale seems apropos for selecting the place for filing statements under RUPA. See Section ___. In the absence of any other clear rule for determining a partnership's legal situs, it seems convenient to use this rule for choice of law purposes as well. The rule is, of course, only a default rule, and the partners may by agreement select the law of any state to govern their internal affairs.

SECTION 107. PARTNERSHIP SUBJECT TO AMENDMENT OR REPEAL OF [ACT]. A partnership governed by this [Act] is subject to any amendment or repeal of this [Act].

COMMENT

Section 107 is new. It is adapted from Section 1.02 of the Revised Model Business Corporation Act (RMBCA). It reserves to the state the power to amend or repeal all or any part of the Act at any time. The Official Comment to RMBCA explains:

Provisions similar to section 1.02 have their genesis in Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 518 (1819), which held that the United States Constitution prohibited the application of newly enacted statutes to existing corporations while suggesting the efficacy of a reservation of power similar to section 1.02. The purpose of section 1.02 is to avoid any possible argument that a corporation has contractual or vested rights in any specific statutory provision and to ensure that the state may in the future modify its corporation statutes as it deems appropriate and require existing corporations to comply with the statutes as modified. 1 MBCA Ann. 3d at 12.
ARTICLE 2

NATURE OF PARTNERSHIP

Section 201. Partnership As Entity.
Section 202. Existence of Partnership.
Section 203. Partnership Property.
Section 204. When Property Is Partnership Property.

SECTION 201. PARTNERSHIP AS ENTITY. A partnership is an entity.

COMMENT

Section 201 provides that a partnership is an entity. The Drafting Committee felt that an explicit statement to this effect was appropriate as an expression of the net effect of the many changes in RUPA toward an entity theory of partnerships. The previous draft included the entity notion as a part of the definition of a partnership: "A partnership is an entity resulting from the association of two or more persons to carry on as co-owners a business for profit." On further reflection, the Committee felt it was unnecessary to incorporate the entity concept within the definition itself and stating it in a separate section would highlight the change.

Giving clear expression to the entity nature of a partnership is intended to allay previous concern that a deed is necessary to convey title from an "old" partnership to a "new" partnership when there is a change in the cast of partners. Cases such as Fairway Development Co. v. Title Ins. Co., 621 F. Supp. 120 (N.D. Ohio 1985), are overruled.

SECTION 202. CREATION OF PARTNERSHIP.

(a) Except as provided in subsection (b), the association of two or more persons to carry on a business for profit as co-owners creates a partnership whether or not the persons intend to create a partnership.

(b) An association created under a statute other than this [Act] or a comparable statute of another jurisdiction is not a partnership.
(c) In determining whether a partnership is created, the following rules apply:

(1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

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

(3) The receipt by a person of a share of the profits of a business is prima facie evidence that the person is a partner in the business, but that inference may not be drawn if the profits were received in payment:

(i) of a debt by installments or otherwise;

(ii) for services as an independent contractor, or of wages or other compensation to an employee;

(iii) of rent;

(iv) of an annuity or other retirement or health benefit to a beneficiary, representative, or designee of a deceased or retired partner;

(v) of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral; or

(vi) of consideration for the sale of the goodwill of a business or other property by installments or otherwise.
(d) Except as provided by Section 308, persons who are not partners as to each other are not partners as to other persons.

**COMMENT**

Section 202 combines UPA Sections 6 and 7; it was Section 201 of the previous draft.

Subsection (a) restates the traditional UPA definition of a partnership in the style of a rule of law: "The association of two or more persons to carry on a business for profit as co-owners creates a partnership whether or not the persons intend to create a partnership." No substantive change in the law is intended. The "definition" of the word "partnership" is now in Section 101(4). UPA Section 6(1), however, has always been understood as a substantive rule, as well as a definition. Drafting Rule 12 of the Conference proscribes substantive provisions in "definitions." Hence, the repetition here. The change from passive to active voice reflects Drafting Rule 3. Finally, the addition of the phrase "whether or not the persons intend to create a partnership" is intended merely to codify the traditional judicial construction of UPA Section 6(1) that a partnership is created by the association of persons whose intent is to carry on a business as co-owners, regardless of their subjective intention to be "partners"; indeed, they may inadvertently create a partnership despite their expressed subjective intention not to do so. The new language alerts readers to this possibility.

Subsection (b) provides that businesses organized under other statutes are not partnerships. These other businesses include corporations, limited partnerships, and limited liability companies. The subsection continues the UPA conception that partnership is the residual business organization, existing only if another form does not.

A limited partnership is not a partnership under this definition. Nevertheless, the provisions of RUPA will continue to govern limited partnerships because RULPA Section 1105 so requires "in any case not provided for" in RULPA. In light of this section, former RUPA Section 102 (previous draft), which provided that limited partnerships are governed by RUPA, has been deleted as unnecessary.

It is not intended that RUPA change any common law rules concerning special types of associations, such as mining partnerships, which in some jurisdictions are not governed by the UPA.

Relationships that are called "joint ventures" are partnerships if they otherwise fit the definition of partnership. An association is not classified a partnership, however, simply because it is called a "joint venture." As the ABA Report at 133 explained:
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.

Subsection (c) provides three rules of construction which apply in determining whether a partnership is created under subsection (a). They are in large part taken directly from UPA Section 7. Paragraph (3) lists the "protected categories" in which the receipt of an interest in profits is not prima facie evidence of partnership. The same rules apply whether the profit share is a single flat ratio or a ratio that varies over time (e.g., a different ratio after a floor is reached or as different levels of profits are reached).

Like its predecessor, RUPA makes no attempt to identify in every case whether a partnership exists. Thus, for example, paragraph (3) makes no attempt to answer whether a relationship is more properly characterized as that of borrower and lender, employer and employee or landlord and tenant. As under the UPA, an individual may function in both partner and nonpartner capacities.

Paragraph (3)(v) provides that a profit share is not prima facie evidence of partnership if the profits are received in payment of interest or other charge on a loan, "including a direct or indirect present or future ownership in the collateral, or rights to income, proceeds, or increase in value derived from the collateral." The quoted language is taken from Section 211 of 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.

Although the purpose of the language differs, many have suggested that it be made a part of RUPA. The new language clarifies that contingent payments do not automatically convert lending arrangements into partnerships. In particular, the new language gives comfort to shared-appreciation mortgagees. The minor changes
from Section 211 are stylistic only, and no substantive change is intended. At present, there is considerable ambiguity because there is remarkably little case law.

Similar ambiguities exist for tax purposes. On the one hand, there is authority that contingent arrangements can trigger a finding of partnership. See Farley Realty Corp. v. Commissioner, 279 F.2d 701 (2d Cir. 1960). More recently, however, the Internal Revenue Service has ruled that shared appreciation mortgages do not give the residential lender an equity position. Rev. Rul. 83-51, 1983-1 C.B. 48.

Subsection (d) is taken from UPA Section 7(1). It means that only those persons who are partners between themselves are liable as partners to third parties for the debts of the partnership, except for partnership debts incurred by purported partners under Section 308.

SECTION 203. PARTNERSHIP PROPERTY. Property transferred to or otherwise acquired by a partnership is property of the partnership and not of the partners individually.

COMMENT

Section 203 provides broadly that all property transferred to the partnership or otherwise acquired by the partnership in its business is property of the partnership and not of the partners individually. The first clause is taken adapted from UPA Section 8(1). The second clause is intended to express simply and powerfully the substantive result of UPA Section 25, which is that partnership property belongs to the partnership as an entity rather than to the individual partners.

Section 203 establishes the general principle that property acquired by the partnership is partnership property, but does not provide much guidance concerning when property is "acquired by" the partnership. UPA Section 8(1) 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 and Ribstein 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.

Bromberg & Ribstein, Partnership (1988) [Bromberg & Ribstein] at 3:4. Section 204 is designed to deal more concretely with the problem of when property is acquired "by the partnership" and thus becomes partnership property.

The previous draft of Section 203 also provided that partnership property is not subject to exemptions, allowances, or rights of a partner's spouse, heirs, or next of kin. This provision has been deleted as unnecessary. No substantive change is intended. These exemptions and rights inure to the property of the partners, and not to partnership property.

SECTION 204. WHEN PROPERTY IS PARTNERSHIP PROPERTY.

(a) Property is partnership property if acquired:

(1) in the name of the partnership; or

(2) in the name of one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership, even if the name of the partnership is not indicated.

(b) Property is acquired in the name of the partnership by a transfer to:

(1) the partnership in its name; or

(2) one or more partners in their capacity as partners in the partnership, if the name of the partnership is indicated in the instrument transferring title to the property.

(c) Property is presumed to be partnership property if purchased with partnership assets, even if not acquired in the name of the partnership or of one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership.
(d) Property acquired in the name of one or more of the partners, without
an indication in the instrument transferring title to the property of the person's
capacity as a partner or of the existence of a partnership and without use of
partnership assets, is presumed to be separate property, even if used for
partnership purposes.

COMMENT

Section 204 sets forth the rules for determining when property is acquired
by the partnership and hence becomes partnership property. It was Section 203 of
the previous draft and has been substantially revised. Use of the term "record title"
has been eliminated.

Subsection (a) provides that property is partnership property if acquired (1)
in the "name of the partnership" or (2) in the name of one or more of the partners
with an indication of either (i) their capacity as partners or (ii) of the existence of a
partnership, even if the name of the partnership is not indicated. Subsection (b)
provides that property acquired in the "name of the partnership" includes property
acquired in the name of one or more partners in their capacity as partners, but only
if the name of the partnership is indicated in the instrument transferring title. The
exact partnership name must be used in the instrument transferring title for the
property to be acquired "in the name of the partnership" pursuant to subsection (b).

Subsections (a) and (b) are based on UPA Section 8(3), but are expanded
to include personal property. This reflects settled law that personal property may
be held in the partnership name.

The previous draft of Section 204 [203] provided that property becomes
partnership property only if titled in the partnership name or in the name of all the
partners with an indication that they are doing business as a partnership. As
redrafted, property transferred to a single partner is partnership property, even if the
name of the partnership is not indicated, provided the instrument transferring title
indicates either (i) the partner's capacity as a partner or (ii) the existence of a
partnership. The change is more consonant with the entity theory and resolves the
troublesome issue of a conveyance to fewer than all the partners which
nevertheless indicates their partnership status.

Section 204 is a heavily-edited version of the new Georgia law, which the
ABA Report recommended as a model. See Ribstein, An Analysis of Georgia's New
Partnership Law, 36 Mercer L.Rev. 443, 481-82 (1985), for an explanation of the
Georgia statute:
In general, under new section [204], 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 [204] than under either prior Georgia law or official [UPA] 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 [204], 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 [UPA] section 8.

RUPA affords more judicial flexibility than the Georgia statute. Bromberg & 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." They also state that 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.

Section 204(c) provides that property is presumed to be partnership property if purchased with partnership assets, notwithstanding in whose name title is held. This provision is, however, subject to Section 302(b) [Section 203(e) of the previous draft], which provides that partnership property held in the name of one or more partners, without an indication of their capacity as partners or of the existence of a partnership, may be transferred by the partners in whose name title is held free of any claims of the partnership to a purchaser without notice that it is partnership property. Unlike the rule in Section 204(b) under which property is deemed to be partnership property, Section 204(c) creates a rebuttable presumption that property is partnership property if it is purchased with partnership funds. Subsection (c) is also intended to apply if partnership credit is used rather than partnership cash or property.

Section 204(d) provides property acquired in the name of one or more partners, without an indication of their capacity as partners or use of partnership funds, is presumed to be their separate property, even if used for partnership purposes. As under subsection (c), the presumption is rebuttable.

Section 203(f) of the previous draft has been deleted. It provided: "A transfer to a partnership in the partnership name, even without words of inheritance, passes the entire estate or interest of the grantor unless a contrary intent appears."
The section was taken directly from UPA Section 8(4) with the addition of the words "or interest." It was deleted as unnecessary because modern conveyancing law deems all transfers to pass the entire estate or interest of the grantor unless a contrary intent appears.
ARTICLE 3

RELATIONS OF PARTNERS TO PERSONS

DEALING WITH PARTNERSHIP

Section 301. Partner Agent of Partnership.
Section 302. Transfer of Partnership Property.
Section 303. Statement of Partnership Authority.
Section 304. Statement of Denial.
Section 305. Partnership Liable for Partner’s Actionable Conduct.
Section 306. Partner’s Liability.
Section 307. Action Against Partnership and Partners.
Section 308. Purported Partner.
Section 309. Liability of Incoming Partner.

SECTION 301. PARTNER AGENT OF PARTNERSHIP. Subject to the effect of a statement of partnership authority pursuant to Section 303:

(1) Each partner is an agent of the partnership for the purpose of its business. Any act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the usual way the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner has no authority to act for the partnership in the particular matter and the person with whom the partner is dealing knows or has received a notice that the partner lacks authority.

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

Section 301 concerns the ability of a partner to bind a partnership to third parties. The rights of the partners among themselves, including their management rights, are governed by Section 401.

The lead in to Section 301 directs the reader to Section 303, the new "Statement of Partnership Authority" provision, the effect of which is to modify some of the rules set forth in Section 301.

Section 301(1) largely continues UPA Section 9(1), which reflects that power to bind the partnership to third parties exists by virtue of actual authority, apparent authority, or inherent agency power. See Bromberg & Ribstein at 4:4:

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, Partnership (1968) [Crane & Bromberg] address 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.

This draft adopts the English solution rather than that of the ABA Report: it specifies that reference can be had to business "of the kind" carried on by the partnership, and not merely to the carrying on of the business of the partnership in question.
The ambiguity would not end simply by deleting the phrase "in the usual way." The basic question of apparent authority would remain: is the focus on the business of the particular partnership or similar partnerships? Moreover, brief investigation indicates that the terms "usual" or "usual and ordinary course of business" are used commonly in matters of agency and corporate law. See 60 Am. Jur. 2d on Partnerships, § 162: "The authority for each transaction may be implied from the nature of the business according to the usual and ordinary course in which it is carried on by those engaged in it in the locality where it operates, but the scope may be broadened by the actual conduct of the business as carried on with the knowledge, actual or presumed, of the partners sought to be charged."

The Committee draft embraces 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."

Section 301(2) continues UPA Section 9(2) with the addition of reference to "the partnership business or business of the kind carried on by the partnership." 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.

The Committee concluded, however, that the deletion obscured the idea that partners can be bound by actual authority even if there is no apparent authority, and the subsection was retained.

Section 301 eliminates UPA Section 9(3), which contains a list of acts that require unanimous consent before they bind the partnership to third parties. The elimination of the list leaves it to the courts to decide the outer limits of the agency power of partners. The Committee expects that most of the items on the UPA § 9(3) list will remain outside the apparent authority of partners even though they are not mentioned in the statute. The Committee concluded that the elimination of the unanimous consent rule from the statute will tend to offer judicial flexibility to protect smaller creditors. In larger transactions, sophisticated creditors likely will exercise due diligence to determine whether an acting partner has authority. The Committee concluded that avoiding a rigid rule will make it easier for smaller partnerships to do business by making it easier for them to satisfy creditors. Non-
acting partners can be protected by the courts in a way that takes into account variations in local practice. Furthermore, under Section 401, a non-consenting partner may recover from an acting partner who improperly binds the partnership to a third party.

See Crane & Bromberg at 296 on the dangers in a list of acts that require unanimous consent:

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 adopted the basic suggestion of the ABA Report that the list of acts requiring unanimous consent be retained but revised to reflect modern business practice; there was no consensus on what acts should be included in a revised list.

UPA Section 9(3)(a) requires unanimous consent to "[a]ssign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership."

UPA Section 9(3)(b) requires unanimous consent to "[d]ispose of the goodwill 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):

[It 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 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) requires unanimous consent to do "any other act which would make it impossible to carry on the ordinary business of the partnership." See Bromberg & Ribstein at § 4.03(c)(3):

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

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

UPA Section 9(3)(d) requires 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 requires 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."

The earlier draft did not adopt the ABA Report inclusion of a pledge of partnership assets for money borrowed. That seemed to cover too many transactions. The ABA Report's suggestion to include the relinquishment of a partnership opportunity seemed to cover too many small transactions and was too vague.

Under Section 303, third parties may be bound by restrictions on the authority of a partner contained in a statement of partnership authority.

SECTION 302. TRANSFER OF PARTNERSHIP PROPERTY.

(a) Subject to the effect of a statement of partnership authority pursuant to Section 303:
(1) Partnership property held in the name of the partnership may be transferred by an instrument of transfer executed by any partner in the partnership name.

(2) Partnership property held in the name of one or more partners with an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, even if the name of the partnership is not indicated, may be transferred by an instrument of transfer executed by the persons in whose name the property is held.

(3) A partnership may recover property transferred under this subsection if it proves that execution of the instrument of transfer did not bind the partnership under Section 301, unless the property was transferred by the initial transferee or a person claiming through the initial transferee to a subsequent transferee who gave value without having notice that the person who executed the instrument of initial transfer lacked authority to bind the partnership.

(b) Partnership property held in the name of one or more persons other than the partnership, without an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, may be transferred free of any claims of the partnership or the partners by the persons in whose name the property is held to a transferee who gives value without having notice that it is partnership property.

(c) If a person holds all of the partners' interests in the partnership, all of the partnership property vests in that person. That person may execute documents in the name of the partnership to evidence vesting of the property in that person and may file or record those documents.
Section 302 provides who may transfer partnership property. It has been substantially revised since the last draft. Subsection (a) deals with property held of record by (1) the partnership and (2) by one or more partners with an indication of their capacity as partners or of the existence of a partnership. Like Section 203, these rules are subject to change if a Statement of Partnership Authority is filed under Section 303.

Section 302 expands UPA Section 10 to include not only real property but also certain 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, Section 302 does not cover all personal property; it applies only to property acquired, held of record, and transferred pursuant to an instrument conveying title. However, use of the term "record title," used in previous drafts, has been avoided.

Subsection (a)(3) provides that a partnership may recover property transferred without authority by a partner if the partnership proves that execution of the instrument of transfer did not bind the partnership under Section 301, unless the property has been transferred to a subsequent transferee for value without notice of the lack of authority. The prior draft of Section 302 protected any such holder without actual knowledge of the lack of authority. The Committee feels that transferees should not be able to ignore facts from which they have reason to know of the lack of authority.

Subsection (a)(3) incorporates 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 modified version of Georgia § 14-8-10. The burden was already on the partnership under the language that is continued in subsection (a)(2).

Subsection (a)(3) provides that the partnership may recover property transferred by a partner if it proves that execution of the instrument of transfer did not bind the partnership under Section 301. The reference to any authority under
Section 301, rather than to authority under Section 301(a) only, responds to Bromberg and Ribstein's criticism of UPA Section 10(1):

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

Bromberg & Ribstein at 4:58. Subsection (a)(3) implements the intent that actual authority is not revoked by the provisions of Section 302.

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."

Subsection (b) provides that partnership property held in the name of one or more persons other than the partnership, without an indication in the record of their capacity as partners or of the existence of a partnership, may be transferred by the persons in whose name title is held free of any claims of the partnership to a transferee for value without notice that it is partnership property. This subsection is based on former Section 203(e). It has been changed to protect only transferees for value and without notice, rather than any person without knowledge.
Subsection (c) is new. It provides that if all of the partners' interests in the partnership are held by one person, such as a surviving partner or a buyout of the other partners, all partnership property vests in that person, who may execute documents in the partnership name to evidence his or her title. The UPA does not have a provision dealing with this problem. The Committee felt that an express provision would allow a clear claim of a record title to be maintained, even though the partnership no longer exists as a technical matter.

SECTION 303. STATEMENT OF PARTNERSHIP AUTHORITY.

(a) A partnership may file a statement of partnership authority, which:

(1) must include:

(i) the name of the partnership;

(ii) the street address of its chief executive office and of an office in this State, if any;

(iii) the names and mailing addresses of all of the partners or of an agent appointed and maintained by the partnership for the purpose of subsection (b); and

(iv) a statement specifying the names of the partners authorized to execute an instrument transferring real property held in the name of the partnership; and

(2) may include a statement of the authority, or of limitations on the authority, of some or all of the partners to enter into other transactions on behalf of the partnership and any other matter.

(b) If a statement of partnership authority names an agent, the agent shall maintain a list of all of the partners and make it available to any person on request for good cause shown.
(c) If a filed statement of partnership authority is executed pursuant to
Section 105(e) and states the name of the partnership but does not contain all of
the other information required by subsection (a), the statement operates with respect
to a person not a partner as provided in subsections (d) and (e).

(d) Except as provided in subsections (e) and (f), a filed statement of
partnership authority supplements the authority of a partner to enter into
transactions on behalf of the partnership as follows:

(1) Except for transfers of real property, a grant of authority contained
in a filed statement of partnership authority is conclusive, in favor of a person who
gives value without knowledge to the contrary, so long as and to the extent that a
limitation on that authority is not contained in another filed statement. A filed
cancellation of a limitation on authority revives the previous grant of authority.

(2) A grant of authority to transfer real property held in the name of
the partnership contained in a certified copy of a filed statement of partnership
authority recorded in the office for recording transfers of that real property is
conclusive, in favor of a person who gives value without knowledge to the contrary,
so long as and to the extent that a certified copy of a filed statement containing a
limitation on that authority is not recorded in the office for recording transfers of that
real property. The recording in the office for recording transfers of that real property
of a certified copy of a filed cancellation of a limitation on authority revives the
previous grant of authority.

(e) A person not a partner is deemed to know of a limitation on the
authority of a partner to transfer real property held in the name of the partnership
if a certified copy of the filed statement containing the limitation on authority is
recorded in the office for recording transfers of that real property.

(f) Unless earlier canceled, a filed statement of partnership authority is
canceled by operation of law five years after the date on which the statement, or
the most recent amendment, was filed with the [Secretary of State].

COMMENT

Section 303 provides for a statement of partnership authority specifying the
names of the partners authorized to execute instruments transferring real property
held in the partnership name; it may also grant extraordinary authority or limit the
authority of partners to enter into other transactions on behalf of the partnership.
The provisions governing the execution, filing, and recording of the statement have
been moved to new Section 105.

Section 303 is the Drafting Committee’s third attempt at crafting the
provisions of a statement of partnership authority. 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 final draft had as its starting point the revisions
recommended by representatives of the California Bar’s Partnership Committee,
edited to borrow from language contained in a draft forged by the Texas Bar
Partnership Committee. It has been further amended since last year’s draft.

Section 303 is intended to be appropriate for limited partnerships, as well
as general partnerships. If the adopting state chooses, the filing of a statement of
partnership authority may also be deemed to satisfy the filing required by those
fictitious name statutes that utilize a central filing system.

Section 303(a) provides that the partnership may file a statement of
partnership authority. 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 realize 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.

As recognized in the ABA Report at 140-41, a mandatory filing rule would have required application to "foreign" partnerships.

Section 105 provides for the central filing of all statements, rather than local filing. However, to bind third parties in connection with real property transfers, a statement of partnership authority must also be filed locally with the land records.

The most important goal of the statement of authority is to facilitate real property transfers. Subsection (a)(1)(iv) provides that the statement must specify the names of the partners authorized to execute an instrument transferring real property held in the name of the partnership.

The statement of partnership authority is also intended to have effect beyond real property transfers. Subsection (a)(2) provides that the statement may contain any other matter the partnership chooses, including a statement of the authority, or of limitations on the authority, of some or all of the partners to enter into other transactions on behalf of the partnership.

The filing of an extraordinary grant of authority is treated differently than a limitation on authority. Subsection (d)(1) states that a filed grant of authority "is conclusive, in favor of a person who gives value without knowledge to the contrary." On the other hand, if the grant of authority concerns the transfer of real property, subsection (d)(2) provides that the property must be held in the partnership name and a certified copy of the statement must be recorded with the land records for the conclusive presumption to operate.

In either case, the presumption operates only so long as and to the extent that a limitation on that authority is not contained in another filed/recorded statement. This language is new and is intended to condition reliance on the record to situations where there is no conflict among filed/recorded statements, amendments, or denials of authority. See Section 304. If the record is in conflict regarding a partner's authority, third parties must ascertain from the partnership the extent of a partner's authority. This rule is modified slightly in the case of a cancellation of a limitation on a partner's authority, which revives the previous grant of authority.

There is a change in subsection (d) [previously (i)]. It now provides (as did old subsection (i)(2)) that a limitation on a partner's authority to transfer real property held in the partnership name is effective against nonpartners the statement is recorded with the land titles. Former subsection (i)(1) provided that a filed limitation
on the authority of a partner, other than a limitation on the partner's authority to
transfer real property, was binding on nonpartners if, and only if, they knew of the
limitation. This subsection has been deleted as unnecessary. Section 301 already
provides as a general rule that a partner's lack of authority is binding on third parties
who know the partner lacks authority. Thus, a limitation on a partner's authority to
transfer personal property or to enter into other transactions on behalf of the
partnership, contained in a filed statement of partnership authority, is effective only
against a nonpartner who knows or has received a notice of it; the filing of such
limitation does not operate as constructive notice, as does a recorded limitation of
a partner's authority to transfer real property.

It should be emphasized that Section 303 concerns the authority of partners
to bind the partnership to third persons. The authority of any partner, as among the
partners, to take any action is governed by the partnership agreement, or by the
provisions of RUPA governing the relations among partners, and is not affected by
the rules on statements of partnership authority, amendments or denials.

Although the statement of partnership authority is optional, RUPA requires
a further disclosure of partnerships that exercise the option to file a statement of
partnership authority. Subsection (a)(1)(iii) provides that the statement must include
the names and mailing addresses of all of the partners or, alternatively, of an agent
appointed and maintained by the partnership for the purpose of maintaining such
a list. If an agent is appointed, subsection (b) provides that the agent shall maintain
a list of all of the partners and make it available to any person on request for good
cause shown.

Closely related to these provisions is Section 308(c), which provides: "A
person is not a partner in a partnership solely because the person is named by
another in a statement of partnership authority."

Subsection (f) states that a statement is canceled by operation of law five
years after the date on which the statement, or the most recent amendment, was
filed.

SECTION 304. STATEMENT OF DENIAL. A partner or other person
named as a partner in a filed statement of partnership authority may file a statement
of denial stating the name of the partnership and the fact that is being denied, which
may include denial of a person's authority or status as a partner. A statement of
denial is a limitation on authority to the extent provided in Section 303(d) and (e).
COMMENT

Section 304 was added to RUPA to complement Section 303. It provides partners (and persons named as partners) an opportunity to deny any fact asserted in a statement of partnership authority, including denial of a person's status or authority as a partner. A statement of denial must be executed, filed, and recorded pursuant to the requirements of Section 105.

Section 304 does not address the consequences of a denial of partnership. An opportunity for a denial of record allows partners and other persons making the denial to protect themselves from a third party arguing that an adverse inference should be drawn from a failure to deny.

The last sentence of Section 304 is new. It provides that a statement of denial operates as a limitation on a partner's authority to the extent provided in Section 303. Section (d) provides that a filed/recorded statement of partnership authority is conclusive, in favor of purchasers without knowledge to the contrary, so long as and to the extent that a limitation on that authority is not contained in another filed/recorded statement. A filed/recorded statement of denial operates as such a limitation on authority, thereby precluding reliance on an inconsistent grant of authority.

SECTION 305. PARTNERSHIP LIABLE FOR PARTNER'S ACTIONABLE CONDUCT.

(a) A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with the authority of the partnership.

(b) If, in the course of its business, a partnership receives money or property of a person not a partner which is misapplied by a partner while it is in the custody of the partnership, the partnership is liable for the loss.

COMMENT

Section 305(a) is an edited continuation of UPA Section 13. It eliminates the UPA limitation on the scope of the section by deleting the words, "not being a partner in the partnership." The deletion is intended to permit a partner to sue the partnership on a tort or other theory during the term of the partnership, rather than
being limited to the remedies of 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 "or other actionable conduct" has been added to implement the
suggestion in the ABA Report that the term "wrongful act or omission" be broadened
to cover no-fault torts.

The language at the end of UPA Section 13, "to the same extent as the
partner so acting or omitting to act," has been eliminated to prevent a partnership
from asserting the immunity of a partner. This has been described as a "badly-
needed change" to conform RUPA to the agency rule that a principal is not entitled
to its agent's immunities. See Ribstein, A Mid-Term Assessment of the Project to
Revise the Uniform Partnership Act, 46 Bus. Law. 111 (1990). The deletion of this
language is not intended to limit a partnership's contractual rights.

UPA Section 14 has been eliminated as a separate section. Section 305(b)
is drawn from UPA Section 14(b). It imposes strict liability on the partnership for the
misapplication of money or property received in the course of the its business.

SECTION 306. PARTNER'S LIABILITY. All partners are liable jointly and
severally for all obligations of the partnership unless otherwise agreed by the
claimant or provided by law.

COMMENT

Section 306 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 the successor to UPA
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.

On the other hand, the rules of Section 307 make clear that the RUPA model differs
from classic joint and several liability.

SECTION 307. ACTION AGAINST PARTNERSHIP AND PARTNERS.

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

(b) An action may be brought against the partnership and any or all of the
partners in the same action or in separate actions.

(c) A judgment against a partnership is not by itself a judgment against a
partner. A judgment against a partnership may not be satisfied from a partner’s
assets unless there is a judgment against the partner.

(d) A judgment creditor of a partner may not levy execution against the
assets of the partner to satisfy a judgment based on a claim against the partnership
unless:

(1) a judgment based on the same claim has been obtained against
the partnership and a writ of execution on the judgment has been returned
unsatisfied in whole or in part;

(2) an involuntary case under Title 11 of the United States Code has
been commenced against the partnership and has not been dismissed within 60
days after commencement, or the partnership has commenced a voluntary case under Title 11 of the United States Code and the case has not been dismissed;

(3) the partner has agreed that the creditor need not exhaust partnership assets;

(4) a court grants permission to the judgment creditor to levy execution against the assets of a partner based on a finding that partnership assets subject to execution within this State are clearly insufficient to satisfy the judgment, that exhaustion of partnership assets is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's inherent equitable powers; or

(5) liability is imposed on the partner by law or contract independent of the existence of the partnership.

(e) This section applies to any partnership liability or obligation resulting from a representation by a partner or purported partner under Section 308(a) or (b).

COMMENT

Section 307(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 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."

Section 307(b) provides that suit may be brought against the partnership and any or all of the partners in the same action or in separate actions. It is intended to clarify that the partners need not be named in an action against the partnership. In particular, 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 ... 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.

The new rule is consistent with RUPA’s broad move to an entity theory of
partnerships.

Section 307(c), which the result of extensive Committee deliberations,
provides that a judgment against a partnership is not automatically a judgment
against a partner:

A judgment against a partnership is not by itself a judgment against a
partner. A judgment against a partnership may not be satisfied from a partner’s
assets unless there is a judgment against the partner.

The Committee could not agree on a rule to govern the effect on a partner
of a prior judgment against the partnership. An earlier draft of Section 307(c)
contained the following provision:

In an action against a partner that follows a judgment against the partnership,
the partner is collaterally estopped from challenging the previous judgment if
the partner [had notice of an opportunity to defend the action] [had knowledge
of the action] [was served in the action].

The three basic policy choices were bracketed because the Committee could not
reach even a tentative agreement on the proper rule. 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.” The conclusion was that RUPA should remain neutral on the question how
the partner must be served.

One recent commentator explains why partners should be personally
served to subject their personal assets to the judgment. See Matthews, Procedural
Considerations in Bringing Suit against a General Partnership in Arkansas, 1989
Ark. L. Notes 57, 61:

Perhaps the best solution is to recognize the partnership as an entity to the
extent of partnership assets, but require personal service on the partners to
subject their personal assets to the judgment. This is, in essence, the result in
the corporate setting, and has also been reached in the partnership context in
other states. The entity aspect of the partnership would thereby be recognized
to an extent consistent with its ability to hold property. Service on the partnership would create a certain risk for the partner, but only to the extent of partnership assets. The partners would be forced to rely on their selected agent to alert them to a suit to that extent, but that risk seems fairly within the partners' responsibility in choosing their agent. For individual liability, however, the partner would be required to be personally served. The ability of the partner to launch an all-out personal defense would thereby be adequately protected.

See also Section 60 of the Second Restatement of Judgments (1982), which provides as follows:

§ 60. Partnership and Its Members

(1) A judgment in an action by an injured person against a partner upon an obligation or liability incurred in the course of partnership business:

* * *

(b) If in favor of the injured person:

(i) does not terminate a claim that he may have against another partner based upon that obligation;

(ii) renders the property of the partnership subject to execution to satisfy the judgment but is not otherwise binding on a partner who was not a party to the action unless he controlled or participated in controlling the defense of the action, or was given notice of an opportunity to defend the action;

(iii) precludes the injured person as to issues litigated therein, including issues concerning the extent of his damage; and

(iv) if satisfied or released, discharges the liability of another partner to the extent stated in § 50.

The Comment to Section 60 provides in part as follows:

The Uniform Partnership Act . . . is silent on many critical points, particularly concerning the effects of judgments. The "common name" and "joint debtor" statutes in terms sometimes deal only with the problem of denomination of parties in partnership litigation and not with the further question of the binding effects of the judgment.

* * *

In most states, however, the plaintiff has the option to denominate [partners] as parties in their common business name and to proceed in the action after having served at least one but less than all of them. In whatever
way the defendants are denominated, those who are individually served are bound by the judgment as fully as by a judgment against any defendant or set of co-defendants. . . .

When the action proceeds with less than all partners joined, a partner who has been served with process can defend the action in behalf of the partnership. . . . A judgment for the plaintiff is binding upon unserved partners to the extent of the partnership property, which thereupon is subject to execution to collect the judgment. To this extent, the partnership is in effect treated as an entity when one of its members is made a defendant. By statute in a few jurisdictions, moreover, the judgment may have evidentiary value in a subsequent action to establish the personal liability of unjoined partners. In these jurisdictions, an unjoined partner may be summoned after judgment to show cause why he should not be made liable under the judgment. The burden of proof on the question of liability is then shifted from plaintiff to the newly joined partner. Aside from this possibility, however, a partner who has not been served as a defendant is not bound beyond his interest in the partnership property.

Section 307(d) implements the general 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 Section 307(d), 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 (emphasis added).

Because judgment is primarily against the partnership, partnership assets should be pursued first, whether the remedy sought is pre- or post-judgment. Section 307 has no special rule concerning pre-judgment attachment because the Committee concluded that the law of pre-judgment remedies is adequate protection.
Section 307(e) is new and was added to clarify that the section governs actions against the partnership under Section 308 involving representations by partners or purported partners.

SECTION 308. PURPORTED PARTNER.

(a) If a person, by words spoken or written or by conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, the purported partner is liable to a person to whom the representation is made and who, relying on the representation, gives credit to the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported partner's consent, is made in a public manner, the purported partner is liable to a person who gives credit in reliance upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable as if the purported partner were a partner. If no partnership liability results, the purported partner is liable jointly and severally with any other person consenting to the representation.

(b) If a person is represented to be a partner in an existing partnership, or with one or more persons not partners, the purported partner is an agent of persons consenting to the representation to bind them to the same extent and in the same manner as if the purported partner were a partner, with respect to persons who give credit in reliance upon the representation. If all of the partners of the existing partnership consent to the representation, a partnership act or obligation results. If fewer than all of the partners of the existing partnership consent to the
representation, the person acting and the partners consenting to the representation are jointly and severally liable.

(c) A person is not a partner in a partnership solely because the person is named by another in a statement of partnership authority.

(d) A person does not continue to be a partner solely because of a failure to file a statement of dissociation or to amend a statement of partnership authority to reflect the partner's dissociation from the partnership.

**COMMENT**

The title "Purported Partner" more accurately reflects the substance of Section 308 than does the UPA Section 16 title "Partner by Estoppel."

Section 308(a) divides what was UPA Section 16(a) into two sentences to make it easier to read. The modification to the second sentence is a gender-neutral version of the proposal made in Painter, *Partnership by Estoppel*, 16 Vand. L. Rev. 327, 338 (1963). Professor Painter criticized the present language as follows:

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

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

The last sentence of Section 308(a) 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's assets) which placed them ahead of those creditors who did not know of, and therefore did not rely on, the holding out of A as B's partner. Subsection (1)(b) was intended to obviate this result and put all creditors of B (and A and B) on an equal footing regarding B's business assets. The new Bankruptcy Code has enacted that result by doing away with the "jingle rule." Thus, subsection 1(b) probably could be eliminated in a revised UPA.

An earlier draft had eliminated the language, but the Committee reinstated it to clarify the rule.

Section 308(b) is modified slightly to emphasize that the person being protected by Section 308 is one who gives credit in reliance upon the representation. Subsection (b) provides, in part, that if "all of the members of the existing partnership consent to the representation, a partnership act or obligation results." There are, of course, other situations in which the partnership may be bound apart from Section 308. For example, the firm may be bound under general principles of apparent authority or ratification of acts by acceptance of a benefit.

If a partnership liability results under Section 308(a) or (b), Section 307 applies to require the creditor to exhaust partnership assets first.

Section 308(c) makes clear that an otherwise innocent person is not liable for failing to deny partnership status asserted by a third person in a statement of partnership authority. The fact that you file a denial does not mean that you were a partner until you file.

Section 308(d) provides that a person does not continue to be a partner solely because of a failure to file a statement of dissociation under Section 704 or to amend a statement of partnership authority to reflect the person's dissociation from the partnership.

**SECTION 309. LIABILITY OF INCOMING PARTNER.** A person admitted as a partner into a partnership is liable for all obligations of the partnership arising before the person's admission as if the person had been a partner when the obligations were incurred, but this liability may be satisfied only out of partnership property.

**COMMENT**

The ABA Report at 145-46 recommended that UPA Section 17, the predecessor of Section 309, 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.

Section 309 has been retained for several reasons. First, it provides a nice clear answer to a basic and common question concerning the rights of a creditor toward a new partner. Second, RUPA eliminates the redundant language from Section 605, the successor to UPA Section 41, rather than from Section 309. Under RUPA, Section 605 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 UPA Section 41’s fictional "liability assumption" by the new partnership.
ARTICLE 4

RELATIONS OF PARTNERS TO EACH OTHER AND TO

PARTNERSHIP

Section 401. Partner's Rights and Duties.
Section 402. Distributions in Kind.
Section 403. Partner's Right to Information.
Section 404. General Standards of Partner's Conduct.
Section 405. Partner's Liability to Partnership.
Section 406. Remedies of Partnership and Partners.
Section 407. Continuation of Partnership Beyond Definite Term or Particular Undertaking.

SECTION 401. PARTNER'S RIGHTS AND DUTIES.

(a) A partnership shall establish an account for each partner which must be credited with an amount equal to the cash plus the value of any other property, net of the amount of any liabilities, the partner contributes to the partnership and the partner's share of the partnership profits. Each partner's account must be charged with an amount equal to the cash plus the value of any other property, net of the amount of any liabilities, distributed by the partnership to the partner and the partner's share of the partnership losses.

(b) A partnership shall credit each partner's account with an equal share of the partnership profits and shall charge each partner with a share of the partnership losses, whether capital or operating, in proportion to the partner's share of the profits.

(c) A partnership shall indemnify each partner for payments reasonably made and liabilities reasonably incurred by the partner in the ordinary and proper
conduct of the business of the partnership or for the preservation of its business or property.

(d) A partnership shall repay a partner who, in aid of the partnership, makes a payment or advance beyond the amount of capital the partner agreed to contribute.

(e) A payment made by a partner which gives rise to a partnership obligation under subsection (c) or (d) constitutes a loan to the partnership. Interest accrues from the date of the payment or advance.

(f) Each partner has equal rights in the management and conduct of the partnership business.

(g) A partner may use or possess partnership property only on behalf of the partnership.

(h) A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership.

(i) A person may become a partner only with the consent of all the partners.

(j) A difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners. An act outside the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the consent of all the partners.

(k) This section does not affect the obligations of a partnership to other persons under Section 301.
COMMENT

Section 401 is drawn substantially from UPA Section 18. It establishes many of the default rules that govern the relations among partners. All of these rules are, however, subject to contrary agreement of the partners as provided in Section 103.

Subsection (a) provides that the partnership shall establish an account for each partner which must be credited with the partner's contributions and share of the partnership profits and charged with distributions to the partner and the partner's share of partnership losses. These rules mandate rudimentary partnership capital accounts as the basis of the partnership's accounting system unless the partners agree otherwise.

Subsection (b) provides that the partnership shall credit each partner's account with an equal share of the partnership profits and shall charge each partner with a share of the partnership losses, whether capital or operating, in proportion to the partner's share of the profits. Thus, under the default rule, partner's share of profits per capita and not in proportion to capital contribution as in the corporate model. If it is agreed to share profits other than equally, losses will be shared similarly to profits, absent agreement to do otherwise. This rule, carried over from the UPA, is predicated on the assumption that partners likely would agree to share losses on the same basis as profits, but may forget to say so. Of course, by agreement they can share losses on a different basis than profits.

These rules differ in statement but not in basic substance from the default rules of UPA Section 18(a) that each partner shall be repaid his contributions while sharing profits equally and losses the same as profits. To illustrate, 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 entitled to just $20 or to recoup part of the $80 loss? If profits are to be split 50/50, must Service pay Property $40? Under the UPA, the answer apparently is yes, and RUPA continues this rule. 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.

Subsection (b) now provides that the partnership shall "charge each partner's account" with a share of the losses, rather than the UPA formulation that each partner shall "contribute" to losses. The change is intended to avoid obligating a partner 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. . . .

On the other hand, as among the partners, a negative capital account does not represent a debt to the partnership if the partners did not intend it to have that effect.

Subsection (c) is drawn from UPA Section 18(b) and provides that the partnership shall indemnify each partner for payments made and liabilities incurred in the partnership business. The right to such indemnification applies in a liquidation context.

Subsections (d) and (e) are derived from UPA Section 18(c). They provide that an advance of funds beyond the amount of a partner's agreed capital contribution shall be treated as a loan to the partnership.

Subsection (f), which provides that each partner has equal rights in the management and conduct of the business, is UPA Section 18(e) with only style modification. This section has been interpreted broadly to mean that, absent contrary agreement, each partner has a continuing right to be informed about the partnership business. See Hillman, Power Shared and Power Denied: A Look At
Because of the coexistence under partnership law of efficiency and dignity considerations, one must distinguish between consultations about specific transactions and the general role of a minority partner in partnership management. Nothing in the U.P.A. gives partners with sufficient power to control a venture a license to ignore consistently the views of minority participants about matters within the ordinary course of business. The principal importance of section 18(e) lies in its recognition and enforcement of dignity interests, and the basis it provides for a participant to resist unwanted exile from partnership affairs.

See also, 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.

Section 403(b) provides that partners have a right of access to partnership books and records.

Subsection (g) is the edited remains of UPA Section 25(2)(a). It now provides simply that partners may use or possess partnership property only for partnership purposes.

Subsection (h) first provides that a partner is not 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."

Noting that an agreement varying 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.

Proposed language was deleted from subsection (h) which would have
permitted a court to award compensation “in other appropriate circumstances.” The
decision was that such a rule would be too much of an invitation to litigation. On
the other hand, the general rule of subsection (h) is subject to the exception that
partners are entitled to reasonable compensation for services rendered in winding
up the partnership business. The deletion of the UPA reference to a "surviving"
partner in this exception means that any partner winding up, and not merely a
partner winding up after the death of another partner, may be entitled to
compensation. The exception is not intended to apply in the mini-winding up that
takes place if there is a buyout under Article 7.

Subsection (i) continues the substance of UPA Section 18(g) that no person
can become a partner without the consent of all the partners.

Subsection (j) continues with one important clarification the rules of UPA
§ 18(h) which allocate management authority among the partners in the absence of
an agreement to the contrary. It first provides that matters arising in the ordinary
course of the business may be decided by a majority of the partners. Amendments
to the partnership agreement and matters outside the ordinary course of the
partnership business require unanimous consent of all of the partners. The text of
the UPA was silent regarding extraordinary matters, although by construction most
courts required the consent of all partners for such matters.

It is not intended that subsection (j) embrace a claim for an objection to a
partnership decision that is not discovered until after the fact. There is no cause of
action based on such “after the fact second guessing.”

The Committee considered and rejected a provision that expressly
authorized different classes of partners.

**SECTION 402. DISTRIBUTIONS IN KIND.** A partner has no right to
receive, and may not be required to accept, a distribution in kind.

**COMMENT**

Section 402 provides that a partner has no right to receive a distribution in
kind and may not be required to take a distribution in kind. It is based on RULPA
Section 605.

This rule is complemented by Section 808(a) which provides that, in
winding up the partnership business on dissolution, any surplus after the payment
of all partnership obligations must be applied to pay in cash the net amount distributable to each partner. This continues the rule in UPA Section 38(1).

SECTION 403. PARTNER'S RIGHT TO INFORMATION.

(a) A partnership shall keep its books and records, if any, at its chief executive office.

(b) A partnership shall provide partners and their agents and attorneys access to its books and records. It shall provide former partners and their agents and attorneys access to books and records pertaining to the period during which they were partners. The right of access provides 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.

(c) Each partner and the partnership, on demand, shall furnish to a partner, and the legal representative of a deceased partner or partner under legal disability, to the extent just and reasonable, complete and accurate information concerning the partnership.

COMMENT

The ABA Report suggested that Section 403 be stated as a "rights" section rather than a duty section, and the new title adopts that suggestion. The Style Committee edited away the text that implemented the suggestion.

Subsection (a) provides that the partnership shall keep its books and records, if any, at its "chief executive office." As recommended in the ABA Report, the treatment of "books" has been expanded to include "records" other than "books." The concept of "chief executive office" comes from UCC Section 9-103(3)(d). See discussion in the Comment to Section 106.

The Committee adopted 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 is different because it does not come into existence unless a certificate has been filed, whereas RUPA deals with inadvertent and informal partnerships.

In general, 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 partnership should also maintain any books and records required by state or federal taxing or other governmental authorities. The Committee rejected the ABA Report suggestion that the books and records must be kept "in perpetuity."

Crane & Bromberg at 383 n.13 point out that UPA Section 19 is "oblique" in its statement of the rule that requires any partnership books be kept, "since the statement is primarily where they shall be kept, and only secondarily that they shall be kept." Subsection (a) reflects a rejection of a requirement that partnership books be kept. An earlier draft had stated that partnerships have a duty to keep books and records. Crane & Bromberg at 384-85 state, "If a partner undertakes to keep books, it is his duty to do so accurately and adequately, according to his ability," and "If there is a managing partner, the duty to keep books falls on him." The Committee did not want to create a new liability to third parties by imposing a duty to keep partnership books.

Subsection (b) states that the partnership shall provide partners and their agents and attorneys access to the books and records. The first substantive change from UPA Section 19 is that subsection (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. Subsection (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 period during which they were partners."

Subsection (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 RMBCA, 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 subsection (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."

The rule in subsection (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."
Section 103(b)(2) provides that the partnership agreement may not "unreasonably restrict a partner's access to books and records under Section 403(b)."

Subsection (c) provides that partners must be furnished, on demand, complete and accurate information concerning the partnership to the extent just and reasonable. This requirement, which is based on UPA Section 20, should be read in light of Section 401(f) which provides that all partners have equal rights in the management and conduct of partnership business. The effect of this provision "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).

Under subsection (c), as under UPA Section 20, the information right is arises only on "demand;" such information need not be volunteered. The ABA Report at 150 recommended that the "demand" requirement for information be eliminated and replaced with a "just and reasonable" limit, like that recently established in Georgia. The Drafting Committee initially eliminated the "on demand" requirement and then reinstated it to avoid overburdening partners with affirmative disclosure obligations. Under some circumstances, however, a disclosure duty may arise under Section 404.

The subsection (c) disclosure duty is also limited by the phrase "to the extent just and reasonable" which is intended to give partners and judges a basis for refusing burdensome and unreasonable demands for information.

SECTION 404. GENERAL STANDARDS OF PARTNER'S CONDUCT.

(a) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in this section. The duties set forth in this [Act] comprise all of the duties, fiduciary or otherwise, appropriate to the partnership relationship.

(b) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(1) to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner, without the consent of the other partners,
In the conduct and winding up of the partnership business or from a use by the
partner of partnership property;

   (2) to refrain from dealing with the partnership on behalf of a party
having an interest adverse to the partnership without the consent of the other
partners; and

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

   (c) A partner's duty of care to the partnership and the other partners in the
conduct and winding up of the partnership business is limited to acting in a manner
that does not constitute gross negligence or willful misconduct.

   (d) A partner shall discharge the duties to the partnership and the other
partners under this [Act] or under the partnership agreement, and exercise any
rights, in good faith. The obligation of good faith may not be eliminated by
agreement, but the partners may by agreement determine the standards by which
the performance of the obligation is to be measured, if the standards are not
manifestly unreasonable.

   (e) A partner does not violate a duty or obligation under this [Act] or under
the partnership agreement merely because the partner's conduct furthers the
partner's own interest. A partner may loan money to and transact other business
with the partnership. The rights and obligations of a partner who lends money to
or transacts business with the partnership are the same as those of a person who
is not a partner, subject to other applicable law.
(f) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.

**COMMENT**

Section 404 is now entitled "General Standards of Partner's Conduct" instead of "Limited Fiduciary Duties of Partner." The change was suggested by the ABA Ad Hoc Committee and is based on the title of the RMBCA's counterpart section (§ 8.30).

Subsection (a) begins as follows: "The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in this section." These duties may be waived or modified in the partnership agreement, since they are not excepted by Section 103(b).

Section 404 continues the term "fiduciary." There are those who believe that the term "fiduciary" is inappropriate when used to describe the duties of a partner. They reason that a partner is someone who by definition is in pursuit of self-interest rather than a detached and disinterested trustee. On the other hand, partners and other co-owners have long been held to be fiduciaries. See, e.g., Melnhard v. Salmon, 249 N.Y. 458, 463, 164 N.E. 545, 546 (1928) (Cardozo, J.). Indeed, the law of partnership reflects the broader law of principal and agent, which states that every agent is a fiduciary, even if the agent receives performance based compensation.

The Committee was aware of the desire to confine broad statements of strict fiduciary standards. Consider, for example, 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." 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, Professor Hillman makes no specific suggestions for statutory reform. Section 404(e) is a partial response to his criticism insofar as it recognizes that not all pursuit of self interest is impermissible.

Duty of Loyalty.

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.

The lead-in to Section 404(b) reads, "A partner’s duty of loyalty to the partnership and the other partners is limited to the following . . . ." The function of this phrase is make the following three rules exclusive with respect to the scope of the duty of loyalty.

Subsection (b)(1) is based on UPA Section 21(1) and continues the rule that a partnership asset usurped by a partner is held in trust for the partnership. As a result, the partnership's claim is greater than that of an ordinary creditor. See the Official Comment to UPA Section 21:

At present [under the common law] 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 [of UPA § 21(1)] "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.

Subsection (b)(2) provides that a partner must refrain from dealing with the partnership on behalf of a party having an adverse interest without the consent of the other partners. 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 Section 389 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, property buy the goods on his own account, even though he pays a higher price for them than the principal could obtain elsewhere.

There are two changes from the previous draft. First, the prior draft required the other partners' consent to be "informed." The word "informed" was deleted at the request of the ABA Ad Hoc Committee because of the excessive gloss accorded the word by some courts. The Committee felt that the "good faith"
requirement in subsection (d) is adequate to ensure full disclosure in connection with the other partners’ consent.

The other change concerns the scope of the duty to account for profits and benefits. The previous draft imposed this duty on partners in all transactions connected with the “formation, conduct, or liquidation” of the partnership. Its application to the “formation” of the partnership has been eliminated, again at the urging of the Ad Hoc Committee. The ABA’s concern is that the duty will be extended to the pre-formation period when the parties are really negotiating at arm’s-length. Once a partnership is agreed to, each partner becomes a fiduciary in the “conduct” of the business. Pre-formation negotiations are, of course, subject to the general contract duty to deal honestly and without fraud.

Subsection (b)(3) provides that a partner must refrain from competing with the partnership without the consent of the other partners. 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.

As in subsection (b)(2), the partners’ consent no longer need be "informed."

Duty of Care.

Subsection (c) provides that the duty of care is limited to acting in a manner that does not constitute gross negligence or willful misconduct. The second sentence of the previous draft has been deleted. It read: “An error in judgment or a failure to use ordinary skill and care does not constitute gross negligence.”

Some courts have held that partners owe one another a duty of care. See, for example, Rosenthal v. Rosenthal, 543 A.2d 348, 352 (Me. 1988), stating that the duty of care is among the fiduciary duties partners owe to one another and to the partnership. The Maine Supreme Court articulated the duty of care as follows:

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

The court went on to say that the duty of care is qualified by the business judgment rule.
The Drafting Committee debated the appropriate standard of care for partners. It rejected both a "prudent person" and a "reasonable care" standard. The "gross negligence" standard was finally adopted, although the Committee was reluctant to put the term in the statute. See generally Note, Fiduciary Duties of Partners, 48 Iowa L. Rev. 902, 904-05 (1963).

There is no clear right result as to the appropriate standard of care, if any. It should be emphasized that the duty of care concerns the rights of partners among themselves. The question is whether a partner should bear all the losses caused by her own negligence or whether a loss caused by a partner's negligence should be allocated among all the partners according to the same rules that allocate losses caused by the negligence of a nonpartner. See Weidner, Three Policy Decisions Animate Revision of Uniform Partnership Act, 46 Bus.Law. 427, 467-68 (1991):

The issue, therefore, is whether there should be a separate default rule for losses caused by the negligence of a partner. . . .

... The exposure of partners to unlimited personal liability to all contract and tort creditors provides a powerful incentive to exercise due care. It also provides incentive to monitor the behavior of other partners. It therefore does not appear necessary to allocate the risk of loss inside the partnership in order to encourage either good performance or good monitoring. . . .

It is not clear what duty of care rule would be included in most partnership agreements if the matter were addressed. To the extent partners know that they vary in ability or attitude toward care, they are likely to contract. Their contracting may take the form of an altered loss-sharing ratio. Rather, their contracting may take the form of assigning low-risk functions to high-risk partners. On the other hand, contracting for care may be far less likely when partners either know little about each other or assume they are equally skillful and careful. If they believe that negligent injuries are an inevitable series of costs that over time will be imposed randomly and equally by all partners, a contract to share losses seems a likely outcome. In such a situation, an agreement to share losses primarily affects the timing of a partner's loss, not the amount of her loss. The agreement to share losses in effect allows each partner to amortize the losses she incurs. To borrow from the argot of the tax person, the loss-sharing agreement avoids a material distortion of income at the level of the individual partner. An assumption of equality, therefore, may explain the opinion of those who believe that partners tacitly agree to share the losses caused by each other's ordinary negligence. If one assumes equality, it seems likely that the partners as a group would agree either to self insure or to purchase third party insurance. This suggests that there should not be a special default rule for the losses caused by the negligence of a partner. Stated differently, as among the partners, there should be no duty of care rule to specially allocate losses to the partners who negligently cause them.

The previous draft of the subsection (c) also codified the business judgment rule. The courts have long recognized the business judgment rule as a defense to
mere errors of judgment resulting in loss to the partnership. As stated by the court in *Rosenthal, supra*, at 353:

> [T]he business judgment rule will insulate from a finding of liability the informed business decisions made by [the partners] unless . . . their allegedly harmful conduct was motivated by fraud or bad faith.

The Committee decided to eliminate the business judgment rule from the text of the Act and leave the further development of the rule to the courts. The RMBCA and most corporate statutes are silent regarding the business judgment rule, thus reflecting a similar policy choice. See also O'Neal & Thompson, 2 *Oppression of Minority Shareholders* § 10.04 (2d ed. 1986), which states that the business judgment rule is less appropriate in the context of the close corporation than in the context of the publicly traded corporation:

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 considered and initially adopted a general standard of conduct based on RMBCA Section 8.30(a):

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.

This standard was subsequently rejected.

Obligation of Good Faith.

Subsection (d) provides that partners must discharge their duties under the Act, including the fiduciary duties of care and loyalty, and any duties arising under the partnership agreement, and exercise any rights, in good faith. Subsection (d) expressly provides that the obligation of good faith may not be eliminated by agreement, but the partners may by agreement determine the standards by which...
the performance of the obligation is to be measured, if the standards are not manifestly unreasonable. This language is based on UCC Section 1-102(3). See also RUPA Section 103(b)(3). The obligation of good faith runs to the partnership and to the other partners in all matters related to the conduct and winding up of the partnership business.

The previous draft [Section 404(a)] contained a separate and independent "duty of good faith and fair dealing." This was deleted at the insistence of the ABA Ad Hoc Committee. The ABA's objection was that the duty of good faith is neither a fiduciary duty nor a separate and independent obligation. Good faith is, the ABA explains, a concept of general contract law which partners owe each other by virtue of the partnership agreement, not by virtue of the special relationship of partners. The characterization of the duty of good faith and fair dealing as a separate and independent fiduciary duty was confusing and would have generated considerable mischief, according to the Ad Hoc Committee.

The meaning of "good faith" is not defined nor is it firmly fixed under present law. The Ad Hoc Committee suggested that RUPA expressly incorporate the UCC meaning of "honesty in fact." See UCC Section 1-201(19). The Drafting Committee rejected this meaning as too narrow and concluded that it would be preferable to leave the term undefined and allow the courts to develop its meaning based on the experience of real cases. Some commentators believe that good faith is more properly defined by what it excludes than by what it includes. See Summers, "Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195, 262 (1968):

Good faith, as judges generally use the term in matters contractual, is best understood as an "excluder" -- a phrase with no general meaning or meanings of its own. Instead, it functions to rule out many different forms of bad faith. It is hard to get this point across to persons used thinking that every word must have one or more general meanings of its own -- must be either univocal or ambiguous.

In some situations the obligation of good faith includes a disclosure component. Depending on the circumstances, a partner may have an affirmative duty to disclose that supplements the Section 403 duty to give information "on demand." The disclosure duty continues, for example, even after consent is given to a transaction that involves a conflict of interest. The obligation of good faith has both an objective and subjective component.

Subsection (e) provides expressly that the obligation of good faith is not violated simply because a partner has served the partner's own interest.

Legitimate Pursuit of Self-Interest.

Subsection (e) first provides that a partner does not violate a duty or obligation under the Act or under the partnership agreement merely because the
partner's conduct furthers the partner's individual interest. This provision has
particular application to the duty of loyalty and the obligation of good faith.

Subsection (e) continues by providing broadly that a partner may loan
money to and transact other business with the partnership and, in so doing, has the
same rights and obligations as a nonpartner. This language is drawn from RULPA
Section 107. The rights and obligations of a partner who loans money to or
transacts business with the partnership are expressly subject to other applicable
law, however. Such law would include laws generally limiting or qualifying the rights
and remedies of inside creditors, such as fraudulent transfer law, equitable
subordination, and the law of avoidable preferences. Although Section 104
preserves the principles of law and equity, to the extent not displaced by the
provisions of RUPA, the Committee wanted to make it clear that subsection (e) was
not intended to displace such laws.

The previous draft expressly authorized the purchase, for the partner's own
account or otherwise, of the assets of the partnership in a foreclosure sale or upon
liquidation of the partnership. This language was deleted as unnecessary in light
of subsection (e)'s broad approval of partners transacting business with the
partnership. It is intended that a partner may purchase partnership assets both
when the partner is the mortgagee and when the mortgagee is an unrelated third
party. Purchases at tax sales are also covered. The purchase must, however,
satisfy the good faith requirement of subsection (d), which presumably requires
disclosure to the other partners.

An earlier draft contained the following general principle: "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." It was rejected as unnecessarily restrictive for
partnership purposes.

Subsection (f) provides that the standards of conduct prescribed by the
section apply equally to a person engaged in winding up the partnership business
as the personal or legal representative of the last surviving partner as if the person
were a partner. This is derived from UPA Section 21(2) but now embraces also the
care standard. The personal or legal representative of the last surviving partner
stands in the shoes of the partner and is, among other things, subject to the same
care standard.

SECTION 405. PARTNER'S LIABILITY TO PARTNERSHIP. A partner
is liable to the partnership for a breach of the partnership agreement or other
wrongful conduct harming the partnership.
COMMENT

Section 405 provides that partners are liable to the partnership for any breach of the partnership agreement or other wrongful conduct. This would include any breach of a partner’s fiduciary or other statutory duties to the partnership. A related change is the addition of Section 406(a).

SECTION 406. REMEDIES OF PARTNERSHIP AND PARTNERS.

(a) A partnership may maintain an action against a partner for a breach of the partnership agreement or other wrongful conduct harming the partnership.

(b) A partner may maintain an action against the partnership or another partner for legal or equitable relief, including an accounting as to partnership business, to:

(1) enforce a right under the partnership agreement;

(2) enforce a right under this [Act], including:

   (i) the partner’s rights under Sections 401, 403, and 404;

   (ii) the partner’s right on dissociation to have the partner’s interest in the partnership purchased pursuant to Section 701 or enforce any other right under Article 6 or 7; or

   (iii) the partner’s right to compel a dissolution and winding up of the partnership business under Section 801 or enforce any other right under Article 8; or

(3) enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.

(c) The accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law.
Section 406(a) provides that the partnership may maintain an action against a partner for any breach of the partnership agreement or other wrongful conduct, such as a breach of fiduciary duty. Section 405, which operates in conjunction with Section 406(a), provides that partners are liable to the partnership for any breach of the partnership agreement or other wrongful conduct.

Section 406(b) is a new and broad remedies provision. It reflects the policy that RUPA should provide ready access to the courts and leave great discretion in the courts to fashion remedies. In this respect, subsection (b) implements the recommendation of the ABA Report at 152:

This section [UPA § 22] 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.

No derivative suit or class action is recommended. The Drafting Committee agreed with the ABA Report "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.

Subsection (b) is a significant change in the law that reflects the increased willingness courts have shown over the past 75 years 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.

Partners may not contract away their Section 406 remedies for breach of the mandatory duties in Section 103.

Section 406(c) replaces former Section 808 and provides that other (i.e., non-partnership) law governs the accrual of a cause of action for which subsection (b) provides a remedy. Subsection (c) further provides that the statute of limitations on such claims is also governed by other law and that claims barred by a statute of limitations are not revived by reason of the partner's right to an accounting upon dissolution.

Section 808 replaces 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.

The new second sentence in subsection (c) rejects the recommendation in the ABA Report at 182 that the statute of limitations not begin to run until dissolution:

(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.

Section 406 is expanded far beyond UPA Section 22. It provides that partners may maintain a variety of actions, including an action for an accounting, during the term of the partnership, as well as a final action for an accounting upon dissolution and winding up. However, such causes of action accrue, and are subject to time limitations, as provided by general law. If not timely pursued, such actions become time barred and are not revived by the right to a final accounting, as they were under the UPA. The effect of these rules is to compel partners to litigate their claims during the life of the partnership or lose them, rather than waiting until dissolution to raise otherwise stale claims.

SECTION 407. CONTINUATION OF PARTNERSHIP BEYOND DEFINITE TERM OR PARTICULAR UNDERTAKING.

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

(b) A continuation of the business by the partners or those of them who habitually acted in the business during the term or undertaking, without any settlement or liquidation of the partnership business, is prima facie evidence of an agreement that the business will not be wound up.

COMMENT

Section 407 is UPA Section 23, with minor substantive changes. Subsection (a) provides that, if a term partnership (i.e., a partnership other than a partnership at will) is continued without an express agreement beyond the expiration of its term or the completion of the undertaking, the rights and duties of the partners remain the same as they were, so far as is consistent with a partnership at will.
Subsection (b) provides that a continuation of the business, without any settlement or liquidation of the business, is prima facie evidence of an agreement that the business will not be wound up. As a partnership at will, it may be dissolved at any time thereafter under Section 801.
ARTICLE 5

TRANSFERREES AND CREDITORS OF PARTNER

Section 501. Partner's Interest in Partnership Property Not Transferable.
Section 502. Partner's Transferable Interest in Partnership.
Section 503. Transfer of Partner's Transferable Interest.
Section 504. Partner's Transferable Interest Subject to Charging Order.

SECTION 501. PARTNER'S INTEREST IN PARTNERSHIP PROPERTY

NOT TRANSFERABLE. A partner is not a co-owner of partnership property and has no interest that can be transferred, either voluntarily or involuntarily, in partnership property.

COMMENT

Section 501 provides that a partner is not a co-owner of partnership property and has no interest in partnership property that can be transferred, either voluntarily or involuntarily. UPA Section 25(1) is overruled, and the concept of "tenants in partnership" is abolished. Section 501 is intended to state more directly the substance of intended rule: it is the entity that owns the asset and not the individual partners pro rata. This result is consistent with the ABA Report.

Section 501 replaces UPA Sections 24 and 25 which both refer to a partner's "right in specific partnership property," although the detailed rules of UPA Section 25 define away such a right. Sections 203 and 501 more directly state the entity result embodied in RUPA. Section 203 provides that property transferred to or otherwise acquired by the partnership is property of the partnership and not of the partners individually.

The Committee carved up what was UPA Section 25 and relocated some of the pieces. UPA Section 25(2)(a) became Section 401(g). UPA Section 25(2)(d) is partly embodied in Section 302(c). There is no ineluctable logic behind these changes; RUPA might have been organized differently.

More direct statement of the entity theory addresses an additional matter raised by the ABA Report. The 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.

RUPA's explicit 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 501 continues part of UPA § 25(2)(c), which is broadly construed
to protect partnership property from "attachment or execution" by the partners' personal creditors. See generally Bromberg & Ribstein at 3:78:

Under U.P.A. § 25(2)(c), there is no right in partners to exemption or
homestead in specific partnership property. Although the act, literally read, bars
exemption only when partnership property is "attached" for a partnership debt, it should have the same effect irrespective of the process used by the creditor. The U.P.A. does not interfere with an exemption claim in nonpartnership property and thus tends to intensify disputes over whether property belongs to the firm or to some or all of the partners.

One effect of Sections 203 and 501 is that partnership property is not subject to exemptions, allowances, or rights of a partner's spouse, heirs, or next of kin. This reflects the present law described in Bromberg & Ribstein at 3:81-82:

Pursuant to U.P.A. §25(2)(d), any ownership rights of the partner are molded to the partnership purposes and pass to the surviving partners after a partner's death. Pursuant to U.P.A. § 25(2)(e), these rights, and the underlying property itself, are exempt from dower and related marital claims. The logic for this is as compelling as for saying a spouse has no marital rights in property owned by a corporation in which the other spouse holds stock. The surviving partners may dispose of the partnership property, including realty, without joinder by heirs, devisees, or spouse of the deceased partner. They need no aid from the court in liquidating realty of the firm.


A partner's separate creditors may pursue the charging order remedy under
Section 504.
SECTION 502. PARTNER'S TRANSFERABLE INTEREST IN PARTNERSHIP.

(a) The only transferable interest of a partner in the partnership is the partner's interest in distributions. The interest is personal property.

(b) A transferee of a partner's transferable interest in the partnership has the right to cause a winding up of the partnership business as provided in Section 801(6).

COMMENT

Section 502(a) introduces the concept of a partner's transferable interest in the partnership; the only transferable interest of a partner in the partnership is the partner's interest in "distributions." See Section 101(3). The interest is personal property.

The ABA Report recommended that UPA Section 26, the predecessor of Section 502, 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 in the conjunctive because profits and losses must be netted to determine the distributions to which a partner is entitled. Related changes were made to Section 401.

Section 502(b) provides that a transferee of a partner's transferable interest in the partnership has the right to cause a winding up of the partnership business as provided in Section 801(6). Section 802(6) is a continuation of UPA Section 32(2). The term "transferee" is used throughout RUPA in lieu of "assignee."

SECTION 503. TRANSFER OF PARTNER'S TRANSFERABLE INTEREST.

(a) A transfer of a partner's transferable interest in the partnership:

(1) is permissible, in whole or in part;
(2) does not by itself cause a winding up of the partnership business;

and

(3) does not, as against the other partners or the partnership, entitle the transferee, during the continuance of the partnership, to participate in the management or conduct of the partnership business, to require access to information concerning or an account of partnership transactions, or to inspect or copy the partnership books or records.

(b) A transferee of a partner's transferable interest in the partnership is entitled to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled. Upon transfer, the transferor has the rights and duties of a partner other than the interest in distributions transferred.

(c) If an event causes a dissolution and winding up of the partnership business under Section 801, a transferee is entitled to receive, in accordance with the transfer, the net amount otherwise distributable to the transferor. In a dissolution and winding up, a transferee may require an accounting only from the date of the last account agreed to by all of the partners.

(d) Until receipt of notice of a transfer, a partnership has no duty to give effect to the transferee's rights under this section.

**COMMENT**

Section 503(a)(1) provides that the transfer of a partner's transferable interest in the partnership is permissible, in whole or in part. Pursuant to Section 103, transfer restrictions in the partnership agreement are generally permissible, however. 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.
A transfer in violation of the agreement is a breach of the agreement as among the partners but is an effective transfer as to third parties without notice of the restriction.

Section 503(a)(2) provides that the transfer of a partner’s interest in the partnership does not by itself cause a winding up of the partnership business. This is derived from the UPA Section 27(1) rule that an assignment does not of itself dissolve the partnership. Section 601(4)(ii) makes a related change. It provides that a partner may be expelled, and thus dissociated, by the unanimous vote of the other partners if there has been a transfer of all or substantially all of the partner’s transferable interest in the partnership, other than a transfer for security purposes or an unforeclosed court order charging the partner’s interest.

Section 503(a)(3) is also derived from UPA Section 27(1) and provides that an transfer does not, as against the other partners, entitle the transferee, during the continuance of the partnership, to participate in the management or conduct of the partnership business, to require access to information concerning or an account of partnership transactions, or to inspect the partnership books or records. Thus, transferees do not have a right to participate in the management of the partnership.

The Committee rejected a suggestion to give transferees greater access to information. In contrast, 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 Section 403(c) provides that the legal representative of a deceased partner or partner under legal disability shall have the right, to the extent just and reasonable, to complete and accurate information concerning the partnership. Section 406(b) is couched in terms of remedies of partners, thus excluding transferees.

Section 503(b) provides that a transferee of a partner’s transferable interest in the partnership is entitled to receive, in accordance with the transfer, the distributions to which the transferor would otherwise be entitled. This rule 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.” The partner whose interest is transferred retains all of the rights and duties of a partner, including personal liability, other than the right to receive distributions, unless and until expelled as provided in Section 601(4)(ii), discussed above.

Section 503(c) provides that upon the dissolution and winding up of the partnership business, the transferee is entitled to receive, in accordance with the terms of the transfer, all or part of the net amount that would otherwise have been distributed to the partner whose interest was transferred. The transferee may require an accounting 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 transfer” were added to avoid giving a partial transferee the entire amount.
According transferees the right to an accounting 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.

Section 503(d) provides that the partnership has no duty to give effect to the transferee’s rights under this section until the partnership receives notice of the transfer.

This rule is consistent with UCC Section 9-318(3) which provides that an "account debtor" is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. It further provides that the assignee, on request, must furnish reasonable proof of the assignment. The UCC governs any transaction (regardless of its form) which is intended to create a security interest in personal property, including "general intangibles." UCC § 9-102(1)(a). A partner's transferable interest in the partnership is a "general intangible" (not an "account"). UCC § 9-106. The person obligated on a general intangible is an "account debtor." UCC § 9-105(1)(a). Thus, the partnership becomes an "account debtor" if a partner grants a security interest in her partnership interest. The partnership agreement may not prohibit the creation of a security interest in a partner's partnership interest nor require the partnership's consent to such security interest. UCC § 9-318(4). The rights of an assignee of a partnership interest are, however, subject to all of the other terms of the partnership agreement and any defense or claim arising therefrom. UCC § 9-318(1)(a).

RUPA's provisions on transfer are 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.

Section 504(b) provides that the purchaser at a foreclosure sale has the rights of a transferee. The same rule should apply to creditors (or other purchasers) who acquire partnership interests by pursuing U.C.C. remedies or statutory liens under federal or state law.
The Committee has not recommended a provision that deems estates and divorced spouses assignees and purchasers. Texas Art. 6132b, § 28-B is such a provision:

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 503 governs generally the status of transferees. Other rules that apply in the case of transfers include: Section 601(4)(ii) provides for the expulsion of a partner who has transferred substantially all of her partnership interest; Section 801(2)(ii) provides that the other partners may unanimously agree to a winding up; and Section 80(6) gives transferees standing to request a court ordered winding up in certain cases, especially in the case of at-will partnerships.

**SECTION 504. PARTNER'S TRANSFERABLE INTEREST SUBJECT TO CHARGING ORDER.**

(a) On application by a judgment creditor of a partner or partner's transferee, a court having jurisdiction may charge the transferable interest of the debtor partner or transferee to satisfy the judgment. The court may appoint a receiver of the debtor's share of the distributions due or to become 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
can require.

(b) A charging order constitutes a lien on the judgment debtor's
transferable interest in the partnership. The court may order a foreclosure of the
interest subject to the charging order at any time and upon conditions it considers
appropriate. The purchaser at the foreclosure sale has the rights of a transferee.

(c) At any time before foreclosure, an interest charged may be redeemed:

(1) by the judgment debtor;

(2) with property other than partnership property, by one or more of the
other partners; or

(3) with partnership property, by one or more of the other partners with
the consent of all of the partners whose interests are not so charged.

(d) This [Act] does not deprive a partner of a right under exemption laws
with respect to the partner's interest in the partnership.

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

COMMENT

Section 504(a) provides that, on application by a judgment creditor, a court
may charge the transferable interest of a debtor partner or transferee to satisfy the
judgment. Subsection (a) makes clear that a charging order is available to the
judgment creditor of an transferee of a partnership interest. This change
implies the suggestion in the ABA Report at 157. The transferable interest of
a partner or transferee is limited to the partner's interest in and right to receive
"distributions" made by the partnership. Section 502(a).

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) . . . .

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.

Subsection (b) is intended to clarify the charging order remedy. It provides that the charging order constitutes a lien on the debtor's transferable interest, which may be foreclosed at any time. The purchaser at the foreclosure sale has the rights of a transferee.

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 was made in Georgia, as 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."

Subsection (c) continues to give the debtor or other partners a right to redeem the partnership interest before sale. Redemption by the partnership (i.e., with partnership property) requires the consent of all the remaining partners. Neither the UPA nor RUPA provide a statutory procedural framework for the redemption. See Bromberg & Ribstein at § 3.05(d)(3):

The court probably has general authority under the last clause of U.P.A. § 28(1) to value the interest and permit redemption at the value. If the partners redeem the interest for the amount of the debt, and this is less than the value fixed by the court, the court may treat this as a loan to the debtor partner or order that the redeeming partners hold the interest in trust for the debtor partner. . . . The nondebtor partners (either before or after foreclosure) can remove the uncertainty created by the creditor's presence by dissolving the firm . . . and buying the assets on liquidation.
Subsection (d) provides that nothing in RUPA deprives a partner of her rights under the state's exemption laws. This is essentially the same as UPA Section 28(3).

Subsection (e) provides that the charging order is the exclusive remedy by which a judgment creditor of a partner or a partner's transferee may satisfy a judgment out of the judgment debtor's transferable 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.

Some states already have specific procedures for the enforcement of support orders, including the recovery of arrearages, out of the obligor's income. In Florida, for example, a court may issue an "income deduction order" requiring any person or entity providing "income" to the obligor of a support order to remit to the obligee or a depository, as directed by the court, a specified portion of the income. Fla. Stat. § 61.1301 (1991). "Income" is broadly defined to include any form of payment, including wages, salary, compensation as an independent contractor, dividends, interest, or other payment, regardless of source, made to the obligor. Fla. Stat. § 61.046(4)(1991). This definition would include distributions payable to an obligor partner. A charging order under RUPA would still be necessary to reach the obligor's entire partnership interest, however.
ARTICLE 6
PARTNER'S DISSOCIATION

SECTION 601. EVENTS CAUSING PARTNER'S DISSOCIATION.

A partner is dissociated from a partnership upon:

(1) receipt by the partnership of notice of the partner's express will to withdraw as a partner or upon any later date specified in the notice;

(2) an event agreed to in the partnership agreement as causing the partner's dissociation;

(3) the partner's expulsion pursuant to the partnership agreement;

(4) the partner's expulsion by the unanimous vote of the other partners if:

(i) it is unlawful to carry on the partnership business with that partner;

(ii) there has been a transfer of all or substantially all of that partner's transferable interest in the partnership, other than a transfer for security purposes or a court order charging the partner's interest which has not been foreclosed;

(iii) within 90 days after the partnership notifies a corporate partner that it will be expelled because it has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business has been suspended by the jurisdiction of its incorporation, there is no revocation of the certificate of dissolution or no reinstatement of its charter or its right to conduct business; or
(iv) a partnership that is a partner has been dissolved and its business is being wound up;

(5) on application by the partnership or another partner, the partner's expulsion by judicial decree because:

(i) the partner engaged in wrongful conduct that adversely and materially affected the partnership business;

(ii) the partner willfully or persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners under Section 404; or

(iii) the partner engaged in conduct relating to the partnership business which made it not reasonably practicable to carry on the business in partnership with that partner;

(6) the partner's:

(i) becoming a debtor in bankruptcy;

(ii) executing an assignment for the benefit of creditors;

(iii) seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of that partner or of all or substantially all of that partner's property; or

(iv) failing, within 90 days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the partner or of all or substantially all of the partner's property obtained without the partner's consent or acquiescence, or failing within 90 days after the expiration of a stay to have the appointment vacated;

(7) in the case of a partner who is an individual:
(i) the partner's death;

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

(iii) a judicial determination that the partner has otherwise become incapable of performing the partner's duties under the partnership agreement;

(8) 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, distribution of the trust's entire transferable interest in the partnership, but not merely the substitution of a successor trustee;

(9) 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, distribution of the estate's entire transferable interest in the partnership, but not merely the substitution of a successor personal representative; or

(10) termination of a partner who is not an individual, partnership, corporation, trust, or estate.

COMMENT

Section 601 attempts to list all the events that cause dissociation. Section 601 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. RUPA does not, however, 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 dissociation of a partner does not necessarily cause a dissolution and winding up of the business of the partnership. Section 801 identifies the situations in which the dissociation of a partner causes a winding up of the business. Section 701 provides that in all other situations there is a buyout of a partner rather than a windup of the partnership business.

A dissociated partner remains a partner for some purposes and still has some residual rights, duties, powers, and liabilities. These depend on whether or
not the partnership continues or is wound up and are spelled out in Articles 7 and 8.

Section 601(1) provides that a partner dissociates from a partnership upon the receipt by the partnership of notice of the partner's express will to withdraw as a partner or upon the later date specified in the notice. This provision continues the rule of present law that a partner has the power, even if not the right, to withdraw at will. See UPA Section 31(2). Section 103(b)(4) provides that the partnership agreement may not vary the power to withdraw as a partner under Section 601(1) except to require the notice to be in writing. If a future date is specified in the notice, other partners may dissociate before that date — the receipt of notice of a future date does not bind the others to remain partners until that date. See also Section 801(2)(i).

Section 601(1) continues the UPA "express will" concept, around which a considerable body of case law has developed. Section 601(1) clarifies existing law by providing that an expression of will to dissociate must be received by the partnership to be effective. Section 102(d) specifies when notice is "received." Written notice is not required. The Committee consensus was that if there is no requirement of a writing to create partner status, there should be none to end it. Although the rest of Section 601 is not couched in terms of events of withdrawal, the term "withdrawal" is the appropriate term for Section 601(1) situations.

The Committee was aware of criticism of the basic rule that a partner has the power to be bought out at any time. 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.

Professor Hillman argues that the present rule is too harsh on the other partners when one partner decides to leave prematurely.

Section 601(2) provides that there is a dissociation upon an event agreed to in the partnership agreement as causing the partner's dissociation.

Section 601(3) provides that a partner is dissociated upon her expulsion pursuant to 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 by "the expulsion of any partner from the business bona fide
in accordance with such a power conferred by the agreement between the partners." Discussing UPA 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.

No change in substance is intended by the deletion of the words "bona fide." The mandatory obligation of good faith in Section 404(d) applies to the exercise by the partners of their right under the partnership agreement to expel another partner.

Section 601(4)(i) provides that a partner is dissociated upon her expulsion by the unanimous vote of the other partners if it is unlawful to carry on the business with her. 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 Section 801(4), which provides that the partnership business must be wound up upon an event that makes it unlawful for all or substantially all of the business of the partnership to be continued, subject to a 90-day cure period.

Section 601(4)(ii) provides that a partner is dissociated upon her expulsion by the unanimous vote of the other partners if she has transferred substantially all of her transferable interest in the partnership, other than a security interest or a court order charging her interest (and the charging order has not been foreclosed). This is drawn from UPA Section 31(1)(c), which provides that dissolution is caused, without violating the partnership agreement, 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." It is similar to RULPA Section 702, which provides in part: "Except as provided in the partnership agreement, a partner ceases to be a partner upon assignment of all his [or her] partnership interest." 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. For the rights of a transferee, see Sections 503 and 802(6). The remaining partners may, by unanimous consent, dissolve the partnership (by expelling the transferor partner first, if necessary). See Section 801(2)(ii).

The word "assignee" has been replaced by the word "transferee" to implement the Committee's decision to substitute the term "transferable" interest in the partnership for the term "assignable" interest in the partnership. See Section 502. Section 504(b) provides that the purchaser of a partner's interest on the foreclosure of a charging order has the rights of a transferee.

Section 601(4)(iii) provides for the expulsion of a corporate partner, by unanimous vote of the other partners, if within 90 days after the partnership notifies
the partner that it will be expelled because it has filed a certificate of dissolution, its
charter has been revoked, or its to conduct business has been suspended, there is
no cure. RULPA Section 402(8) provides that "in the case of a general partner that
is a corporation, [there is a dissociation upon] the filing of a certificate of dissolution,
or its equivalent, for the corporation or the revocation of its charter." There is cure
language in Section 601(4)(iii) because charter revocation is very common in some
states and partner status should not end for a technical noncompliance with
corporate law. The Committee also concluded that withdrawal of a voluntarily filed
notice of dissolution constitutes a cure.

Section 601(4)(iv) provides that a partnership that is a partner may be
expelled by the unanimous vote of the other partners if it has been dissolved and
its business is being wound up. A previous draft had provided for the automatic
dissociation of a partnership partner upon its dissolution. As now written, the
commencement of winding up is a cause for expulsion.

Section 601(5) is new insofar as it expressly refers to dissociation by
expulsion pursuant to court order. The causes, however, are based on the UPA.
The application for expulsion may be brought by the partnership or any partner.

Section 601(5)(i) provides for the partner's expulsion if the court finds that
the partner has engaged in wrongful conduct that adversely and materially affected
the partnership business. This language was suggested by the ABA Ad Hoc
Committee and is based on UPA Section 32(1)(c), which provides for dissolution by
judicial decree whenever a partner has been guilty of "such conduct as tends to
affect prejudicially the carrying on of the business."

Section 601(5)(ii) provides for expulsion if the court determines that the
expelled partner wilfully or persistently committed a material breach of the
partnership agreement or of a duty owed to the partnership or to the other partners
under Section 404.

Section 601(5)(iii) provides for judicial expulsion of a partner who engaged
in conduct relating to the partnership business which made it 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 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 which forms the basis for expulsion by judicial
decree under Section 601(5)(iii) makes the partner's dissociation wrongful under
Section 602(a)(ii) and may also support a judicial decree of dissolution under
Section 801(5)(ii).

Section 601(6)(i) provides that a partner is dissociated upon becoming a
debtor in bankruptcy; executing an assignment for the benefit of creditors; seeking,
consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of the partner or the partner's property; or failing within 90 days to have such appointments vacated or stayed. UPA Section 31(5) provides that dissolution is caused by "the bankruptcy of any partner or the partnership." "Debtor in bankruptcy" is defined in Section 101(2) to mean a person who is the subject of an order for relief under the Bankruptcy Code. This includes all persons who file a voluntary petition and those adjudicated insolvent in an involuntary case. The Committee was unsure about the application of Section 541(c)(1)(B) of the Bankruptcy Code if a debtor in bankruptcy is dissociated as a partner by operation of law. The Committee expressed its desire to continue to coordinate with those involved in the bankruptcy laws and decided to recommend here what it thinks is good policy as a matter of partnership law. See Kaster & CymbJer, The Impact of A General Partner's Bankruptcy upon The Remaining Partners, 21 R. Prop., Prob. & Trust J. 539 (1986).

The UPA says nothing about an involuntary petition against a partner or the appointment of a trustee, receiver, or liquidator. See Bromberg & Ribstein at 7:51:

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 Section 101(2) definition of "debtor in bankruptcy" resolves the involuntary petition problem as suggested by Bromberg & Ribstein. Section 601(6)(iii) and (iv) cover the appointment of a trustee, receiver, or liquidator. The latter are based substantially on RULPA Section 402(4) and (5).

Section 601(7)(i) provides that an individual partner is dissociated upon the partner's death. This is based on UPA Section 31(4), which provides that "the death of any partner" causes dissolution.

Section 601(6)(ii) provides that an individual partner is dissociated upon the appointment of a guardian or general conservator for the partner. The Committee decided to make no mention of a durable power of attorney.

Section 601(6)(iii) provides that an individual partner is dissociated upon a judicial determination that the partner has become in any other way incapable of performing the partner's duties under the partnership agreement. This is based on UPA Section 32(1)(b), which provides that, on application by or for a partner, a 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 in RUPA is 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." Note that there is no longer a reference to application by or for a partner.

Section 601(8) provides for the dissociation 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 transferable 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.

Section 601(9) provides for the dissociation of a partner that is an estate, or is acting as a partner by virtue of being a personal representative of an estate, upon the distribution of the estate's entire transferable interest in the partnership, but not merely the substitution of a successor personal representative. This is similar to the rule in RULPA Section 402(10), which provides that, "in the case of an estate, [partner status ends on] the distribution by the fiduciary of the estate's entire interest in the partnership." It was felt that a Section 601(9) occurrence would be a rare event. Under Section 601(7), a partner is dissociated upon her death and her estate becomes a transferee. It is a rare estate that would be admitted to the partnership. There was some opinion that the case is so rare that Section 601(9) should be eliminated, with the further goal to make sure that the distributee is an transferee, not a partner.

Section 601(10) provides that a partner which is not an individual, partnership, corporation, trust, or estate is dissociated upon its termination.

SECTION 602. PARTNER’S WRONGFUL DISSOCIATION.

(a) A partner's dissociation is wrongful only if:

(1) it is in breach of an express provision of the partnership agreement;

or

(2) in the case of a partnership for a definite term or particular undertaking, before the expiration of the term or the completion of the undertaking:

(i) the partner withdraws by express will, unless the withdrawal follows the dissociation of another partner and results in a dissolution of the partnership under Section 801(2)(i);
(ii) the partner is expelled by judicial decree under Section 601(5);

or

(iii) in the case of a partner who is not an individual, trust other

than a business trust, or estate, the partner is expelled or otherwise dissociated

because it willfully dissolved or terminated.

(b) A wrongfully dissociating partner is liable to the partnership and to the

other partners for damages caused by the dissociation. That liability is in addition

to any other liability of the partner to the partnership or to the other partners.

COMMENT

Section 602 provides that a partner's dissociation is wrongful only if it
results from one of the events listed in the subsection (a). The significance of a
wrongful dissociation is that it may give rise to damages under subsection (b) and,
if it results in the dissolution of the partnership, the wrongfully dissociating partner
is not entitled to participate in winding up the business under Section 804.

Under subsection (a), a partner's dissociation is wrongful if: (1) it is in
breach of an express provision of the partnership agreement; or (2) in a term
partnership, before the expiration of the term or the completion of the undertaking:
(i) the partner withdraws by express will, unless the withdrawal follows the wrongful
or other dissociation of another partner and results in a dissolution of the partnership
under Section 801(2)(i); (ii) the partner is expelled for misconduct under Section
601(5); or (iii) a partner that is an entity (other than a trust or estate) is expelled or
otherwise dissociated because it willfully caused its own dissolution or termination.
Section 801(2)(i) allows a partner in a term partnership to withdraw "non-wrongfully"
if another partner, perhaps a key partner, has died, become incapacitated, declared
bankruptcy, or wrongfully withdrawn before the expiration of the term. Since Section
602 is merely a default rule, the partnership agreement can eliminate or expand the
dissociations which are wrongful or modify the effects of wrongful dissociation.

The exception in subsection (a)(2)(i) is intended to protect partners who
withdraw from a term partnership after the premature departure of another partner
under certain circumstances. It is not as broad as prior drafts which allowed a
partner to withdraw for other good reasons, for example, on discovering a co-partner
is diverting firm assets. As now drafted, the other partners could seek to have the
offending partner expelled by a court for misconduct under Section 6015) (a
wrongful dissociation) or they could (unanimously) dissolve the partnership under
Section 801(2)(ii). 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 he suggests 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.

Subsection (b) provides that a wrongfully dissociating partner is liable to the
partnership and to the other partners for any damages caused by the wrongful
nature of the dissociation. Such liability is in addition to any other liability of the
partner to the partnership or to the other partners. For example, the partner would
be liable for any damage caused by her breach of the partnership agreement or
other misconduct. The partnership might also incur substantial expenses resulting
from a partner's premature withdrawal from a term partnership, such as replacing
the partner's expertise of obtaining new financing.

Section 701(c) provides that any damages for wrongful dissociation may
be offset against the amount of the buyout price due to the partner under Section
701(a), and Section 701(h) provides that a partner who wrongfully dissociates before
the expiration of a term partnership is not entitled to payment of the buyout price for
her partnership interest until the term expires.

The Committee asked that a shorter version of Section 602 be
memorialized in Comment:

ALTERNATE SECTION 602. WRONGFUL DISSOCIATION. The
dissociation of a partner does not of itself discharge the liability of a partner for
obligations arising because of events that caused the dissociation or because
of the effect of the dissociation on the partnership.

Some members believed that alternate Section 602 would save unnecessary
verbiage and parallel the approach taken in Section 703.
SECTION 603. EFFECT OF PARTNER'S DISSOCIATION.

(a) A dissociated partner's interest in the partnership must be purchased pursuant to Article 7 unless the partner's dissociation results in a dissolution and winding up of the partnership business under Article 8.

(b) Upon a partner's dissociation, the partner's right to participate in the management and conduct of the partnership business is terminated, except as provided in Article 8.

COMMENT

Section 603(a) is a "switching" provision which provides that the partnership must purchase a dissociated partner's interest in the partnership pursuant to the buyout rules in Article 7 unless there is a dissolution and winding up of the partnership business under Article 8. Thus, a partner's dissociation will always result in either a buyout of the dissociated partner's interest or dissolution and a winding up of the business.

Section 603(b) makes it clear that one of the consequences of a partner's dissociation is the immediate loss of her right to participate in the management of the business, unless it results in a dissolution and winding up of the business. In this case, Section 804(a) provides that all partners who have not wrongfully dissociated may participate in winding up the business. In some cases, it will not be known immediately whether or not the business is to be wound up as a result of the partner's dissociation. In such cases, the dissociating partner's right to participate in management may be suspended temporarily and then restored if winding up ensues.

This will ordinarily be the case upon a partner's dissociation by express will to withdraw from a partnership at will under Section 601(1). Although such withdrawal gives rise to a right to have the business wound up, the dissolution is deferred for 90 days by operation of Section 802(a). However, the partner's dissociation under Section 601 results in the immediate loss of management rights for 90 days or until the earlier decision is made to wind up the business. This result is made explicit in Section 802(c)(1).
ARTICLE 7

PARTNER'S DISSOCIATION WHEN BUSINESS NOT WOUND UP

Section 701. Purchase of Dissociated Partner's Interest.
Section 702. Dissociated Partner's Power to Bind Partnership.
Section 703. Dissociated Partner's Liability to Other Persons.
Section 704. Statement of Dissociation.
Section 705. Continued Use of Partnership Name.

SECTION 701. PURCHASE OF DISSOCIATED PARTNER'S INTEREST.

(a) If a partner is dissociated from a partnership without resulting in a dissolution and winding up of the partnership business under Section 801, the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b).

(b) The buyout price of a dissociated partner's interest is the amount that would have been distributable to the dissociating partner under Section 808(b) if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership were wound up as of that date. In either case, the sale price of the partnership assets must be determined on the basis of the amount that would be paid by a willing buyer to a willing seller, neither being under any compulsion to buy or sell, and with knowledge of all relevant facts. Interest must be paid from the date of dissociation to the date of payment.
(c) Damages for wrongful dissociation under Section 602(b), and all other amounts owing, whether or not presently due, from the dissociated partner to the partnership, must be offset against the buyout price. Interest must be paid from the date the amount owed becomes due to the date of payment.

(d) A partnership shall indemnify a dissociated partner against all partnership liabilities incurred before the dissociation, except liabilities then unknown to the partnership, and against all partnership liabilities incurred after the dissociation, except liabilities incurred by an act of the dissociated partner under Section 702. For purposes of this subsection, a liability not known to a partner other than the dissociated partner is not known to the partnership.

(e) If no agreement for the purchase of a dissociated partner's interest is reached within 120 days after a written demand for payment, the partnership shall pay, or cause to be paid, in cash to the dissociated partner the amount the partnership estimates to be the buyout price and accrued interest, reduced by any offsets and accrued interest under subsection (c).

(f) If a deferred payment is authorized under subsection (h), the partnership may tender a written offer to pay the amount it estimates to be the buyout price and accrued interest, reduced by any offsets under subsection (c), stating the time of payment, the amount and type of security for payment, and the other terms and conditions of the obligation.

(g) The payment or tender required by subsections (e) or (f) must be accompanied by the following:

(1) a statement of partnership assets and liabilities as of the date of dissociation;
(2) the latest available partnership balance sheet and income
statement, if any;

(3) an explanation of how the estimated amount of the payment was
calculated; and

(4) written notice that the payment is in full satisfaction of the obligation
to purchase unless, within 120 days after the written notice, the dissociated partner
commences an action to determine the buyout price, any offsets under subsection
(c), or other terms of the purchase obligation.

(h) A partner who wrongfully dissociates before the expiration of a definite
term or the completion of a particular undertaking is not entitled to payment of any
portion of the buyout price until the expiration of the term or completion of the
undertaking, unless the partner establishes to the satisfaction of the court that
earlier payment will not cause undue hardship to the business of the partnership.
A deferred payment must be adequately secured and bear interest.

(i) A dissociated partner may maintain an action against the partnership,
pursuant to Section 406(b)(2)(ii), to determine the buyout price of that partner's
interest, any offsets under subsection (c), or other terms of the purchase obligation.
The action must be commenced within 120 days after the partnership has tendered
payment or an offer to pay or within one year after written demand for payment if
no payment or offer to pay is tendered. The court shall determine the buyout price
of the dissociated partner's interest, any offset due under subsection (c), and
accrued interest, and enter judgment for any additional payment or refund. If
deferred payment is authorized under subsection (h), the court shall also determine
the security for payment and other terms of the obligation to purchase. The court
may assess reasonable attorney's fees and the fees and expenses of appraisers or
other experts for a party to the action, in amounts the court finds equitable, against
any other party, if the court finds that the other party acted arbitrarily, vexatiously,
or not in good faith, including the partnership's failure to tender payment or an offer
to pay or to comply with the requirements of subsection (g).

**COMMENT**

Section 701 applies whenever a dissociation of a partner does not cause
a winding up of the partnership business. For example, Section 701 applies to the
common situation in which a partner gives notice of an express will to withdraw
before an agreed term has expired. If the departure of a partner does not cause a
dissolution and winding up, the partner who dissociates has a continuing relationship
with the remaining partners and other persons as provided in Sections 603, 702,
and 703.

Subsection (a) provides that if a person dissociates without causing a
business windup, the partnership shall cause the interest of the dissociating partner
to be purchased for a buyout price determined pursuant to subsection (b). Subsection (a) reflects Committee intent to make the buyout mandatory. The "cause to be purchased" language is intended to accommodate both a purchase by
the partnership and a purchase by another partner.

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. Subsection (a) 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.

Subsection (b) reflects an intent to provide guidance on the determination
of the "buyout price." The previous draft used the term "fair market value." The
ABA Ad Hoc Committee and others objected the use of this term since it is often
used as a term of art with a special gloss depending on the context, such as in tax
or corporate law. The Committee wanted a new term which would give courts the
freedom to develop a concept appropriate to the partnership buyout situation, but
at the same time to draw on valuation principles developed elsewhere.

Subsection (b) provides that the buyout price of a dissociated partner's
interest is the amount that would have been distributable to them under Section
808(b) if, on the date of dissociation, the assets of the partnership were sold at a
price equal to the greater of liquidation value or going concern value, without the departing partner. In either case, the hypothetical sale price must be the price which a willing buyer would have paid a willing seller with full knowledge of all relevant facts and neither being under any compulsion to deal. Since the price is based on the value of the business at the time of dissociation, and the partnership has the use of the dissociating partner's interest until payment, the partnership must pay interest on the amount due. Section 104(b) provide that interest shall be at the legal rate unless otherwise provided in the partnership agreement.

The view was expressed that, if value under Section 701 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 result under an Article 7 buyout or an Article 8 liquidation. The departing partner is in the same position either way, 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" as defined in Section 13.01(3) of the RMBCA:

"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 Section 604. The Committee also rejected the Cal. Corp. 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."

Subsection (b) also implicitly 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, 552-55 (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.”

As a final comment to subsection (b), it should again be emphasized that the Section 701 rules are merely default rules. The partners may, in the partnership agreement, fix the method or formula for determining the buyout price and all of the other terms and conditions of the buyout right. Indeed, the very right to a buyout itself may be modified, although a total forfeiture provision would probably not be enforceable.
Subsection (c) provides that the partnership may offset against the buyout price all other amounts owing from the dissociated partner to the partnership, whether or not presently due, including any damages for wrongful dissociation under Section 602(b). This has the effect of accelerating payment of amounts not yet due from the departing partner to the partnership, such as a long-term loan. Note that the converse is not true; amounts owing by the partnership to the dissociating partner are not entitled to offset. So, a departing partner who has made a long-term loan to the partnership must wait for repayment unless the terms of the loan agreement provide for acceleration upon dissociation.

Subsection (d) provides that the partnership must indemnify a dissociated partner against all partnership liabilities incurred before the dissociation, except liabilities then unknown to the partnership, and against all partnership liabilities incurred after the dissociation, except those incurred under Section 702 by the partner herself.

This is a change from the UPA rule in Section 38, which provided that a departing partner was to be indemnified "against all present or future partnership liabilities." The rule adopted by the Committee is based on the suggestion of a study group of the Partnership Committee of the ABA Section of Business Law:

A dissociating partner whose interest is purchased shall [must] be indemnified by the partnership against all partnership liabilities known to the remaining partners . . . .

The Naples draft crafted a slightly different rule. It provided that the "liabilities" subject to indemnification were those "taken into account to determine the amount paid for the partnership interest." The need for clarification of the UPA indemnification provisions is discussed 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.

As indicated above, the ABA study group specified the liabilities "known to the remaining partners at the time" of the buyout. This was modified slightly to read all liabilities incurred before the dissolution, "except liabilities then unknown to the partnership." Subsection (d) further provides that a liability not known to a partner other than the dissociated partner is not known to the partnership.

The effect of the "known" liabilities rule is similar to the "liabilities taken into account in the price" rule. The former rule was adopted by the Committee because it will often be difficult to determine which liabilities were "taken into account" by discounting them 100%, that is, ignored in the actual computation of the price. The partnership has every incentive to insist that all known liabilities be taken account in determining the buyout price. The dissociating partner might prefer to ignore contingent liabilities in favor of a higher buyout price and take her chances on them materializing. Thus, requiring indemnification of all known liabilities merely presumes that the partnership did, as it had every incentive to do, take all such liabilities into account in determining the buyout price. Use of the negative, "except liabilities then unknown to the partnership," is intended to put the burden of proof on the partnership, which was in the best position to know of contingent or yet unasserted liabilities, to show such liabilities were not known at the time of dissociation.

Subsection (e) provides that, if no agreement for the purchase of the dissociated partner's interest is reached within 120 days after the dissociated partner's written demand for payment, the partnership must pay, or cause to be paid, in cash the amount it estimated to be the buyout price, adjusted for any offsets
allowed and accrued interest. Thus, the dissociating partner will receive in cash within 120 days of her dissociation the undisputed minimum value of her partnership interest. At that point, the only further dispute to be resolved is whether, as presumably she claims, the buyout price should be greater. As provided in subsection (i), she may thereafter bring suit to have the amount of the buyout price determined by the court.

Subsection (e) repeats the "cause to be paid" language of subsection (a) to permit either the partnership or one or more of the continuing partners to tender payment of the estimated amount due.

The Drafting Committee wanted Comment to reflect that subsection (e), and ensuing subsections, were based substantially on suggestions of the ABA study group. The ABA recommended the following language:

[e] The partnership must, within 120 days of the dissociation of a partner whose interest is being purchased, tender, or cause to be tendered, to the dissociating partner the cash amount estimated to be the fair market value of the dissociating partner's partnership interest, plus accrued interest.

[g] The tender must be accompanied by a written notice stating that the dissociating partner shall be deemed to have accepted the dissociation and the tender in full satisfaction of the purchase obligation unless the dissociating partner, or the dissociating partner's successor in interest commences an action contesting the purchase price or other terms of the purchase within 120 days of the tender.

[f] If a deferred payment is authorized under subsection [h], in lieu of a cash tender, the tender may be in the form of a written offer stating the estimated value of the dissociated partner's interest, the amount and type of security, the time of payment and the other terms and conditions of the deferred payment obligation.

[i] If the dissociating partner timely commences an action contesting the tender required under subsection [d], the court shall determine the fair market value of the dissociated partner's interest, the amount of any additional payment or refund, and if deferred purchase is authorized pursuant to subsection [h], determine the security and other terms of the deferred purchase and enter judgment accordingly.

[i] If the court finds that a party to the proceeding has acted arbitrarily, vexatiously, or otherwise not in good faith, it may award one or more other parties their reasonable expenses, including counsel fees and the expenses of appraisers or other experts, incurred in the proceeding.

Subsection (f) adopts the ABA suggestion that, when deferred payment is authorized under subsection (h) in the case of a wrongfully dissociating partner, a written offer stating the amount the partnership estimated to be the purchase price
should be tendered within the 120-day period, even though actual payment of the amount may be deferred -- possibly for many years. The dissociated partner is entitled to know now what amount the remaining partners think is due, including the estimated amount of any damages alleged for wrongful dissociation which may be offset against the buyout price.

Subsection (g) is based in part on the dissenters' rights provisions of RMBCA Section 13.25(b) and in part on the ABA suggestion. It provides that the payment of the estimated price (or tender of a written offer under subsection (f)) by the partnership must be accompanied by (1) a statement of the partnership's assets and liabilities as of the date of the partner's dissociation; (2) the latest available balance sheet and income statement, if the partnership maintains such financial statements; (3) an explanation of how the estimated amount of the payment was calculated; and (4) a written notice that the payment will be in full satisfaction of the partnership's buyout obligation unless the dissociated partner commences an action to determine the price within 120 days of the notice. These disclosures should serve to identify and narrow substantially the items of dispute between the dissociated partner and the partnership over the valuation of her partnership interest. They will also serve to pin down the parties as to their claims of partnership assets and values and as to the existence and amount of all known liabilities. See Comment to subsection (d). Lastly, it will force the remaining partners to consider thoughtfully the difficult and important questions as to the appropriate method of valuation under the circumstances, in particular, whether they are using going concern or liquidation value. Simply getting all this information on the table in a timely fashion should increase the likelihood of an amicable resolution of their differences within the 120-day period before the dissociated partner must bring suit.

Subsection (h) provides that a partner who wrongfully dissociates before the expiration of a definite term or the completion of a particular undertaking need not be paid any portion of the value of the partner's interest before the expiration of the term or completion of the undertaking, unless the partner establishes to the satisfaction of the court that earlier payment will not cause undue hardship to the business of the partnership. In all other cases, there must be an immediate payment in cash. Wrongful dissociation is defined in Section 602.

Subsection (i) provides that a dissociated partner may maintain an action against the partnership, pursuant to Section 406(b)(2)(ii), to determine the buyout price, any offsets, or other terms of the purchase obligation. The action must be commenced within 120 days after the partnership tenders payment under subsection (e) of the amount it estimates to be due or, if deferred payment is authorized under subsection (h), its written offer under subsection (f). This provision creates a 120-day "cooling off" period that does not exist under the UPA. It also allows the parties an opportunity to negotiate their differences after disclosure by the partnership of its financial statements and other information required by subsection (g).
If the partnership fails to tender payment of the estimated amount due as required by subsection (e), or a written offer if deferred payment is authorized, the dissociated partner has one year after her written demand for payment in which to commence suit.

The court shall determine the buyout price of the partner's interest, any offsets, including damages for wrongful dissociation, and the amount of interest accrued. It may also determine the security for payment and other terms of the obligation if payment is deferred.

As suggested by the ABA study group, subsection (i) provides for the assessment of attorney's fees and other costs against any party found to have acted arbitrarily, vexatiously, or not in good faith, including the partnership's failure to tender payment of the estimated price or to comply with the disclosure requirements of subsection (g). Some of this language is taken from RMBCA Section 13.31(b).

The Committee deleted the following language from a previous draft of Section 701(i):

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 804].

The Committee's decision was to make the buyout mandatory and not provide winding up as an alternative.

The Committee also deleted a rule it had included in an earlier draft to require continuation of distributions so important to a surviving spouse:

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.

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 deleted the rule because it thought it presented too many problems. Where income continuation is critical to a partner or her spouse, it should be provided for in the partnership agreement.

SECTION 702. DISSOCIATED PARTNER'S POWER TO BIND PARTNERSHIP. For two years after a partner dissociates without resulting in a dissolution and winding up of the partnership business, the partnership, including
a surviving partnership under Article 9, is bound by an act of the dissociated partner that would have bound the partnership under Section 301 before dissociation if the other party to the transaction reasonably believes when entering the transaction that the dissociated partner is a partner at that time, does not have notice of the partner's dissociation, and is not deemed to have notice under Section 704.

**COMMENT**

Article 7 covers the situation in which the partner's dissociation triggers a buyout, rather than a winding up. It also applies to partners who withdraw in a merger under Article 9. The sole concern of Section 702 is with the dissociated partner's lingering apparent authority to engage in ordinary course partnership transactions.

Section 702 provides that the partnership may be bound, for two years after a partner's dissociation, by the partner's acts which would have bound the partnership under Section 301 before dissociation if the other party to the transaction (i) reasonably believes when entering the transaction that the dissociated partner is a partner; (ii) does not have notice of the dissociation; and (iii) is not deemed to have notice of the dissociation under Section 704.

Under Section 301, every partner has apparent agency power to bind the partnership by any act for carrying on the partnership business in the usual way, unless the partner has no actual authority to act for the partnership in the particular transaction and the other party to the transaction knows or has received a notice of the partner's lack of authority. A dissociated partner has no actual authority to act for the partnership. Under the general rule of Section 301, a dissociated partner would have lingering apparent authority to bind the partnership unless the other party knew or had "received a notice" of the partner's lack of authority. Under Section 102, a person "receives a notice" of a fact if the notice is duly delivered to her place of business or otherwise comes to her attention.

Section 702 modifies the general rule after a partner's dissociation by requiring the other party to show both (i) reasonable reliance on the partner's status as a partner and (ii) a lack of "notice" of the partner's dissociation. Under Section 102, a person has "notice" of a fact if she knows or has reason to know it exists from all the facts which are known to her (i.e., traditional inquiry notice) or she has "received a notice" of it. This provides the partnership with greater protection from the unauthorized acts of a dissociated partner than Section 301 provides generally.

The major innovation of Article 7, however, is the statement of dissociation under Section 704. Section 704(b) provides that, for the purposes of Sections 301 and 702, persons dealing with the partnership are deemed to have notice of a
partner's dissociation and the termination of her authority 90 days after the statement is filed. Thus, the filing of a statement of dissociation becomes constructive notice of the dissociated partner's lack of authority after 90 days, conclusively binding on all persons. By filing, the partnership can effectively reduce to 90 days from two years the lingering agency power of a dissociated partner. Such incentive should make the filing of statements routine upon a partner's departure, as well as the checking of the record at least every 90 days by those transacting substantial business with partnerships.

The language of Section 702 evolved from a provision originally suggested in Ribstein, A Statutory Approach to Partner Dissociation, 65 Wash. U.L.Q. 357, 422 (1987):

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.

SECTION 703. DISSOCIATED PARTNER'S LIABILITY TO OTHER PERSONS.

(a) A partner's dissociation does not of itself discharge the partner's liability for a partnership obligation incurred before dissociation.

(b) A partner who dissociates without resulting in a dissolution and winding up of the partnership business is liable as a partner to the other party in a transaction entered into by the partnership or a surviving partnership under Article 9 within two years after the partner's dissociation, if the other party reasonably believes when entering the transaction that the dissociated partner is a partner at that time, does not have notice of the dissociation, and is not deemed to have notice under Section 704.

(c) By agreement with the partnership creditor and the partners continuing the business, a dissociated partner may be released from liability for a partnership obligation.
(d) A dissociated partner is released from liability for a partnership obligation if a partnership creditor, with notice of the partner's dissociation but without the partner's consent, agrees to a material alteration in the nature or time of payment of a partnership obligation.

**COMMENT**

Section 703 (Naples draft Section 603) is based on UPA Section 36 and continues the basic rule that the departure of a partner does not of itself discharge any of the partner's liabilities. The Committee felt the section more properly belongs in Article 7.

Section 703(a) amends UPA Section 36(1) to clarify that it is partnership obligations "incurred before dissociation" for which a partner remains liable.

Section 703(b) deals with the problem of protecting third parties who extend credit to the partnership after the departure of a partner, believing her to be a partner. It provides that a dissociated partner remains liable as a partner, in transactions entered into by the partnership within two years after her dissociation, if the other party (i) reasonably believes when entering the transaction that the dissociated partner is a partner at that time; (ii) does not have notice of the partner's dissociation; and (iii) is not deemed to have notice under Section 704.

Section 703(b) operates similarly to Section 702 in that it requires reliance on the departed partner's continued partnership status, as well as lack of notice. A statement of dissociation again operates conclusively as constructive notice 90 days after filing.

Section 703(c) provides that a departing partner can bargain for a contractual release of her personal liability for a partnership obligation, but it requires the agreement of both the creditor and the remaining partners. The section covers all partner dissociations and is not limited, as was UPA Section 36(3), to situations in which a third party "agrees to assume the existing obligations of a dissolved partnership."

Section 703(d) continues the rule of UPA Section 36(3) that a dissociated partner is released from liability if a partnership creditor, without the partner's consent, agrees to a material alteration in the nature or time of payment.

The rule in UPA Section 36(4) is eliminated to reflect the deletion of the "Jingle rule" which provided that separate debts have first claim on separate property. RUPA deletes this "dual priority" rule to conform to the new Bankruptcy Code. UPA Section 41(8) is also eliminated for this reason.
Section 604 of the Naples draft provided:

Unless otherwise agreed or provided in this [Act], relationships between a partnership and its creditors are not affected by the dissociation of a partner or by the addition of a new partner.

Section 604 began as an edited-down version of UPA Section 41. In short, UPA Section 41 provides for continuity of relationships between a partnership and its creditors by providing that the "new" partnership that springs into existence after the dissolution of an "old" partnership is deemed to undertake the liabilities of the old partnership. Because under RUPA the partnership entity continues, unless the business is wound up, there is not the same need for an elaborate provision deeming the new partnership to assume the liabilities of the old partnership. This result appears so obvious to the Committee that Section 604 was deleted.

The Committee deliberated at length over the basic question 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 decided that the new partnership only assumes the liability of the old partnership to the extent it agrees. It was said that the same rule should apply whether the new partnership takes over by a purchase of the assets or a purchase of the partnership interests. Given that the original partners remain personally liable, given that RUPA makes them jointly and severally liable to contract as well as tort creditors, and given that the law of fraudulent transfers still applies, it does not seem necessary to consider the new partnership a continuation of the old partnership whenever one original partner carries over.

The Committee considered but rejected answering the basic policy question in the affirmative. There are four basic ways this could have been accomplished. First, say that the original partnership has not dissolved even though it has terminated. This approach seems awkward and confusing. 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 without either resurrecting the concept of dissolution or giving "termination" a strained meaning.

Professor Ribstein commented at 65 Wash. U.L.Q. 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 at id. 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 Committee draft is consistent with the present law concerning the corporate purchaser of partnership assets.

SECTION 704. STATEMENT OF DISSOCIATION.

(a) A dissociated partner or the partnership may file a statement of dissociation stating the name of the partnership and that the partner is dissociated from the partnership. A statement of dissociation is a limitation on the authority of a dissociated partner to the extent provided in Section 303(d) and (e).
(b) For the purposes of Sections 301, 702, and 703(b), a person not a partner is deemed to have notice of the dissociation and the termination of the dissociated partner's authority as a result of the statement of dissociation 90 days after it is filed.

COMMENT

Section 704 is new and provides that either the dissociated partner or the partnership may file a statement of dissociation stating the name of the partnership and that the partner is dissociated. Like other RUPA filings, the statement of dissociation is voluntary. However, both the partnership and the departing partner have an incentive to file, and it is anticipated that such filings will be routine upon a partner's dissociation. The execution, filing, and recording of the statement is governed by Section 105.

Filing or recording a statement of dissociation has threefold significance:

(1) It is a statement of limitation on the dissociated partner's authority to the extent provided in Section 303(d) and (e). Under subsection (d), a filed or recorded limitation on the authority of a partner destroys the conclusive effect of a prior grant of authority to the extent it contradicts the prior grant. Under subsection (e), nonpartners are conclusively bound by a recorded limitation on the authority of a partner to transfer partnership real property.

(2) Ninety days after the statement is filed, nonpartners are deemed to have notice of the dissociation and the termination of the partner's authority, and thus they are conclusively bound for purposes of cutting off the partner's apparent authority under Sections 301 and 702.

(3) Ninety days after the statement is filed, third parties are conclusively bound for purposes of cutting off the dissociated partner's liability as a partner for such transactions under Section 703(b).

SECTION 705. CONTINUED USE OF PARTNERSHIP NAME.

Continued use of a partnership name, or a dissociated partner's name as part thereof, by the partners continuing the business does not of itself make the dissociated partner liable for an obligation of the partners or the partnership continuing the business.
COMMENT

Section 705 is an edited version of UPA Section 41(10) and provides that a dissociated partner is not liable for the debts of the continuing business simply because of continued use of the partnership name or the dissociated partner's name as a part thereof. This prevents forcing the business to forego the goodwill associated with its name.
ARTICLE 8

WINDING UP PARTNERSHIP BUSINESS

Section 801. Events Causing Dissolution and Winding Up of Partnership Business.

Section 802. Dissolution Deferred 90 Days.

Section 803. Partnership Continues After Dissolution.

Section 804. Right to Wind Up Partnership Business.

Section 805. Partner's Power to Bind Partnership After Dissolution.

Section 806. Statement of Dissolution.

Section 807. Partner's Liability to Other Partners After Dissolution.

Section 808. Settlement of Accounts Among Partners.

SECTION 801. EVENTS CAUSING DISSOLUTION AND WINDING UP OF PARTNERSHIP BUSINESS. A partnership is dissolved, and its business must be wound up, only upon:

(1) except as provided in Section 802, receipt by a partnership at will of notice from a partner, other than a partner who is dissociated under Section 601(2) to (10), of that partner's express will to withdraw as a partner or to terminate the partnership, or upon any later date specified in the notice;

(2) in a partnership for a definite term or particular undertaking:

(i) except as provided in Section 802, within 90 days after a partner's wrongful dissociation under Section 602 or a partner's dissociation by death or otherwise under Section 601(6) to (10), receipt by the partnership of notice from another partner of that partner's express will to withdraw as a partner or to terminate the partnership;

(ii) the express will of all the partners; or
(iii) the expiration of the term or the completion of the undertaking, unless all the partners agree to continue the business, in which case the partnership agreement is deemed amended retroactively to provide that the expiration or completion does not result in the dissolution and winding up of the partnership business;

(3) an event agreed to in the partnership agreement resulting in the winding up of the partnership business, unless all the partners agree to continue the business, in which case the partnership agreement is deemed amended retroactively to provide that the event does not result in the dissolution and winding up of the partnership business;

(4) an event that makes it unlawful for all or substantially all of the business of the partnership to be continued, but any cure of illegality within 90 days after notice to the partnership of the event is effective retroactively to the date of the event for purposes of this section;

(5) on application by a partner, a judicial decree that:

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

(ii) another partner has engaged in conduct relating to the partnership business that makes it not reasonably practicable to carry on the business in partnership with that partner; or

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

(6) on application by a transferee of a partner’s transferable interest, a judicial decree that it is equitable to wind up the partnership business:
(i) if the partnership was for a definite term or particular undertaking at
the time of the transfer or entry of the charging order that gave rise to the transfer,
after the expiration of the term or completion of the undertaking; or

(ii) if the partnership was a partnership at will at the time of the transfer
or entry of the charging order that gave rise to the transfer, at any time.

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 theoretical end of the old partnership and the creation of a new
partnership creates many unnecessary problems, particularly problems concerning
title to property. The ABA Report recommends sixty-six 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. Although there is of course
a range of opinion on the rules that should govern partnership breakups, there
appears to be a basic consensus that the UPA's "dissolution" provisions are due for
a major overhaul.

Reform has already started under RULPA, which 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 partnership to be carried on by the
remaining general partner and that partner does so, but the limited partnership
is not dissolved and is not required to be wound up by reason of any event of
withdrawal, if, within 90 days after the withdrawal, all partners agree in writing
to continue the business of the limited partnership and to the appointment of
one or more additional general partners if necessary or desired . . . .

The first draft of the new breakup provisions eliminated the term
"dissolution." 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. It was decided to continue with the term
"termination" rather than "dissolution" because the term "dissolution" has 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.

The Committee initially made two decisions. First, it rejected proposed revisions that significantly curtailed the right to force a liquidation of the partnership. It reinstated 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, it decided to continue to give partnerships greater stability, preferably without using "the D word." The Committee did not want the partnership theoretically blown apart on every departure.

The Committee later 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 dissociation will cause a dissolution of the partnership. Only certain departures trigger a dissolution, which is the commencement of the winding up of the partnership business rather than a buyout of the departing partner.

Section 801 was amended to provide, "A partnership is dissolved only when a winding up of its business is caused under Section 802." It was revised further to read, "A partnership is dissolved only when an event occurs which causes a winding up of its business under Section 802," to clarify that dissolution is triggered only by the occurrence of an event listed in Section 802. Both sections have now been combined in a single Section 801.

The Committee also decided to add back the language of UPA Section 30: "On dissolution the partnership is not terminated, but continues until the winding up of the partnership business is completed." This language has now been moved to Section 803.

An earlier draft also provided that if the dissociation of a partner causes a winding up of the business, the partners still have a continuing relationship with third parties and with each other as provided in Sections 803-810. This language was deleted from the text as unnecessary and left to Comment.

Another early draft provided that when a partnership is dissolved and a winding up is commenced, the partnership continues for the limited purpose of winding up the partnership business and terminates when the winding up is completed. Because this provision was merely a cross-reference to other rules, it was placed in Comment rather than text. 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. The winding up of the business under Article 8 is to be distinguished from the "mini-winding up" that takes place if there is a buyout. See Section 701(b).
In summary, under RUPA, any partner has the power to leave the partnership at any time. The mere departure of a partner, however, does not cause a winding up of the business. Stated differently, the partnership as an entity and its 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.

The basic rule is that a partnership is dissolved, and its business must be wound up, only upon the occurrence of one of the events listed in Section 801. With the exception of subsections (4), (5), and (6), the provisions of Section 801 are merely default rules and may be varied in the partnership agreement.

Section 801(1) provides that the business of a partnership at will must be wound up upon receipt by the partnership of notice from a partner (not then dissociated) of the partner's express will to withdraw as a partner or to terminate the partnership, or upon a later date specified in the notice. The language referring to "receipt by the partnership of notice" has been added to conform to Section 601(1).

Section 801(1) is intended to continue two basic rules under the UPA. First, RUPA continues the UPA rule that any member of an at-will partnership has the right to force a winding up. Second, RUPA continues the UPA rule that, when there is an agreed-upon term, the partners who wish to continue can not be forced to liquidate the business by a partner who leaves early. They have the right to buy out the partner who departs in violation of her agreement.

The UPA rule is gleaned from the separate provisions governing 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 by "the express will of any partner when no definite term or particular undertaking is specified." UPA Section 31(2) states that dissolution is caused "in contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time."

UPA Section 38(1) provides that, in general, if dissolution is not caused wrongfully, each partner has the right to have the business wound up. It reads in part:

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 have the surplus applied to pay in cash the net amount owing to the respective partners. . . .

UPA Section 38(2), on the other hand, 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 nonbreaching partners may continue by unanimous consent.

UPA Section 38 is a default rule to be applied only in the absence of an agreement to the contrary (e.g., an agreement limiting the departing partner to a buyout by the other partners). After briefly considering with the idea of abandoning the traditional view in favor of a more limited buyout right, the Committee decided to retain the UPA rule which has been the law for more than 75 years. The ABA Report had not called for change. See 43 Bus. Law. at 165 (rule discussed but no change recommended).

An earlier draft of Section 801(1) provided that the business shall be wound up, "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 initial draft had called for dissolution "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. An interim draft required winding up "on the receipt of notice by a partnership of a partner's express will to withdraw as a partner, unless the partners, including the withdrawing partner, have agreed that the partnership is to continue for a definite term or undertaking." This was intended to cover either a preexisting and a contemporaneous agreement. Eventually, the Committee decided to refer simply to "at will" partnerships. Further editing was done to clarify the language and conform it to Section 601(1).

Section 801 raises a very basic policy question. Should the default rule be that a dissociating partner in an at will partnership has the right to have the business wound up, as provided in the UPA, or merely the right to be bought out, leaving to the remaining partners the decision of whether to wind up? There is substantial disagreement between the Drafting Committee and the ABA Ad Hoc Committee on the answer to this question.

Concededly, the traditional rule has its drawbacks. It has been blamed as one of the major factors contributing to the instability of partnerships, and it is in some ways inconsistent with the move to an entity theory of partnership. It may also frustrate the will of the majority of partners when they wish to continue the partnership business.
On the other hand, there are strong policy arguments in favor of a liquidation right. Foremost is the belief that only by an actual sale of the partnership assets and the payment of all partnership obligations is the withdrawing partner assured of a fair price for her partnership interest and a final satisfaction of all partnership obligations or, if the firm is insolvent, a determination of the amount of her personal liability for the remaining obligations. A buyout, even if court supervised, is merely an educated guess as to the value of the partnership business, and the remaining partners' indemnification may not prove adequate to hold her harmless against liability for the firm's existing obligations (for which she has, in effect, already contributed by the calculation of the buyout price), as well as her lingering exposure to liability for future partnership obligations.

The ABA Ad Hoc Committee strongly urged the Drafting Committee to abrogate the traditional rule in favor of allowing the remaining partners to continue the business, relegating the withdrawing partner to a buyout. The Ad Hoc Committee felt this would be the preferable default rule because: (i) it is conceptually more consistent with an entity theory; (ii) it enhances stability; (iii) most of the time the remaining partners will wish to continue the business; and (iv) most partners in fact expect that the majority has the right to continue the business (despite the UPA rule to the contrary). The Ad Hoc Committee also argued that the Article 7 valuation mechanism will produce a buyout price that is fair, without affording the departing partner excessive leverage in the negotiations.

Many members of the Drafting Committee do not share these beliefs. They believe, instead, that partners, especially those in small, often casual, arrangements for whom the default rules are designed, are more likely to believe the firm will break up if anyone leaves. Many on the Drafting Committee are also somewhat skeptical that the buyout value will be fair, and thus they feel that the departing partner needs the leverage of a liquidation right to even the playing field when negotiating with the remaining partners. Some Committee members feel that, on withdrawal, a partner at will should be entitled to have partnership liabilities, for which she is personally liable, paid off -- or the deficiency fixed. Moreover, since RUPA is only the default rule, the partnership may, by agreement, limit withdrawing partners to a buyout. Inasmuch as larger partnerships are the ones for which a buyout is most appropriate, they have the sophistication to draft around the problem, and it is hard to be very sympathetic if they -- or their lawyers -- fail to do so.

The Drafting Committee was not wholly unsympathetic to the Ad Hoc Committee's concerns. Certainly, no one wants the business wound up if the remaining partners wish to continue and the departing partner agrees to a buyout. This problem is addressed by Section 802. It provides that, after the partner's dissociation under Section 601(1), there is a 90-day "cooling off" period before dissolution and the commencement of the winding up process. The purpose of delaying the dissolution is to afford the remaining partners an opportunity, if they so choose, to negotiate with the dissociating partner in order to avoid the dissolution and ensuing liquidation. If successful, such discussions would likely result in a buyout of the dissociating partner instead of winding up the business. See Comment to Section 802.
Section 801(2) provides several ways in which a term partnership may be dissolved before the expiration of the term. Section 801(2)(i) provides that, after a partner's wrongful dissociation under Section 602, or a partner's dissociation by death or otherwise under Section 601(6) to (10), any other partner may have the partnership business wound up. The other Section 601 dissociations giving rise to a Section 801(2)(i) right to dissolution are: (6) the partner's bankruptcy; (7) the partner's death or incapacity; (8) the distribution by a trust-partner of its entire partnership interest; (9) the distribution by an estate-partner of its entire partnership interest; and (10) the termination of an entity-partner.

The partner exercising the Section 801(2)(i) right is not the one who first dissociates, and the right must be exercised by the second partner notifying the partnership, within 90 days after the first partner's dissociation, of her express will to have the partnership wound up. The reason for giving each of the remaining partners this option is that the dissociating partner may, in their opinion, have been crucial to the firm's success, and requiring them to remain for the balance of the term without a key player is not what they bargained for.

Dissolution under Section 801(2)(i) is also subject to a 90-day waiting period under Section 802 after the second partner gives notice of her will that the partnership be dissolved. Thus, dissolution may not occur for 180 days after the first partner's wrongful dissociation, death, or other requisite dissociation.

Section 801(2)(i) continues the rule in UPA Section 38(2)(b) that requires unanimity for the exercise of the continuation right after a wrongful dissociation: "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. The "receipt of notice" requirement was added to improve certainty.

Under Section 601(6), there is a dissociation whenever a partner becomes a debtor in bankruptcy or executes an assignment for the benefit of creditors. The intent of adding bankruptcy to Section 801(2)(i) is to avoid requiring partnerships to buy out every partner who becomes a debtor in bankruptcy. The debtor partner's transferable interest in the partnership will, however, pass to the bankruptcy trustee as property of the estate under 11 U.S.C. § 541(a)(1), notwithstanding any restrictions on transfer provided in the partnership agreement. In most chapter 7 cases, this will result in the eventual buyout of the partner's interest.

To summarize the situation with respect to death: under Section 801(2)(i), 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 Section 701. 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 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 the surviving partners.

Section 801(2)(i) provides that a term partnership may be dissolved and wound up at any time by the express will of all the partners. This is really just an expression of the general rule that the partnership agreement may override the statutory default rules and that the partnership agreement, like any contract, can be amended at any time by unanimous consent.

RUPA previously provided that a term partnership could be wound up by the express will of all the partners if a partner’s transferable interest had been assigned pursuant to Section 503 or charged for a partner’s separate debts under Section 504. This rule was drawn from UPA Section 31(1)(c) and reflects the belief that the remaining partners may find transferees very intrusive. This provision has been deleted because the liquidation is easily accomplished under Section 801(2)(ii) by first expelling the transferee partner under Section 601(4)(ii).

Section 801(2)(iii) provides for liquidation of a term partnership upon the expiration of the term or the completion of the undertaking. It also provides an "out" if the partners agree unanimously that the partnership business not be dissolved and wound up upon the expiration of the partnership term. To avoid an arguably technical dissolution in such case, the partnership agreement is deemed amended retroactively to provide that the expiration of its stated term does not result in dissolution.

The RUPA text is based on UPA Section 31(1)(a), which provides that dissolution is caused, without violating the partnership agreement, "by the
termination of the definite term or particular undertaking specified in the agreement.”
The “unless” language is new. The second clause, providing for the retroactive amendment of the partnership agreement to reflect the partners’ unanimous decision not to wind up the business, is drawn from the Revised Model Business Corporation Act. See RMBCA § 14.04(e) (revocation of dissolution).

Section 407 is a related provision and refers to the situation in which the partners simply continue the business with no additional formalities.

Section 801(3) provides for dissolution upon the occurrence of an event specified in the partnership agreement as resulting in the winding up of the partnership business, unless all the partners agree to continue the business. The Committee wanted a windup rule that would parallel the departure rule in Section 601(2). The retroactive effect provision parallels Section 801(2)(iii).

Section 801(4) provides for a winding up upon an event that makes it unlawful for all or substantially all of the business of the partnership to be continued, but any cure of illegality within 90 days after notice to the partnership of the event is effective retroactively to the date of the event for purposes of this section. This modifies the rule in UPA Section 31(3) 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.” 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 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, [under UPA § 35(3)] 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 801(4) 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, the section provides that any cure within 90 days of notice operates retroactively for purposes of this section. The requirement that an illegal business be wound up cannot be varied in the partnership agreement. See Section 103(b)(6).

Section 801(5) 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." The section 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."

Section 801(5) continues the notion that it applies only upon application by a partner (rather than by a creditor or transferee) and follows with language the Committee felt more accurately reflects current contract notions, that is, when a court decrees that: (i) the economic purpose of the partnership is likely to be unreasonably frustrated; (ii) another partner has engaged in conduct relating to the partnership business that makes it not reasonably practicable to carry on the business in partnership with that partner; or (iii) it is not otherwise reasonably practicable to carry on the partnership business in conformity with the partnership agreement.

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. The partnership agreement cannot vary the court's power to wind up the partnership under Section 801(5). See Section 103(b)(6).
Under Section 801(6), on application by a transferee of a partner's transferable interest (including the purchaser of a partner's interest upon foreclosure of a charging order), a court may decree that it is equitable to wind up the partnership business: (i) after the expiration of the partnership term or completion of the undertaking; or (ii) at any time, if the partnership was at will at the time of the transfer or when the charging order was issued. Under Section 103(b)(6), the rights of a transferee cannot be varied in the partnership agreement.

Section 801(6) 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 transferee should not be able to demand more than a buyout. Another person questioned why a transferee should even have the right to force a buyout. It was also suggested that different kinds of transferees could be treated differently. The consensus, however, was to continue the present law, which is reflected in Section 801(6).

The language, "that it is equitable to wind up the partnership business," was added to underscore the equitable nature of the right to dissolution. An earlier draft contained an exception to Section 801(6) based on an agreement between the partner and the transferee. This was deleted because the Committee felt that the effect of such an agreement was better left to the equitable discretion of the court.

The Committee considered the question of whether a deceased partner's heir or devisee should have the right to wind up the partnership. It was concluded that a person who takes on the death of a partner should be confined to a Section 701 buyout right. RUPA accomplishes this result by virtue of the fact that a deceased partner is dissociated immediately upon death under Section 601(7)(i), but the partner's death does not trigger dissolution under Section 801. Therefore, under Section 603(a), the deceased partner's share must be purchased pursuant to Article 7. On the other hand, it is not clear why RUPA treats donees differently from those who take on death. Compare Vernon's Ann. Texas Civ. St. art. 6132b, § 28-B(1)(B) (persons who take on death regarded as assignees).

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 701." The intent was to give the departing partner the right to force a liquidation if his right to be bought out was not honored.
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.

UPA Section 39 grants ancillary remedies to a person who rescinds her participation in a partnership because it was fraudulently induced, including the right to a lien on surplus partnership property for the amount of the person’s interest in the partnership. The Drafting Committee considered whether a buyout or a liquidation right is an appropriate remedy for fraud. It was eventually decided to delete from RUPA a counterpart provision to UPA Section 39 and to rely instead on the general law of rescission to determine the rights of a person fraudulently induced to invest in a partnership.

SECTION 802. DISSOLUTION DEFERRED 90 DAYS.

(a) Except as provided in subsection (b), a partnership is not dissolved until 90 days after receipt by the partnership of notice from a partner under Section 801(1) or (2)(i), and its business may be continued until that date as if no notice were received. Before that date, the partner who gave the notice may waive the right to have the partnership business wound up. If there is no waiver before that date, the partnership is dissolved and its business must be wound up.

(b) A partnership may be dissolved at any time during the 90-day period, and its business wound up, by the express will of at least half of the remaining partners.

(c) After receipt by the partnership of notice from a partner under Section 801(1) or (2)(i), the partner who gave the notice:

(1) has no rights in the management and conduct of the partnership business if it is continued under subsection (a), but may participate in winding up the business under Section 804 if the partnership is dissolved on or before the expiration of the 90-day period pursuant to subsection (a) or (b);
(2) is not liable to the other partners for, and must be indemnified by
them against, any partnership liability incurred by another partner to the extent the
liability is not appropriate for winding up the partnership business; and

(3) must be credited with a share of any profit or charged with a share
of any loss from a partnership transaction to the extent the transaction is appropriate
for winding up the partnership business.

**COMMENT**

Section 802 is new since the Naples draft. Simply put, in two situations it
defers for 90 days a partner's right under Section 801 to have the partnership
dissolved and its business wound up. First and foremost, it defers for 90 days the
right of a partner at will to have the business wound up. In this regard, Section 802
represents something of a compromise between the two divergent views regarding
the right of a partner at will to have the partnership business liquidated upon her
dissociation. The other situation in which Section 802 applies is the dissolution of
a term partnership under Section 801(2)(i). This section allows a partner to have
the business wound up in the event of another partner's wrongful dissociation before
the expiration of the partnership term.

Dissolution under Section 801(1) is qualified by the clause, "except as
provided in Section 802." Section 802(a) provides that dissolution of a partnership
at will under Section 801(1) is deferred for 90 days after receipt of notice by the
partnership of the partner's will to withdraw and that the partnership business may
be continued as usual during the 90-day period rather than beginning immediately
the winding up process. Before the expiration of the 90-day period, the withdrawing
partner may waive the right to have the business wound up. If she does not, the
partnership is dissolved after 90 days, and its business must be wound up. Section
802(b) provides that the 90-day waiting period can be avoided, and the business
wound up immediately, by the express will of at least half of the remaining partners.
Section 802(c) prescribes three special rules governing the rights of the dissociating
partner during the waiting period. The entire scheme of Section 802 can, of course,
be varied or eliminated in the partnership agreement.

Section 802 effects a compromise which preserves the absolute right of a
partner at will to have the business liquidated, but slows down the dissolution
process to give the remaining partners an opportunity to assess the effect of the
dissociating partner's departure and to negotiate with her about a buyout in lieu of
a liquidation if they wish to continue the business.

Section 802 also avoids a technical dissolution in those situations where
there is a negotiated buyout or the departing partner otherwise waives her right to
have the business wound up. Many partnership loan agreements contain an
acceleration clause triggered by "dissolution" of the partnership or a "due on sale"
clause. The Committee considered several ways of preventing a technical
dissolution.

RULPA Section 801(4) provides that a limited partnership is dissolved and
its affairs shall be wound up upon the withdrawal of a sole general partner,
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 . . . and to the appointment
of one or more additional general partners . . . .

No mechanism for undoing or waiving the dissolution is mentioned.

RMBCA Section 14.04 provides that a corporation may revoke its
dissolution within 120 days of the effective date of the articles of dissolution and that
such revocation of dissolution

. . . relates back to and takes effect as of the effective date of the dissolution
and the corporation resumes carrying on its business as if dissolution had never
occurred.

The seminal version of Section 802 was based on the RMBCA. It gave
retroactive effect to a partner's revocation of her will to dissolve the partnership or
other consent to the avoidance of the dissolution and winding up of the business,
if given within 90 days of the original notice of dissolution. In such case, the
revocation or consent "relates back and takes effect as of the date of the notice for
the purposes of [Section 801] and the partnership resumes carrying on its business
as if dissolution had never occurred." This was subsequently simplified to read:

Within 90 days after receipt of the notice [of dissociation] by the
partnership . . . , the partner who gave the notice may waive the right to a
winding up of the partnership.

This was thought sufficient since the only significance of dissolution to the
partnership internally is a contraction in the scope of its business; if the dissociating
partner waives the right to have the business wound up, it simply restores the usual
scope of the partnership's business.

Concern was voiced, however, that this did not avoid the technical
dissolution with respect to third parties and thus might trigger adverse external
consequences, such as loan acceleration clauses. As now drafted, Section 802(a)
defers "dissolution" for 90 days, thus avoiding even a technical dissolution.

Section 802 accords similar treatment to the dissolution of a term
partnership caused when a partner elects to dissociate under Section 801(2)(i) upon
the death, bankruptcy, or wrongful dissociation of another partner before the
expiration of the partnership term.

Section 802(c) provides three special rules governing the rights of the
dissociating partner during the 90-day waiting period. Basically, it treats the
dissociated partner as if she were dissociated under Section 601 and being bought
out under Article 7, rather than liquidating under Article 8. If, after 90 days, the
business is dissolved and wound up, her usual rights and duties as a partner are
reinstated.

Under Section 804, every partner, except a wrongfully dissociated partner,
is normally entitled to participate in winding up the partnership's affairs upon a
dissolution of the partnership. Section 802(c)(1), on the other hand, provides that
the dissociating partner has no rights in the management and conduct of the
business if it is continued without winding up during the 90-day period. Thereafter,
if the partnership is dissolved and its business wound up, the partner's management
rights are restored. But this means, for example, that, if the deep pocket partner
withdraws from a partnership at will, she may be locked out for 90 days while the
remaining partners continue to run the business.

Section 802(c)(2) attempts to restore this seeming imbalance by insulating
the dissociating partner from liability to the remaining partners for any obligations
incurred during the 90-day period to the extent they are not appropriate for winding
up the business, and the remaining partners must indemnify her against any liability
she may have to third parties for such obligations. The dissociating partner remains
personally liable to third parties, however, for all partnership obligations incurred
during the 90 days. If and when a buyout is agreed to, the rights and liabilities of
the dissociating partner will be governed by Article 7. Under Section 703(b), the
dissociating partner is potentially liable for partnership transactions for two years,
but she may cut off her liability after 90 days by filing a statement of dissociation.
See Section 704(b). The concept of obligations not appropriate for winding up is
well developed under UPA Section 35(1)(a) and continued under RUPA Section
805(1).

Section 802(c)(3) is the corollary of paragraph (2). It provides that, in
settling accounts among the partners, the dissociating partner must be credited with
a share of any profit, and may be charged with a share of any loss, from a
partnership transaction during the 90-day period to only the extent it is appropriate
for winding up the business. This will require characterizing every transaction
entered into during the 90 days as ongoing business or winding up, as well as
determining the profit or loss from each transaction. Undoubtedly there will
occasionally be difficult and complex accounting problems, but the Committee
believes such an allocation can be made readily most of the time. These may be
anticipated and provided for in the partnership agreement.

The lingering agency power of a dissociating partner during the 90-day
waiting period is governed by the usual rules of Section 702 unless and until the
partnership is dissolved and winding up begins.
SECTION 803. PARTNERSHIP CONTINUES AFTER DISSOLUTION.
A partnership continues after dissolution until the winding up of its business is completed, at which time the partnership is terminated.

COMMENT

Section 803 is drawn from UPA Section 30: "On dissolution the partnership is not terminated, but continues until the winding up of the partnership business is completed."

SECTION 804. RIGHT TO WIND UP PARTNERSHIP BUSINESS.

(a) After dissolution, the partners who have not wrongfully dissociated may wind up a partnership's business, but on application of any partner, partner's legal representative, or transferee, the [designate the appropriate court], for good cause, may order that the partnership business be wound up.

(b) The legal representative of the last surviving partner may wind up a partnership's business.

(c) A person winding up a partnership's business may preserve the partnership business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, settle and close the partnership's business, dispose of and transfer the partnership's property, discharge the partnership's liabilities, distribute the assets of the partnership pursuant to Section 808, and perform other necessary acts, including settlement of disputes by mediation or arbitration.

COMMENT

Section 804(a) is drawn from UPA Section 37. It provides that the partners who have not wrongfully dissociated may participate in winding up the partnership business. The "unless otherwise agreed" language of UPA Section 37(a) is supplanted by the general rule in RUPA Section 103.
Section 602 defines wrongful dissociation. The previous draft referred instead to partners "who have not wrongfully caused a winding up." The concept of wrongful dissolution, i.e., wrongful winding up, was intended to be somewhat different and more fluid, since dissolution is caused by some events which are not dissociations. The other wrongful causes of dissolution were not listed in the Act, but were to be left to judicial development. The Committee decided this was too confusing and eliminated the separate concept of "wrongful dissolution."

Section 804(b) provides that the legal representative of the last surviving partner may wind up the business. This section is drawn directly from UPA Section 25(2)(d), but is recast in terms of winding up. It makes clear that the representative of the last surviving partner will not be forced to go to court for a winding up right. On the other hand, the legal representative of a deceased partner, other than the last surviving partner, has only the rights of a transferee of the deceased partner's transferable interest. In this regard, there is no intent to change present law.

Section 806(c) 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 Vernon's Ann. Texas Civ. St. art. 6132a-1, § 8.04(b) (RULPA). 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, e.g., Paciaroni v. Crane, 408 A.2d 946 (Del. Ch. 1979). This change embraces the recommendations in 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.

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 804(c) are nonexclusive. The phrase, "in the name of, and for and on behalf of, the partnership," was deleted as unnecessary.

The final phrase referring to the settlement of disputes by mediation or arbitration was added in accordance with Conference policy encouraging alternative dispute resolution.
SECTION 805. PARTNER'S POWER TO BIND PARTNERSHIP AFTER DISSOLUTION. Subject to Section 806, a partnership is bound by a partner's act after dissolution that:

(1) is appropriate for winding up the partnership business; or

(2) would have bound the partnership under Section 301 before dissolution, if the other party to the transaction does not have notice of the dissolution.

COMMENT

The ABA Report at 167 recommends that UPA Section 33(1) be merged with UPA Section 34 and that UPA Section 33(2) be merged with UPA Section 35. RUPA implements the ABA recommendation. Section 805 is the successor to UPA Sections 33(2) and 35, which wind down the authority of partners to bind the partnership to third persons. Section 807 [Section 804 of Naples draft] is the successor to UPA Sections 33(1) and 34, which govern the rights of partners among themselves with respect to post-dissolution obligations.

Section 804 is drawn from UPA Section 35, which provides that partners have the authority to engage in winding-up transactions. Both sections also state the general rule that partners have the power, as provided in Section 301, to bind the partnership in transactions with third parties, including transactions inconsistent with winding up when the third party has no notice of the dissolution. Section 804 thus balances the interests of the partners to end their mutual agency against the interests of outside creditors who have no notice of dissolution. Of course, the faithless partner who purports to act for the partnership after dissolution may be liable individually to the innocent third party under the law of agency if the partnership is not bound. See Restatement of Agency (2d) § 330 (agent liable for misrepresentation of authority), applicable as provided in Section 104(a).

Section 805 has been extensively revised by the Committee since the Naples draft. Section 805(1) now provides that a partner can bind the partnership after dissolution by any act appropriate for winding up the partnership business. This would include all actions enumerated in Section 804(c), including the preservation of the business as a going concern for a reasonable time. The second phrase in the prior draft, "or completing transactions unfinished when the winding up is caused," was deleted as redundant.

Section 805(2) deals with partners' post-dissolution apparent authority: a partner can bind the partnership after dissolution by any act that would have bound the partnership under Section 301 before dissolution if the other party to the transaction does not have notice of the dissolution. The Committee decided to abandon the special rules limiting the apparent authority of partners after dissolution,
included in the prior draft, in favor of the general principles of apparent authority under Section 301, subject to the effect of a filed statement of dissolution under Section 806. This enhances the protection of innocent third parties and imposes liability on the partnership and the partners who, after all, choose their fellow partner-agents and are in the best position to protect others by providing notice of the dissolution. The special protection previously provided by Section 804(a)(2)(i) to former creditors and the lesser special protection provided by Section 804(a)(ii) to other parties who knew of the partnership before dissolution has been abolished.

The deleted portions of Section 804(a) of the Naples draft provided that a partner can bind the partnership after dissolution:

* * *

(2) by any transaction that would bind the partnership if the winding up had not been caused, if the other party to the transaction did not have notice that a winding up had been caused and:

(i) had extended credit to the partnership within two years before the event causing the winding up; or

(ii) knew of the partnership before the event causing the winding up and the fact of winding up had not been advertised in a newspaper of general circulation in each place in which the partnership business was regularly carried on.

The above language of previous Section 804, now deleted, was based in part on Georgia § 14-8-35. It also implemented the ABA Report recommendation 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.

The Georgia and Texas statutes already limit the notice requirement to those who extended credit within two years prior to dissolution.

The Committee eschewed these cumbersome notice provisions in favor of a filed statement of dissolution, as provided in Section 806.

The Committee also decided to delete from Section 805 the special rule found in Section 804(b) of the Naples draft limiting the liability of silent partners.
This, too, was seen as inconsistent with the revised policy of Section 804. Deleted Section 804(b) previously provided:

(b) The liability of a partner under Section 804(a)(2) must be satisfied out of partnership assets alone when the partner, before the event causing the winding up, was:

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

(2) so far unknown and inactive in partnership 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.

Finally, the Committee decided to abolish the special exceptions to partnerships' post-dissolution liability as inconsistent with the general principles implicit in Sections 301 and 805(a). Deleted Section 804(c) previously provided:

(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 if:

(1) the partnership business must be wound up because it is unlawful to carry on all or substantially all of the business under Section [801(4)], unless the act is appropriate for winding up partnership affairs;

(2) the partner has become a debtor in bankruptcy; or

(3) the partner has no authority to wind up partnership affairs, except by a transaction with a person who did not have notice of the absence of authority and:

(i) the person had extended credit to the partnership within two years before an event causing the winding up; or

(ii) the absence of authority had not been advertised in the manner provided for advertising the fact of winding up in Section 804(a)(2)(ii).

Deleted Section 805(c)(1) had been modified to reflect Section 801(4), which provides that not every illegality will cause a winding up. The change alleviated 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.

Deleted Section 805(c)(2) had continued the UPA rule that bankruptcy
automatically terminates the authority of the bankrupt partner, even as to innocent
creditors who are unaware of the bankruptcy. See Bromberg & Ribstein at 7:52.

Section 805 should be contrasted with Section 702, which winds down the
power of a partner being bought out. The power of a dissociating partner is now
limited to transactions entered into within two years after the partner’s dissociation.
The Committee rejected a similar limitation in Section 805. However, both situations
are now subject to the filing of a statement of dissociation or dissolution, as the case
may be, which operates to limit partners’ apparent authority to 90 days after filing.

SECTION 806. STATEMENT OF DISSOLUTION.

(a) After dissolution, a partner who has not wrongfully dissociated may file
a statement of dissolution stating the name of the partnership and that the
partnership has dissolved and is winding up its business.

(b) A statement of dissolution cancels a filed statement of partnership
authority to the extent provided in Section 303(d) and is a limitation on authority to
the extent provided in Section 303(e).

(c) For the purposes of Sections 301 and 805, a person not a partner is
deemed to have notice of the dissolution and the limitation on the partners’ authority
as a result of the statement of dissolution 90 days after it is filed.

(d) After filing and, where appropriate, recording a statement of dissolution,
the dissolved partnership may file and, where appropriate, record a statement of
partnership authority which will operate with respect to a person not a partner as
provided in Section 303(d) and (e) in any transaction, whether or not the transaction
is appropriate for winding up the partnership business.
COMMENT

The Committee considered requiring publication of a notice of dissolution. California has long had a mandatory publication rule. See Cal. Statutes, Partnerships, § 15035.5, adopted 1949. There was considerable difference of opinion as to whether published notice should be required and, if so, the proper effect to be accorded the notice. Some felt published notice should be an absolute bar to lingering apparent authority after dissolution, while others felt publication should be merely some evidence of a notice defense to be considered along with all the other facts and circumstances, such as the third party's prior dealing with the partnership. This seems to be the effect of publication in California. See Credit Bureaus of Merced County, Inc. v. Shipman, 334 P.2d 1036 (Cal. App. 1959). The Committee finally decided to authorize the optional filing and recording of a statement of dissolution. The incentives to file are so great, however, it is anticipated that filing will become routine and that creditors and other affected third parties will watch regularly for such filings.

Section 806(a) provides that, after an event of dissolution, any partner who has not wrongfully dissociated may file a statement of dissolution on behalf of the partnership. The execution, filing, and recording is governed by Section 105. The legal consequences of filing a statement of dissolution are similar to those of a statement of dissociation under Section 704.

Section 806(b) provides that a statement of dissolution cancels a filed statement of partnership authority to the extent provided in Section 303(d). Under this section, a filed or recorded limitation on the authority of a partner destroys the conclusive effect of a prior grant of authority to the extent it contradicts the prior grant. A statement of dissolution, in effect, limits the authority of all partners to acts which are appropriate for winding up the business. Third parties are thus at risk and must, if in doubt, inquire of the partnership whether a contemplated transaction is appropriate for winding up.

Under Section 806(b), a statement of dissolution also has the effect of a limitation on the partners' authority to the extent provided in Section 303(e). This section provides that nonpartners are deemed to know of a limitation on the authority of a partner to transfer real property held in the name of the partnership when a certified copy of the statement containing the limitation is recorded with the real estate records.

Section 806(d) provides that, after filing and recording a statement of dissolution, the partnership may file and record a new statement of partnership authority which will operate conclusively, as provided in Section 303(d) and (e), whether or not the transaction is appropriate for winding up the partnership business. This is a means of making partners' record authority conclusive, even after dissolution, thus precluding going behind the record to inquire into whether the transaction was appropriate for winding up.
Section 806(c) operates in conjunction with Sections 301 and 805 to wind down partners' apparent authority after dissolution. It provides that, for purposes of those sections, 90 days after the filing of a statement of dissolution nonpartners are deemed to have notice of the dissolution and the corresponding limitation on the authority of all partners. Sections 301 and 805 provide that a partner's lack of authority is binding on persons with notice thereof. Thus, after 90 days the statement of dissolution operates as constructive notice to the world conclusively limiting the apparent authority of partners to transactions which are appropriate for winding up the business.

SECTION 807. PARTNER'S LIABILITY TO OTHER PARTNERS AFTER DISSOLUTION.

(a) Except as provided in subsection (b) and Section 802(c)(2), after dissolution a partner is liable to the other partners for the partner's share of any partnership liability incurred under Section 805.

(b) The other partners are not liable to a partner who, with knowledge of the winding up, incurs a partnership liability under Section 805(2) by an act that is not appropriate for winding up the partnership business.

COMMENT

Section 807(a) [Section 804 of Naples draft] provides that, except as provided in subsection (b) and Section 802(c)(2), after dissolution each partner is liable to her co-partners by way of contribution for her share of any partnership liability incurred under Section 805. The latter section includes not only obligations that are appropriate for winding up the business, but also obligations that are inappropriate if within the partner's apparent authority. Section 807 draws no distinction as to the cause of the dissolution. Thus, as among the partners, all events that cause a winding up of the business are governed by RUPA Section 805 and treated alike, except when the dissolution is deferred under Section 802.

This is a change from UPA Section 33(1), which distinguishes among different causes of 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. The Committee could find no persuasive policy
reason to continue the more complicated rule.

Section 807(a) implements the suggestion in the ABA Report at 169:

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.

Section 807(b) creates an exception to the general rule in (a). It provides
that a partner is not entitled to contribution from the other partners if, with
knowledge of the winding up, nevertheless incurs a binding obligation that is
inappropriate for winding up. With slight variation, this 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 section also implements the ABA Report recommendation at 169 that
UPA 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.

Section 805 deviates from the UPA and the new Georgia law insofar as it
treats all events that trigger winding up alike. Hence, the acting partner with
knowledge is denied contribution, independent of the cause of the dissolution.

Section 103 implements the suggestion of the ABA Report at 169 that the
section be subject to contrary agreement of the partners.

SECTION 808. SETTLEMENT OF ACCOUNTS AMONG PARTNERS.

(a) In winding up the partnership business, the assets of the partnership
must be applied to discharge its obligations to creditors, including partners who are
creditors. Any surplus must be applied to pay in cash the net amount distributable
to partners in accordance with their right to distributions pursuant to subsection (b).
(b) Each partner is entitled to a settlement of all partnership accounts upon winding up the partnership business. In settling accounts among the partners, the profits and losses that result from the liquidation of the partnership assets must be credited and charged to the partners' accounts. The partnership shall make a distribution to a partner in an amount equal to that partner's positive balance. A partner shall contribute to the partnership an amount equal to that partner's negative balance.

(c) To the extent not taken into account in settling the accounts among partners pursuant to subsection (b), each partner shall contribute, in the proportion in which the partner shares partnership losses, the amount necessary to satisfy partnership obligations. If a partner fails to contribute, the other partners shall contribute, in the proportions in which the partners share partnership losses, the additional amount necessary to satisfy the partnership obligations. A partner or partner's legal representative may recover from the other partners any contributions the partner makes to the extent the amount contributed exceeds that partner's share of the partnership obligations.

(d) The estate of a deceased partner is liable for the partner's obligation to contribute to the partnership.

(e) An assignee for the benefit of creditors of a partnership or a partner, or a person appointed by a court to represent creditors of a partnership or a partner, may enforce a partner's obligation to contribute to the partnership.

COMMENT

Section 808 combines and extensively revises Sections 803 and 807 of the Naples draft.
Section 808(a) (formerly Section 803(a)) continues the rule in UPA Section 38(1) that there must be payment "In cash" when the partnership is liquidated. It disapproves 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 is that, given the partners are not getting along, they should not be forced into a cotenancy. On the other hand, there is 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.

Section 808(a) is related to Section 402, which provides: "A partner has no right to receive, and may not be required to accept, a distribution 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 the 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 [UPA] 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 UPA Section 38:
[Section 38] is intended to protect creditors as well as partners. In-kind distributions may affect a creditor's right to collect the debt owed since the assets of the partnership, as a whole, may be worth more than the assets once divided up. Thus, the creditor's ability to collect from the individual partners may be jeopardized. Secondly, if others are interested in the assets, a sale provides a more accurate means of establishing the market value of the assets and, thus, better assuring each partner his share in the value of the assets. Where only the partners are interested in the assets, a fair value can be determined without the necessity of a sale. The sale would be merely the partners bidding with each other without any competition. This process could be accomplished through negotiations or at trial with the court as a final arbitrator of the value of the assets.

The Wisconsin court, however, refused to accept even a narrow ground for following the Michigan decision: "The statute [is] quite clear that if a partner may force liquidation, he is entitled to his share of the partnership assets after creditors are paid in cash." A sale was required; it was not sufficient for the trial court to determine the fair market value of the assets and order [an amount paid] equal to his share in the assets. A "sale is the best means of determining the true fair market value of the assets. . . . While judicial sales in some instances may cause economic hardships, these hardships can be avoided by the use of partnership agreements."

The Naples draft contained a Section 803(b) which provided:

If the partnership business is wound up pursuant to a decree under Section [801(5)], 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.

This section has been deleted as unnecessary in light of the recent addition of Section 405, defining the liability of a partner to the partnership; Section 406(a), providing for an action by the partnership against a partner for any breach of the partnership agreement or other wrongful conduct; and Section 602, defining liability for wrongful dissociation. Compare Section 701(c) and (e) (damages for wrongful dissociation offset against buyout price).

Section 808 [formerly Section 807] also replaces UPA Section 40. Section 808(a) establishes the default rule for the application of partnership assets upon winding up. Since Naples, the Drafting Committee has abolished the rule subordinating inside debt to outside debt. Section 808(a) now provides that the assets of the partnership shall first be applied "to discharge its obligations to creditors, including partners who are creditors." This is consistent with the payout scheme in both RULPA and the RMBCA. See RULPA § 804; cf. RMBCA §§ 6.40(f), 14.05(a) (by implication). Parity for partner debt may be ephemeral, however, since partners are ultimately liable for all unsatisfied partnership debt.
Section 808(b) provides that each partner is entitled to a settlement of all partnership accounts upon winding up. It then establishes the default rules for how the partner's capital accounts are to be closed out. First, the profits and losses resulting from the liquidation of the partnership assets must be credited or charged to the partners' accounts, as the case may be. Then, the partnership shall make a distribution to each partner with a positive capital account balance. Any partner with a negative capital account balance must make a contribution to the partnership.

Section 808(b) eliminates the distinction in UPA Section 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, Section 808(b) speaks simply of the right of a partner to a liquidating distribution. This is an attempt to implement the logic of Sections 401 and 502, which is that contributions to capital and shares in profits and losses combine to determine the right to distributions.

More broadly, Section 808 eliminates the present structure of UPA Section 40 that refers to the "assets" and "liabilities" of the partnership. Section 401 continues the default rule that partners share all losses. Thus, partners are free to share "operating" losses differently from "capital" losses. The Committee concluded 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. That message could be confused 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.

The change in structure reflected in Section 808(b) is similar to RULPA Section 804, which 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.

Section 808 also reflects a decision to delete UPA Section 40(h) and (i). These sections gave partnership creditors priority as to partnership property and separate creditors priority as to separate property. These deletions were recommended by the ABA Report at 177-78:

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

Georgia did retain the jingle rule of the UPA notwithstanding the change in federal bankruptcy law. The reasons advanced were (i) that the rule is supported by strong policy, and (ii) that Georgia's adoption of the rule would bring it into line with the partnership law of virtually every other state. Professor Kennedy has pointed out that the jingle rule was incorporated in section 40 largely in deference to the provision for it in the Bankruptcy Act. The desirability of deferring to the federal bankruptcy rule continues, and the jingle rule should therefore be deleted from the UPA.

The dual priority rule is abolished in bankruptcy by Section 723(c) of the Bankruptcy Code (Title 11, USC):

(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 the Notes of the 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.

Section 808(c) provides that, to the extent not taken into account in settling the partners' accounts, each partner must contribute, in the proportion in which she shares losses, the amount necessary to satisfy partnership obligations. Solvent partners must also share proportionately in the shortfall caused by insolvent partners who fail to contribute.

Under Section 808(c), the estate of a deceased partner is entitled to recover any contributions made by the deceased partner or her estate to the extent the amount paid exceeds the partner's share of the liability.

Under Section 808(d), the estate of a deceased partner is liable for the partner's obligation to contribute to partnership losses.

Section 808(e) provides that an assignee for the benefit of creditors of a partnership or a partner (or other court appointed creditor representative) may enforce a partner's obligation to contribute to the partnership.
ARTICLE 9

CONVERSIONS AND MERGERS

Section 901. Conversion of Partnership to Limited Partnership.
Section 902. Conversion of Limited Partnership to Partnership.
Section 903. Effect of Conversion; Entity Unchanged.
Section 904. Merger of Partnerships.
Section 905. Effect of Merger.
Section 906. Statement of Merger.
Section 907. Nonexclusive.

SECTION 901. CONVERSION OF PARTNERSHIP TO LIMITED PARTNERSHIP.

(a) A partnership may be converted to a limited partnership pursuant to this section.

(b) The terms and conditions of a conversion of a partnership to a limited partnership must be approved by all the partners or by a number or percentage specified for conversion in the partnership agreement.

(c) After the conversion is approved by the partners, the partnership shall file a certificate of limited partnership which satisfies the requirements of [Section ____ of the State Limited Partnership Act] and includes:

(1) a statement that the partnership was converted to a limited partnership from a partnership;

(2) its former name; and
(3) a statement of the number of votes cast by the partners for and against the conversion and, if the vote is less than unanimous, the number or percentage required to approve the conversion under the partnership agreement.

(d) The conversion takes effect when the certificate of limited partnership is filed or at any later date specified in the certificate.

(e) A partner who becomes a limited partner as a result of the conversion remains liable as a partner for an obligation incurred by the partnership before the conversion takes effect. If the other party to a transaction with the limited partnership reasonably believes when entering the transaction that the limited partner is a general partner, the partner is liable for an obligation incurred by the limited partnership within 90 days after the conversion takes effect. The partner’s liability for all other obligations of the limited partnership incurred after the conversion takes effect is that of a limited partner as provided in the [State Limited Partnership Act].

COMMENT

Article 9 on conversions and mergers is new since the Naples draft. Many practitioners, as well as the ABA Ad Hoc Committee, urged the Drafting Committee to include conversion and merger provisions in RUPA, since such transactions are almost routine today.

Section 901 authorizes the conversion of a general partnership to a limited partnership and establishes a procedure for such conversion. Note that the RUPA definition of “partnership” is limited to a partnership created under this Act, that is, a general partnership; where a limited partnership is contemplated, Article 9 uses the term “limited partnership.”

At least one state already authorizes the conversion of a general to a limited partnership. See Va. Code 1950, § 50-73.11:1. Several states authorize the merger of limited partnerships (California, Georgia, Indiana, Kansas, Maryland, Mississippi, Texas, and South Carolina), while two states (Delaware and Tennessee) authorize limited partnerships to merge with a variety of other entities,

As Section 907 makes clear, the requirements of Section 901 are not mandatory, and a partnership may convert in any other manner provided by law. The requirements of Section 901 are merely a "safe harbor"; if they are followed, it can safely be said that the conversion is legally valid. Since most states have no other established procedure for conversion, it is likely that the Section 901 procedures will be used in virtually all cases.

Subsection (b) provides that the terms and conditions of the conversion must be approved by all the partners, unless the partnership agreement specifies otherwise.

Subsection (c) provides that, after approval, the partnership must file a certificate of limited partnership which satisfies the requirements of the limited partnership act, and in addition includes the requisite information concerning the conversion.

Subsection (d) provides that the conversion takes effect when the certificate is filed, unless a later date is specified.

Subsection (e) establishes the partners' liabilities following a conversion. A partner who becomes a limited partner as a result of the conversion remains fully liable as a general partner for any obligation arising before the effective date of the conversion. Moreover, third parties who transact business with the converted partnership unaware of a partner's new status as a limited partner are protected for 90 days after the conversion. Since the certificate of limited partnership must name all of the general partners (see RULPA Section 201(a)(3)) and the filing is public notice of the conversion, parties transacting business with the converted partnership can protect themselves by checking the record. A limited partner can avoid the lingering 90-day exposure as a general partner by giving actual notice of her limited partner status by giving actual notice to those transacting business with the partnership.

The Committee considered restricting the provisions authorizing conversions and mergers under Article 9 to domestic partnerships, but decided not to do so. First, since no filing is required for the creation of a partnership under RUPA, it is often unclear where a partnership is domiciled. Moreover, a partnership doing business in the state satisfies the definition of a partnership created under this Act since it is an association of two or more co-owners carrying on a business. Even a partnership clearly domiciled in another state may easily amend its partnership agreement to provide that its internal affairs are to be governed by the laws of the designated jurisdiction. Finally, the Committee could think of no harm or other mischief likely to result from extending to foreign partnerships the right to convert or merge under local law.
SECTION 902. CONVERSION OF LIMITED PARTNERSHIP TO PARTNERSHIP.

(a) A limited partnership may be converted to a partnership pursuant to this section.

(b) Notwithstanding a provision to the contrary in a limited partnership agreement, the terms and conditions of a conversion of a limited partnership to a partnership must be approved by all the partners.

(c) After the conversion is approved by the partners, the limited partnership shall cancel its certificate of limited partnership pursuant to [Section ____ of the State Limited Partnership Act].

(d) The conversion takes effect when the certificate of limited partnership is canceled.

(e) A limited partner who becomes a partner as a result of the conversion remains liable only as a limited partner for an obligation incurred by the limited partnership before the conversion takes effect. The limited partner is liable as a partner for an obligation of the partnership incurred after the conversion takes effect.

COMMENT

Section 902 authorizes the conversion of a limited partnership to a general partnership and provides a "safe harbor" for the conversion.

Subsection (b) provides that the conversion must be approved by all the partners, both general and limited, even if the partnership agreement provides to the contrary. The Drafting Committee felt that a limited partner should not be exposed to personal liability as a general partner without her consent, despite an agreement to the contrary, since such a conversion may never have been contemplated by the limited partner when she invested in the partnership.

Subsection (c) provides that after approval of the conversion the converted partnership must cancel its certificate of limited partnership pursuant to RULPA Section 203.
Subsection (d) provides that the conversion takes effect when the certificate of limited partnership is cancelled.

Subsection (e) provides that a limited partner who becomes a general partner becomes liable as a general partner for all obligations incurred after the effective date of the conversion, but remains only limitedly liable for obligations incurred before the conversion.

SECTION 903. EFFECT OF CONVERSION; ENTITY UNCHANGED.

(a) A partnership or limited partnership that has been converted pursuant to this article is for all purposes the same entity that existed before the conversion.

(b) When a conversion takes effect:

(1) all property owned by the converting partnership or limited partnership remains vested in the converted entity;

(2) all obligations of the converting partnership or limited partnership continue as obligations of the converted entity; and

(3) an action or proceeding pending against the converting partnership or limited partnership may be continued as if the conversion had not occurred.

COMMENT

Section 903 sets forth the effect of a conversion on the partnership. Subsection (a) makes emphatic that the converted partnership is for all purposes the same entity as before the conversion. This preserves the many benefits of the entity nature of partnerships.

Subsection (b) provides that upon conversion: (1) all partnership property remains vested in the converted entity; (2) all obligations remain the obligations of the converted entity; and (3) all pending legal actions may be continued as if the conversion had not occurred. The term "entity" as used in Article 9 refers to either or both general and limited partnerships as the context requires.

Under subsection (b)(1), title to partnership property vests in the converted partnership without further act or deed and without reversion or impairment. Since this is a matter of general property law, the Committee felt that it was not necessary to repeat it in the Act.
SECTION 904. MERGER OF PARTNERSHIPS.

(a) Pursuant to a plan of merger approved as provided in subsection (c), a partnership may be merged with one or more partnerships or limited partnerships.

(b) The plan of merger must set forth:

(1) the name of each partnership or limited partnership that is a party to the merger;

(2) the name of the surviving entity into which the other partnerships or limited partnerships will merge;

(3) whether the surviving entity is a partnership or a limited partnership and the status of each partner;

(4) the terms and conditions of the merger;

(5) the manner and basis of converting the interests of each party to the merger into interests or obligations of the surviving entity, or into cash or other property in whole or part; and

(6) the street address of the surviving entity's chief executive office.

(c) The plan of merger must be approved:

(1) in the case of a partnership that is a party to the merger, by all the partners, or a number or percentage specified for merger in the partnership agreement; and

(2) in the case of a limited partnership that is a party to the merger, by the vote required for approval of a merger by the law of the state or foreign jurisdiction in which the limited partnership is organized and, in the absence of such specifically applicable law, by all the partners, notwithstanding a provision to the contrary in the partnership agreement.
(d) After a plan of merger is approved and before the merger takes effect, the plan may be amended or abandoned as provided in the plan.

(e) The merger takes effect on the later of:

(1) the approval of the plan of merger by each party to the merger, as provided in subsection (c);

(2) the filing by each party to the merger of any documents required by statute to be filed as a condition to the effectiveness of the merger; or

(3) any effective date specified in the plan of merger.

COMMENT

Section 904 provides a "safe harbor" for the merger of a general partnership and one or more general or limited partnerships. The surviving entity may be either a general or a limited partnership.

The plan of merger must set forth the information required by subsection (b), including the status of each partner and the manner and basis of converting the interests of each party to the merger into interests or obligations of the surviving entity.

Subsection (c) provides that the plan of merger must be approved: (1) by all the partners of a general partnership, unless the partnership agreement provides otherwise specifically for mergers; and (2) by all the partners of a limited partnership, including both general and limited partners, notwithstanding a contrary provision in the partnership agreement, unless specifically authorized by the law of the jurisdiction in which the limited partnership is organized. Again, the Drafting Committee wished to protect limited partners from exposure to liability as general partners without their consent.

Subsection (d) provides that the plan of merger may be amended or abandoned at any time before the merger takes effect, if the plan so provides.

Subsection (e) provides that the merger takes effect on the later of: (1) approval by all parties to the merger; (2) filing of all required documents; or (3) the effective date specified in the plan. The surviving entity should file promptly all notices and documents relating to the merger required by all applicable statutes governing the entities that are parties to the merger, including articles of merger or the amendment or cancellation of a statement of partnership authority or certificate of limited partnership.
SECTION 905. EFFECT OF MERGER.

(a) When a merger takes effect:

(1) every partnership or limited partnership that is a party to the merger other than the surviving entity ceases to exist;

(2) all property owned by each of the merged partnerships or limited partnerships vests in the surviving entity;

(3) all obligations of every partnership or limited partnership that is a party to the merger become the obligations of the surviving entity; and

(4) an action or proceeding pending against a partnership or limited partnership that is a party to the merger may be continued as if the merger had not occurred or the surviving entity may be substituted as a party to the action or proceeding.

(b) The [Secretary of State] of this State is the agent for service of process in an action or proceeding against a surviving foreign partnership or limited partnership to enforce an obligation of a domestic partnership or limited partnership that is a party to a merger. The surviving entity shall promptly notify the [Secretary of State] of the mailing address of its chief executive office and of any change of address. Upon receipt of process, the [Secretary of State] shall mail a copy of the process to the surviving foreign partnership or limited partnership.

(c) A partner of the surviving partnership or limited partnership is liable for:

(1) all obligations of a party to the merger for which the partner was personally liable before the merger;
(2) all other obligations of the surviving entity incurred before the
merger by a party to the merger, but those obligations may be satisfied only out of
property of that entity; and

(3) all obligations of the surviving entity incurred after the merger takes
effect.

(d) If the obligations incurred before the merger by a party to the merger
are not satisfied out of the property of the surviving partnership or limited
partnership, the partners of that party immediately before the effective date of the
merger shall contribute the amount necessary to satisfy that party's obligations to
the surviving entity, in the manner provided in Section 808(c) as if the merged party
were dissolved.

(e) A partner of a party to a merger who does not become a partner of the
surviving partnership or limited partnership is dissociated from the entity, of which
that partner was a partner, as of the date the merger takes effect. The surviving
dentity shall cause the partner's interest in the entity to be purchased under Section
701. The surviving entity is bound under Section 702 by an act of a partner
dissociated under this subsection, and the partner is liable under Section 703 for
transactions entered into by the surviving entity after the merger takes effect.

**COMMENT**

Section 905 states the effect of a merger on the partnerships which are
parties to the merger and on the individual partners. Subsection (a) provides that
when the merger takes effect: (1) every partnership that is a party to the merger
other than the surviving entity ceases to exist; (2) all property owned by the parties
to the merger vests in the surviving entity; (3) all obligations of every party to the
merger become the obligations of the surviving entity; and (4) all legal actions
pending against a party to the merger may be continued as if the merger had not
occurred or the surviving entity may be substituted as a party. Title to partnership
property vests in the surviving entity without further act or deed and without reversion or impairment.

Subsection (b) makes the secretary of state the agent for service of process in any action against the surviving entity, if it is a foreign entity, to enforce an obligation of a domestic partnership that is a party to the merger. The purpose of this rule is to make it more convenient for local creditors to sue a foreign surviving entity when the credit was extended to a domestic partnership which has disappeared as a result of the merger.

Subsection (c) provides that a partner of the surviving entity is liable for: (1) all obligations for which the partner was personally liable before the merger; (2) all other obligations of the surviving entity incurred before the merger by a party to the merger, but such obligations may be satisfied only out of the surviving entity's partnership property; and (3) all obligations incurred by the surviving entity after the merger. This scheme of liability is similar to that of an incoming partner under Section 309. Thus, only the surviving partnership itself is liable for all obligations, including obligations incurred by every constituent party before the merger. Accordingly, the partners are liable for all such obligations, but only to the extent of their partnership interests. The partners are not personally liable for all obligations of the surviving entity, only those incurred before the merger by the partnership of which they were a partner and those incurred by the surviving entity after the merger.

Subsection (d) requires partners to contribute the amount necessary to satisfy all obligations for which they were personally liable before the merger, if such obligations are not satisfied out of the partnership property of the surviving entity, in the same manner provided in Section 808(c) upon dissolution.

Subsection (e) provides for the dissociation of a partner of a party to the merger who does not become a partner in the surviving entity. The surviving entity must buy out such partner's interest in the partnership under Section 701. The partner's agency power is wound down pursuant to Section 702, and the partner is subject to lingering liability for two years under Section 703. However, the dissociated partner can limit to 90 days her exposure to liability under Section 703 by filing a statement of dissociation under Section 704.

SECTION 906. STATEMENT OF MERGER.

(a) After a merger, the surviving partnership or limited partnership may file a statement that one or more partnerships or limited partnerships have merged into the surviving entity.

(b) A statement of merger must contain:
(1) the name of each partnership or limited partnership that is a party to the merger;

(2) the name of the surviving entity into which the other partnerships or limited partnership were merged;

(3) the street address of the surviving entity's chief executive office and of an office in this State, if any; and

(4) whether the surviving entity is a partnership or limited partnership.

(c) Except as provided in subsection (d), for the purposes of Section 302, property of the surviving partnership or limited partnership which before the merger was held in the name of another party to the merger is property held in the name of the surviving entity upon filing a statement of merger.

(d) For the purposes of Section 302, real property of the surviving partnership or limited partnership which before the merger was held in the name of another party to the merger is property held in the name of the surviving entity upon recording a certified copy of the statement of merger in the office for recording transfers of that real property.

(e) A filed and, where appropriate, recorded statement of merger, executed and declared to be accurate pursuant to Section 105(e), stating the name of a partnership or limited partnership that is a party to the merger in whose name property was held before the merger and the name of the surviving entity, but not containing all of the other information required by subsection (b), operates with respect to the partnerships or limited partnerships named to the extent provided in subsections (c) and (d).
COMMENT

Section 906(a) provides that the surviving partnership or limited partnership, as the case may be, may file a statement of merger. The execution, filing, and recording of the statement is governed by Section 105.

Subsection (b) requires the statement to contain the name of each party to the merger, the name and address of the surviving entity, and whether it is a general or limited partnership.

Subsection (c) provides that, for the purpose of the Section 302 rules regarding the transfer of partnership property, all personal and intangible property which before the merger was held in the name of a party to the merger becomes, upon the filing of the statement of merger with the secretary of state, property held in the name of the surviving entity.

Subsection (d) provides a similar rule for real property, except that it does not become property held in the name of the surviving entity until a certified copy of the statement of merger is recorded in the office for recording transfers of that real property under local law.

Subsection (e) is a savings provision in the event a statement of merger is filed or recorded, but fails to contain all of the information required by subsection (b). If the statement correctly states the name of the party to the merger in whose name the property was held before the merger, and thus would be found by someone searching the record, it will have the operative effect of subsections (c) and (d), provided that the statement is executed and declared to be accurate pursuant to Section 105(e).

SECTION 907. NONEXCLUSIVE. This article is not exclusive.

Partnerships or limited partnerships may be converted or merged in any other manner provided by law.

COMMENT

Section 907 provides that Article 9 is not exclusive. It is merely a "safe harbor." Partnerships may be converted or merged in any other manner provided by law. The limited partnership acts of several states authorize the conversion of a general partnership into a limited partnership or the merger of a limited partnership with a general partnership. See the Comment to Section 901. These procedures may be followed in lieu of Article 9.
ARTICLE 10

MISCELLANEOUS PROVISIONS

Section 1001. 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.

SECTION 1001. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This [Act] may be cited as the Uniform Partnership Act (199_).

SECTION 1002. SHORT TITLE. This [Act] may be cited as the Uniform Partnership Act (199_).

SECTION 1003. SEVERABILITY. 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.

COMMENT

The language of this section is from the Conference's Drafting Rule 23.

SECTION 1004. EFFECTIVE DATE. This [Act] takes effect .............

COMMENT

This section is based on UPA Section 44.

SECTION 1005. REPEALS. The following acts and parts of acts are
repealed: [the State Partnership Act as amended and in effect immediately prior to
the adoption of this [Act]].

COMMENT

Section 1005 implements 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." The language of the section is taken from the Conference's
Drafting Rules' Sample Form.

SECTION 1006. APPLICATION TO EXISTING RELATIONSHIPS. (a)
Except as otherwise provided in this section, this [Act] applies to all partnerships in
existence on its effective date that were formed under the [State] Partnership Act
or any predecessor statute providing for the formation, operation, and liquidation of
partnerships.

(b) This [Act] does not impair the obligations of a contract existing when
the [Act] goes into effect or affect an action or proceeding begun or right accrued
before this [Act] takes effect.
(c) A judgment against a partnership or a partner in an action commenced before the effective date of this [Act] may be enforced in the same manner as a judgment rendered before the effective date of this [Act].

COMMENT

This section implements the ABA recommendation that the revised act should apply to partnerships formed under the prior act. The ABA Report explains at 183-84:

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.

Subsection (c) identifies the enforcement of judgments against partners and the partnership under Section 307 as substantive rights that are changed by RUPA and provides that judgments obtained in actions commenced before the effective date of the revised Act may be enforced in the same manner as judgments rendered before the effective date. The UPA was silent on this point, and the laws of some states did not require the exhaustion of partnership assets before levying on the partners’ separate property to enforce judgments based on claims against the partnership.
AMENDMENTS TO
UNIFORM PARTNERSHIP ACT (199_)
August 3, 1992

AMENDMENT 1
Section 101 of the Act is amended to read:

SECTION 101. DEFINITIONS. In this [Act]:
(1) "Business" includes every trade, occupation, and profession.
(2) "Debtor in bankruptcy" means a person who is the subject of:
   (i) an order for relief under Title 11 of the United States Code or a comparable order under a successor statute of general application; or
   (ii) a comparable order under federal or state law governing insolvency.
(3) "Distribution" means a transfer of cash or other property from a partnership to a partner in the partner's capacity as a partner, or to the partner's transferee.
(4) "Partnership" means an association of two or more persons to carry on as co-owners a business for profit created under this [Act] or a comparable statute of another jurisdiction.
"Partnership agreement" means an agreement, written or oral, among the partners concerning the partnership.

"Partnership at will" means a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking.

"Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

"Property" means all property, real, personal, or mixed, tangible or intangible, or any interest therein.

"State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

"Statement" means a statement of partnership authority under Section 303, a statement of denial under Section 304, a statement of dissociation under Section 704, a statement of dissolution under Section 806, a statement of merger under Section 906, or an amendment or cancellation of any of the foregoing.
(1) "Transfer" includes an assignment, conveyance, lease, mortgage, deed, and encumbrance.

AMENDMENT 2

Section 102 of the Act is amended to read:

SECTION 102. KNOWLEDGE AND NOTICE.

(a) A person knows a fact if the person has knowledge of it.

(b) A person has notice of a fact if the person:

(1) knows of it;

(2) has received a notice of it; or

(3) has reason to know it exists from all of the facts known to that person at the time in question.

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

(d) A person is notified or receives a notice of a fact when:

(1) the existence of the fact comes to the person's attention; or

(2) the notice is duly delivered at the person's place of business or at any other place held out by the person as a place for receiving communications.
(e) Except as provided in subsection (f), notice received by a person who is not an individual, including a partnership, is effective for a particular transaction when the notice is brought to the attention of the individual conducting the transaction, or in any event when the notice would have been brought to that individual's attention if the person had exercised due diligence. Such a person 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 person 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.

(f) Receipt of notice by a partner of a matter relating to the partnership is effective immediately as notice to the partnership, but is not effective in the case of fraud on the partnership committed by or with the consent of the partner who received the notice.
Section 103 of the Act is amended to read:

SECTION 103. EFFECT OF PARTNERSHIP AGREEMENT;

NONWAIVABLE PROVISIONS.

(a) Except as provided in subsection (b), a partnership agreement governs relations among the partners and between the partners and the partnership. To the extent the partnership agreement does not otherwise provide, this Act governs relations among the partners and between the partners and the partnership.

(b) A partnership agreement may not:

(1) vary the rights and duties under Section 105 except to eliminate the duty to provide copies of statements to all the partners;

(2) unreasonably restrict a partner's right of access to books and records under Section 403(b);

(3) eliminate the duty of loyalty under Section 404(b);

(4) limit the liability of a partner for intentional misconduct or knowing violation of law under Section 404(d);

(5) eliminate the obligation of good faith and fair dealing under Section 404(d) 404(e);
(4) (6) vary the power to withdraw as a partner under Section 601(1), except to require the notice to be in writing;

(5) (7) vary the right to expulsion of a partner by a court in the events specified in Section 601(5);

(6) (8) vary the requirement to wind up the partnership business in cases specified in Section 601(4), (5), or (6); or

(7) (9) restrict rights of third parties under this [Act].

AMENDMENT 4

Section 105 of the Act is amended to read:

SECTION 105. EXECUTION, FILING, AND RECORDING OF STATEMENTS.

(a) A statement may be filed in the office of [the Secretary of State]. A certified copy of a statement that is filed in an office in another state may be filed in the office of [the Secretary of State]. Either filing has the effect provided in this [Act] with respect to partnership property located in or transactions that occur in this State.

(b) Only a certified copy of a statement that has been filed in the office of the [Secretary of State] may be that is recorded in an the office for recording
transfers of real property shall have the effect provided for recorded statements in this [Act]. A recorded statement that is not a certified copy of a statement filed in the office of the [Secretary of State] shall not have the effect provided for recorded statements in this [Act].

(c) A statement that may be filed by a partnership must be executed by at least two partners. Other statements must be executed by a partner or other person authorized by this [Act]. An individual who executes a statement as, or on behalf of, a partner or other person named as a partner in a statement must personally declare under penalty of perjury that the contents of the statement are accurate.

(d) A person authorized by this [Act] to file a statement may amend or cancel the statement by filing an amendment or cancellation that names the partnership, identifies the statement, and states the substance of the amendment or cancellation.

(e) A person who files a statement pursuant to this section shall promptly send a copy of the statement to every partner, and to any other person named as a partner in the statement. Failure to send a copy of a statement to a partner or other person does not affect limit the validity effectiveness of the statement as to a person not a partner.
(f) The [Secretary of State] may collect a fee for filing or providing a certified copy of a statement. The [officers responsible for] recording transfers of real property may collect a fee for recording a statement.

AMENDMENT 5
Section 202 of the Act is amended to read:

SECTION 202. CREATION OF PARTNERSHIP.

(a) Except as provided in subsection (b), the association of two or more persons to carry on a business for profit as co-owners creates a partnership, whether or not the persons intend to create a partnership.

(b) An association created under a statute other than this [Act], any predecessor law, or a comparable statute of another jurisdiction is not a partnership.

(c) In determining whether a partnership is created, the following rules apply:

(1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

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

(3) The receipt by a person of a share of the profits of a business is prima facie evidence that the person is a partner in the business, but that inference may not be drawn if the profits were received in payment:

(i) of a debt by installments or otherwise;
(ii) for services as an independent contractor, or of wages or other compensation to an employee;
(iii) of rent;
(iv) of an annuity or other retirement or health benefit to a beneficiary, representative, or designee of a deceased or retired partner;
(v) of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral; or
(vi) of consideration for the sale of the goodwill of a business or other property by installments or otherwise.
(d) Except as provided by Section 308, persons who are not partners as to each other are not partners as to other persons.

(e) A partnership created under this [Act] is a general partnership, and the partners are general partners of the partnership.

AMENDMENT 6

Section 301 of the Act is amended to read:

SECTION 301. PARTNER AGENT OF PARTNERSHIP. Subject to the effect of a statement of partnership authority pursuant to Section 303:

(1) Each partner is an agent of the partnership for the purpose of its business. Any act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the usual way the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner has no authority to act for the partnership in the particular matter and the person with whom the partner is dealing knows or has received a notice that the partner lacks authority.

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

AMENDMENT 7

Section 302 of the Act is amended to read:

SECTION 302. TRANSFER OF PARTNERSHIP PROPERTY.

(a) Subject to the effect of a statement of partnership authority pursuant to Section 303:

(1) Partnership property held in the name of the partnership may be transferred by an instrument of transfer executed by any partner in the partnership name.

(2) Partnership property held in the name of one or more partners with an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, even if the name of the partnership is not indicated, may be transferred by an instrument of transfer executed by the persons in whose name the property is held.

(3) A partnership may recover property transferred under this subsection if it proves that execution of the instrument of transfer did not bind the partnership under Section 301, unless the property was transferred by the initial transferee or a person claiming through the initial transferee to a subsequent
transferee who gave value without having notice that the 
person who executed the instrument of initial transfer 
lacked authority to bind the partnership.

(b) Partnership property held in the name of one 
or more persons other than the partnership, without an 
indication in the instrument transferring the property 
to them of their capacity as partners or of the 
existence of a partnership, may be transferred free of 
any claims of the partnership or the partners by the 
persons in whose name the property is held to a 
transferee who gives value without having notice that it 
is partnership property.

(c) If a person holds all of the partners' 
interests in the partnership, all of the partnership 
property vests in that person. That person may execute 
documents in the name of the partnership to evidence 
vesting of the property in that person and may file or 
record those documents.

AMENDMENT 8

Section 303 of the Act is amended to read:

SECTION 303. STATEMENT OF PARTNERSHIP AUTHORITY.

(a) A partnership may file a statement of 
partnership authority, which:

(1) must include:

(i) the name of the partnership;
(ii) the street address of its chief executive office and of an office in this State, if any;

(iii) the names name and mailing addresses address of all of the partners each partner or of an agent appointed and maintained by the partnership for the purpose of subsection (b); and

(iv) a statement specifying the names of the partners authorized to execute an instrument transferring real property held in the name of the partnership; and

(2) may include a statement of the authority, or of limitations on the authority, of some or all of the partners to enter into other transactions on behalf of the partnership and any other matter.

(b) If a statement of partnership authority names an agent, the agent shall maintain a list of the names and mailing addresses of all of the partners and make it available to any person on request for good cause shown.

(c) If a filed statement of partnership authority is executed pursuant to Section 105(e) and states the name of the partnership but does not contain all of the other information required by subsection (a), the statement nevertheless operates with respect to a person not a partner as provided in subsections (d) and (e).

(d) Except as provided in subsections (e) and (f), and (g), a filed statement of partnership authority
supplements the authority of a partner to enter into transactions on behalf of the partnership as follows:

(1) Except for transfers of real property, a grant of authority contained in a filed statement of partnership authority is conclusive, in favor of a person who gives value without knowledge to the contrary, so long as and to the extent that a limitation on that authority is not then contained in another filed statement. A filed cancellation of a limitation on authority revives the previous grant of authority.

(2) A grant of authority to transfer real property held in the name of the partnership contained in a certified copy of a filed statement of partnership authority recorded in the office for recording transfers of that real property is conclusive, in favor of a person who gives value without knowledge to the contrary, so long as and to the extent that a certified copy of a filed statement containing a limitation on that authority is not then recorded in the office for recording transfers of that real property. The recording in the office for recording transfers of that real property of a certified copy of a filed cancellation of a limitation on authority revives the previous grant of authority.

(e) A person not a partner is deemed to know of a limitation on the authority of a partner to transfer
real property held in the name of the partnership if a certified copy of the filed statement containing the limitation on authority is recorded in the office for recording transfers of that real property.

(f) Except as provided in subsection (e) and Sections 704 and 805, a person not a partner is not deemed to know of a limitation on the authority of a partner contained in a filed statement.

(fff) (g) Unless earlier canceled, a filed statement of partnership authority is canceled by operation of law five years after the date on which the statement, or the most recent amendment, was filed with the [Secretary of State].

AMENDMENT 9

Section 304 of the Act is amended to read:

SECTION 304. STATEMENT OF DENIAL. A partner or other person named as a partner in a filed statement of partnership authority or in a list maintained by an agent pursuant to Section 303(b) may file a statement of denial stating the name of the partnership and the fact that is being denied, which may include denial of a person's authority or status as a partner. A statement of denial is a limitation on authority to the extent provided in Section 303(d) and (e).
AMENDMENT 10

Section 307 of the Act is amended to read:

SECTION 307. ACTION ACTIONS BY AND AGAINST PARTNERSHIP AND PARTNERS.

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

(b) An action may be brought against the partnership and any or all of the partners in the same action or in separate actions.

(c) A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is a judgment against the partner.

(d) A judgment creditor of a partner may not levy execution against the assets of the partner to satisfy a judgment based on a claim against the partnership unless:

(1) a judgment based on the same claim has been obtained against the partnership and a writ of execution on the judgment has been returned unsatisfied in whole or in part;

(2) an involuntary case under Title 11 of the United States Code has been commenced against the partnership and has not been dismissed within 60 days after commencement, or the partnership has commenced a
voluntary case under Title 11 of the United States Code and the case has not been dismissed;

(3) the partner has agreed that the creditor need not exhaust partnership assets;

(4) a court grants permission to the judgment creditor to levy execution against the assets of a partner based on a finding that partnership assets subject to execution within this State are clearly insufficient to satisfy the judgment, that exhaustion of partnership assets is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's inherent equitable powers; or

(5) liability is imposed on the partner by law or contract independent of the existence of the partnership.

(e) This section applies to any partnership liability or obligation resulting from a representation by a partner or purported partner under Section 308(a) or (b).

AMENDMENT 11

Section 308 of the Act is amended to read:

SECTION 308. PURPORTED PARTNER.

(a) If a person, by words spoken or written or by conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or
with one or more persons not partners, the purported partner is liable to a person to whom the representation is made and who, relying on the representation, gives credit to enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported partner's consent, is made in a public manner, the purported partner is liable to a person who gives credit in reliance relies upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable as if the purported partner were a partner. If no partnership liability results, the purported partner is liable jointly and severally with any other person consenting to the representation.

(b) If a person is thus represented to be a partner in an existing partnership, or with one or more persons not partners, the purported partner is an agent of persons consenting to the representation to bind them to the same extent and in the same manner as if the purported partner were a partner, with respect to persons who give credit enter into transactions in reliance upon the representation. If all of the partners of the existing partnership consent to the representation, a partnership act or obligation results.
If fewer than all of the partners of the existing partnership consent to the representation, the person acting and the partners consenting to the representation are jointly and severally liable.

(c) A person is not a partner in a partnership solely because the person is named by another in a statement of partnership authority.

(d) A person does not continue to be a partner solely because of a failure to file a statement of dissociation or to amend a statement of partnership authority to reflect indicate the partner's dissociation from the partnership.

AMENDMENT 12

Section 404 of the Act is amended to read:

SECTION 404. GENERAL STANDARDS OF PARTNER'S CONDUCT.

(a) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in this section. The duties set forth in this [Act] comprise all of the duties, fiduciary or otherwise, appropriate to the partnership relationship.

(b) A partner's duty of loyalty to the partnership and the other partners is limited to the following:
(1) to account to the partnership and hold as
trustee for it any property, profit, or benefit derived
by the partner, without the consent of the other
partners, in the conduct and winding up of the
partnership business or from a use or appropriation by
the partner of partnership property or opportunity;

(2) to refrain from dealing with the
partnership in the conduct or winding up of the
partnership business, as or on behalf of a party having
an interest adverse to the partnership without the
consent of the other partners; and

(3) to refrain from competing with the
partnership in the conduct of the partnership business
without the consent of the other partners before the
dissolution of the partnership.

(c) A partner's duty of loyalty may not be
eliminated by agreement, but the partners may by
agreement exempt identify specific types or categories
of activities from being breaches of that do not violate
the duty of loyalty.

(d) A partner's duty of care to the partnership
and the other partners in the conduct and winding up of
the partnership business is limited to acting in a
manner that does not constitute gross negligence or
willful misconduct refraining from engaging in grossly
negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(e) A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement, and exercise any rights, fairly and in good faith. The obligation of good faith and fair dealing may not be eliminated by agreement, but the partners may by agreement determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable.

(f) A partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the partner's conduct furthers the partner's own interest. A partner may lend money to and transact other business with the partnership. The rights and obligations of a partner who lends money to or transacts business with the partnership are the same as those of a person who is not a partner, subject to other applicable law.

(g) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.
AMENDMENT 13

Section 405 of the Act is amended to read:

SECTION 405. PARTNER'S LIABILITY TO PARTNERSHIP. A partner is liable to the partnership for a breach of the partnership agreement, or other wrongful conduct harming for the violation of any duty to the partnership, causing harm to the partnership.

AMENDMENT 14

Section 406 of the Act is amended to read:

SECTION 406. REMEDIES OF PARTNERSHIP AND PARTNERS.

(a) A partnership may maintain an action against a partner for a breach of the partnership agreement, or other wrongful conduct harming for the violation of any duty to the partnership, causing harm to the partnership.

(b) A partner may maintain an action against the partnership or another partner for legal or equitable relief, including an accounting as to partnership business, to:

(1) enforce a right under the partnership agreement;

(2) enforce a right under this [Act], including:

(i) the partner's rights under Sections 401, 403, and 404;
(ii) the partner's right on dissociation to have the partner's interest in the partnership purchased pursuant to Section 701 or enforce any other right under Article 6 or 7; or

(iii) the partner's right to compel a dissolution and winding up of the partnership business under Section 801 or enforce any other right under Article 8; or

(3) enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.

(c) The accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law.

AMENDMENT 15

Section 503 of the Act is amended to read:

SECTION 503. TRANSFER OF PARTNER'S TRANSFERABLE INTEREST.

(a) A transfer, in whole or in part, of a partner's transferable interest in the partnership:

(1) is permissible, in whole or in part;
(2) does not by itself cause a winding up of
the partnership business; and

(3) does not, as against the other partners or
the partnership, entitle the transferee, during the
continuance of the partnership, to participate in the
management or conduct of the partnership business, to
require access to information concerning or an account
of partnership transactions, or to inspect or copy the
partnership books or records.

(b) A transferee of a partner's transferable
interest in the partnership is entitled to receive, in
accordance with the transfer, distributions to which the
transferor would otherwise be entitled. Upon transfer,
the transferor has retains the rights and duties of a
partner other than the interest in distributions
transferred.

(c) If an event causes a dissolution and winding
up of the partnership business under Section 801, a
transferee is entitled to receive, in accordance with
the transfer, the net amount otherwise distributable to
the transferor. In a dissolution and winding up, a
transferee may require an accounting only from the date
of the last account agreed to by all of the partners.

(d) Until receipt of notice of a transfer, a
partnership has no duty to give effect to the
transferee's rights under this section.
AMENDMENT 16

Section 602 of the Act is amended to read:

SECTION 602. PARTNER'S WRONGFUL DISSOCIATION.

(a) A partner's dissociation is wrongful only if:

(1) it is in breach of an express provision of the partnership agreement; or

(2) in the case of a partnership for a definite term or particular undertaking, before the expiration of the term or the completion of the undertaking:

(i) the partner withdraws by express will, unless the withdrawal follows the dissociation of another partner and results in a dissolution of right to dissolve the partnership under Section 801(2)(i);

(ii) the partner is expelled by judicial decree under Section 601(5); or

(iii) in the case of a partner who is not an individual, trust other than a business trust, or estate, the partner is expelled or otherwise dissociated because it willfully dissolved or terminated.

(b) A wrongfully dissociating partner who wrongfully dissociates is liable to the partnership and to the other partners for damages caused by the dissociation. That liability is in addition to any other liability of the partner to the partnership or to the other partners.
AMENDMENT 17

Section 603 of the Act is amended to read:

SECTION 603. EFFECT OF PARTNER'S DISSOCIATION.

(a) A dissociated partner's interest in the partnership must be purchased pursuant to Article 7 unless the partner's dissociation results in a dissolution and winding up of the partnership business under Article 8.

(b) Upon a partner's dissociation, the that partner's right to participate in the management and conduct of the partnership business is terminated, except as provided in Article 8 Section 804, and that partner's duties (i) under Section 404(b)(1) and (2) and (d) continue only with regard to matters or events that occurred before the dissociation, and (ii) under Section 404(b)(3) terminate.

AMENDMENT 18

Section 702 of the Act is amended to read:

SECTION 702. DISSOCIATED PARTNER'S POWER TO BIND AND LIABILITY TO PARTNERSHIP.

(a) For two years after a partner dissociates without resulting in a dissolution and winding up of the partnership business, the partnership, including a surviving partnership under Article 9, is bound by an
act of the dissociated partner that would have bound the partnership under Section 301 before dissociation only if the other party to the transaction:

(i) reasonably believes when entering the transaction that the dissociated partner is a partner at that time;

(ii) does not have notice of the partner's dissociation; and

(iii) is not deemed to have notice under Section 704.

(b) A dissociated partner shall indemnify the partnership against any loss caused to the partnership arising from an obligation incurred by the dissociated partner after dissociation, for which the partnership is liable under subsection (a).

AMENDMENT 19

Section 703 of the Act is amended to read:

SECTION 703. DISSOCIATED PARTNER'S LIABILITY TO OTHER PERSONS.

(a) A partner's dissociation does not of itself discharge the partner's liability for a partnership obligation incurred before dissociation. A dissociated partner is not liable for a partnership obligation incurred after dissociation except as provided in subsection (b).
(b) A partner who dissociates without resulting in a dissolution and winding up of the partnership business is liable as a partner to the other party in a transaction entered into by the partnership or a surviving partnership under Article 9 within two years after the partner's dissociation, only if the other party to the transaction:

(i) reasonably believes when entering the transaction that the dissociated partner is a partner at that time;

(ii) does not have notice of the partner's dissociation and

(iii) is not deemed to have notice under Section 704.

(c) By agreement with the partnership creditor and the partners continuing the business, a dissociated partner may be released from liability for a partnership obligation.

(d) A dissociated partner is released from liability for a partnership obligation if a partnership creditor, with notice of the partner's dissociation but without the partner's consent, agrees to a material alteration in the nature or time of payment of a partnership obligation.
AMENDMENT 20

Section 704 of the Act is amended to read:

SECTION 704. STATEMENT OF DISSOCIATION.

(a) A dissociated partner or the partnership may file a statement of dissociation stating the name of the partnership and that the partner is dissociated from the partnership. A statement of dissociation is a limitation on the authority of a dissociated partner to the extent provided in for the purposes of Section 303(d) and (e).

(b) For the purposes of Sections 301, 702, and 703(b), a person not a partner is deemed to have notice of the dissociation and the termination of the dissociated partner's authority as a result of the statement of dissociation 90 days after the statement of dissociation is filed.

AMENDMENT 21

Section 802 of the Act is amended to read:

SECTION 802. DISSOLUTION DEFERRED 90 DAYS.

(a) Except as provided in subsection (b), a partnership of more than two persons is not dissolved until 90 days after receipt by the partnership of notice from a partner under Section 801(1) or (2)(i), and its business may be continued until that date as if no notice were received. Before that date, the partner who
gave the notice may waive the right to have the
partnership business wound up. If there is no waiver
before that date, the partnership is dissolved and its
business must be wound up.

(b) A partnership may be dissolved at any time
during the 90-day period, and its business wound up, by
the express will of at least half of the remaining other
partners.

(c) After receipt by the partnership of notice
from a partner under Section 801(1) or (2)(i), the
partner who gave the notice:

(1) has no rights in the management and conduct
of the partnership business if it is continued under
subsection (a), but may participate in winding up the
business under Section 804 if the partnership is
dissolved on or before the expiration of the 90-day
period pursuant to subsection (a) or (b);

(2) is liable for obligations incurred during
the period only to the extent a dissociated partner
would be liable under Section 702(b) or Section 703(b),
but is not liable to the other partners for
contributions for, and must be indemnified by them the
other partners against, any partnership liability
incurred by another partner to the extent the liability
is not appropriate for winding up the partnership
business; and
(3) must be credited with a share of any profit or charged with a share of any loss from a partnership transaction to the extent the transaction is appropriate for winding up the partnership business profits from transactions during the period but shall be charged with a share of any losses, only to the extent of profits, credited for the period.

AMENDMENT 22

Section 804 of the Act is amended to read:

SECTION 804. RIGHT TO WIND UP PARTNERSHIP BUSINESS.

(a) After dissolution, the partner who has not wrongfully dissociated may wind up a partnership business, but on application of any partner, partner's legal representative, or transferee, the court, for good cause, may order that the partnership business be wound up judicial supervision of the winding up.

(b) The legal representative of the last surviving partner may wind up a partnership's business.

(c) A person winding up a partnership's business may preserve the partnership business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, settle and close the partnership's
business, dispose of and transfer the partnership's property, discharge the partnership's liabilities, distribute the assets of the partnership pursuant to Section 808, and perform other necessary acts, including settlement of disputes by mediation or arbitration.

AMENDMENT 23

Section 806 of the Act is amended to read:

SECTION 806. STATEMENT OF DISSOLUTION.

(a) After dissolution, a partner who has not wrongfully dissociated may file a statement of dissolution stating the name of the partnership and that the partnership has dissolved and is winding up its business.

(b) A statement of dissolution cancels a filed statement of partnership authority to the extent provided in for the purposes of Section 303(d) and is a limitation on authority to the extent provided in for the purposes of Section 303(e).

(c) For the purposes of Sections 301 and 805, a person not a partner is deemed to have notice of the dissolution and the limitation on the partners' authority as a result of the statement of dissolution 90 days after it is filed.

(d) After filing and, where appropriate, recording a statement of dissolution, the dissolved
partnership may file and, where appropriate, record a statement of partnership authority which will operate with respect to a person not a partner as provided in Section 303(d) and (e) in any transaction, whether or not the transaction is appropriate for winding up the partnership business.

AMENDMENT 24

Section 807 of the Act is amended to read:

SECTION 807. PARTNER'S LIABILITY TO OTHER PARTNERS AFTER DISSOLUTION.

(a) Except as provided in subsection (b) and Section (c)(2), after dissolution a partner is liable to the other partners for the partner's share of any partnership liability incurred under Section 805.

(b) The other partners are not liable to a partner who, with knowledge of the winding up, incurs a partnership liability obligation under Section 805(2) by an act that is not appropriate for winding up the partnership business shall indemnify the partnership against any loss caused to the partnership arising from that liability.
AMENDMENT 25

Section 904 of the Act is amended to read:

SECTION 904. MERGER OF PARTNERSHIPS.

(a) Pursuant to a plan of merger approved as provided in subsection (c), a partnership may be merged with one or more partnerships or limited partnerships.

(b) The plan of merger must set forth:

(1) the name of each partnership or limited partnership that is a party to the merger;

(2) the name of the surviving entity into which the other partnerships or limited partnerships will merge;

(3) whether the surviving entity is a partnership or a limited partnership and the status of each partner;

(4) the terms and conditions of the merger;

(5) the manner and basis of converting the interests of each party to the merger into interests or obligations of the surviving entity, or into cash or other property in whole or part; and

(6) the street address of the surviving entity's chief executive office.

(c) The plan of merger must be approved:

(1) in the case of a partnership that is a party to the merger, by all the partners, or a number or
percentage specified for merger in the partnership agreement; and

(2) in the case of a limited partnership that is a party to the merger, by the vote required for approval of a merger by the law of the state or foreign jurisdiction in which the limited partnership is organized and, in the absence of such specifically applicable law, by all the partners, notwithstanding a provision to the contrary in the partnership agreement.

(d) After a plan of merger is approved and before the merger takes effect, the plan may be amended or abandoned as provided in the plan.

(e) The merger takes effect on the later of:

(1) the approval of the plan of merger by each party all parties to the merger, as provided in subsection (c);

(2) the filing by each party to the merger of any all documents required by statute law to be filed as a condition to the effectiveness of the merger; or

(3) any effective date specified in the plan of merger.
AMENDMENT 26

Section 906 of the Act is amended to read:

SECTION 906. STATEMENT OF MERGER.

(a) After a merger, the surviving partnership or limited partnership may file a statement that one or more partnerships or limited partnerships have merged into the surviving entity.

(b) A statement of merger must contain:

(1) the name of each partnership or limited partnership that is a party to the merger;

(2) the name of the surviving entity into which the other partnerships or limited partnership were merged;

(3) the street address of the surviving entity's chief executive office and of an office in this State, if any; and

(4) whether the surviving entity is a partnership or limited partnership.

(c) Except as provided in subsection (d), for the purposes of Section 302, property of the surviving partnership or limited partnership which before the merger was held in the name of another party to the merger is property held in the name of the surviving entity upon filing a statement of merger.

(d) For the purposes of Section 302, real property of the surviving partnership or limited
partnership which before the merger was held in the name of another party to the merger is property held in the name of the surviving entity upon recording a certified copy of the statement of merger in the office for recording transfers of that real property.

(e) A filed and, where appropriate, recorded statement of merger, executed and declared to be accurate pursuant to Section 105(e) 105(c), stating the name of a partnership or limited partnership that is a party to the merger in whose name property was held before the merger and the name of the surviving entity, but not containing all of the other information required by subsection (b), operates with respect to the partnerships or limited partnerships named to the extent provided in subsections (c) and (d).

AMENDMENT 27

Section 1006 of the Act is amended to read:

SECTION 1006. APPLICATION TO EXISTING RELATIONSHIPS.

(a) Except as otherwise provided in this section, this [Act] applies to all partnerships in existence on its effective date that were formed under the [State] Partnership Act or any predecessor statute law providing for the formation, operation, and liquidation of partnerships.
(b) This [Act] does is not intended to, and shall not, impair the obligations of a contract existing when the [Act] goes into effect or affect an action or proceeding begun or right accrued before this [Act] takes effect.

(c) A judgment against a partnership or a partner in an action commenced before the effective date of this [Act] may be enforced in the same manner as a judgment rendered before the effective date of this [Act].
For Immediate Release:

UNIFORM PARTNERSHIP ACT REVISED

August 27, 1992 — At its 101st annual meeting this summer in San Francisco, the Uniform Law Commissioners (ULC) approved the Revised Uniform Partnership Act (RUPA). RUPA is a revision of the Uniform Partnership Act (UPA), approved by the ULC in 1914, and ultimately adopted in every state except Louisiana. RUPA and UPA govern general partnerships.

The revised act, which has been under consideration and drafting for more than four years, restructures the fundamentals of partnership law and represents the first revision of the UPA in more than 75 years. This new act governs the relations among general partners and between the partners and the partnership, unless there is a partnership agreement to the contrary. The act is now available for consideration and adoption by all the states.

The most significant change in the revision is that RUPA rewrites the rules on partnership breakups. RUPA gives partnerships much greater stability because it provides that partnerships no longer dissolve every time a partner leaves. It lists the different ways one dissociates from the partnership and the varying consequences of a partner’s dissociation, identifying those events that cause a winding up of the partnership’s business. All other dissociations result in a buy-out of the dissociating partner by the remaining partners, the terms of which are, for the first time, described in detail in the statute.

The revision also reflects the attempt to reconcile two conflicting conceptual theories of partnership law.

The common law aggregate theory does not recognize the partnership as an entity with a separate legal personality. It views the partnership as nothing more than a conduit for the individuals it embraces. Each partner is seen as owning a direct stake in the partnership assets and as conducting a share of partnership business.

The entity theory instead treats the partnership as a distinct body placed between the partners and partnership assets. The partner’s interest is viewed as a separate group of rights and liabilities associated with participation in the partnership, analogous, in part, to the interests of a corporate stockholder in shares of stock.

The original UPA is a statutory hybrid, with elements of both the entity and aggregate theories.

RUPA explicitly states that a partnership is an entity resulting from the association of two or more persons to carry on a business for profit as co-owners. A partnership may sue and be sued in the partnership name. Property may be acquired in the partnership name.
Each partner has equal rights in the management and conduct of the business of the partnership. The partnership credits each partner with an equal share of its profits.

On the other hand, RUPA also provides that all partners are liable for all debts and obligations of the partnership. To this extent, RUPA continues an aggregate conception of partnerships. A creditor may proceed against one or more partners to satisfy a judgment based on a partnership debt or obligation, but only after partnership assets have been exhausted.

The act defines partnership property, rules determining rights of partners, remedies of partners and termination of the partnership. The act also imposes a duty of care of partners to the partnership and a duty of loyalty among the partners.

While the partner's general obligation of good faith and fair dealing may not be varied by agreement, RUPA has a new provision which allows partners to contract out of most of the other rules that govern their relations among themselves.

The Revised Uniform Partnership Act drafting committee was chaired by H. Lane Kneedler of Richmond, Virginia. Other committee members included: George H. Buxton, III, Oak Ridge, Tennessee; Robert H. Cornell, San Francisco, California; William C. Gardner, Washington, DC; Harry J. Haynsworth, IV, Carbondale, Illinois; Mendes Hershman (deceased), New York, New York; Thomas L. Jones, Tuscaloosa, Alabama; Morris W. Macey, Atlanta, Georgia; Francis J. Pavetti, New London, Connecticut; Harold E. Read, Jr. (deceased), Cave Creek, Arizona; Howard J. Swibel, Chicago, Illinois; and M. Gay Taylor, Salt Lake City, Utah. Donald J. Weidner of Tallahassee, Florida served as the committee’s reporter, and John W. Larson, also of Tallahassee, Florida, served as the committee’s assistant reporter.

The ULC, officially called the National Conference of Commissioners on Uniform State Laws, is currently in its 101st year. The organization is comprised of more than 300 lawyers, judges and law professors, appointed by the states as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands, to draft proposals for uniform and model laws and work toward their enactment in the state legislatures.

Since the first meeting of the Conference in 1892, the Commissioners have promulgated more than 200 acts that reflect changes in law and society, including such bulwarks of state statutory law as the Uniform Commercial Code, the Uniform Probate Code and the Uniform Controlled Substances Act.

For further information, please contact John McCabe or Katie Robinson at 312-915-0195, or Gabrielle Bamberger at 212-333-5222.
UNIFORM PARTNERSHIP ACT (1992)*

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-FIRST YEAR
IN SAN FRANCISCO, CALIFORNIA
JULY 30 - AUGUST 6, 1992

WITHOUT PREFATORY NOTE AND COMMENTS

* The following text is subject to revision by the Style
Committee of the National Conference of Commissioners on Uniform
State Laws. Final copies of the Act with style changes and complete
Prefatory Note and Comments can be obtained for a nominal charge
from the Headquarters Office of the National Conference of
Commissioners on Uniform State Laws after November 1, 1992: 676
North St. Clair Street, Suite 1700, Chicago, IL 60611, 312/915-
0195.

10-7-92 cc: Ann Ussel
9-23-92 cc: NCCUSL

9-23-92 cc: Lane Kreeden

Donald Weidner

John Laslie

Committee on Style
SECTION 101. DEFINITIONS. In this Act:

(1) "Business" includes every trade, occupation, and profession.

(2) "Debtor in bankruptcy" means a person who is the subject of:

   (i) an order for relief under Title 11 of the United States Code or a comparable order under a successor statute of general application; or

   (ii) a comparable order under federal or state law governing insolvency.

(3) "Distribution" means a transfer of cash or other property from a partnership to a partner in the partner's capacity as a partner or to the partner's transferee.

(4) "Partnership agreement" means an agreement, written or oral, among the partners concerning the partnership.

(5) "Partnership at will" means a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking.
(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) "Property" means all property, real, personal, or mixed, tangible or intangible, or any interest therein.

(8) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

(9) "Statement" means a statement of partnership authority under Section 303, a statement of denial under Section 304, a statement of dissociation under Section 704, a statement of dissolution under Section 806, a statement of merger under Section 906, or an amendment or cancellation of any of the foregoing.

(10) "Transfer" includes an assignment, conveyance, lease, mortgage, deed, and encumbrance.

SECTION 102. KNOWLEDGE AND NOTICE.

(a) A person knows a fact if the person has knowledge of it.

(b) A person has notice of a fact if the person:

(1) knows of it;
(2) has received a notice of it; or

(3) has reason to know it exists from all of the facts known to that person at the time in question.

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

(d) A person is notified or receives a notice of a fact when:

(1) the existence of the fact comes to the person's attention; or

(2) the notice is duly delivered at the person's place of business or at any other place held out by the person as a place for receiving communications.

(e) Except as provided in subsection (f), notice received by a person who is not an individual, including a partnership, is effective for a particular transaction when the notice is brought to the attention of the individual conducting the transaction, or in any event when the notice would have been brought to that individual's attention if the person had exercised due diligence.

(f) Except as provided in subsection (f), a person other than an individual knows, has notice, or receives a notification of a fact for purposes of a particular transaction when the individual conducting the transaction knows, has notice, or receives a notification of the fact, or in any event when the fact would have been brought to the individual's attention if the person had exercised reasonable diligence. Such a person 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 person 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.

(f) Receipt of notice by a partner of a matter relating to the partnership is effective immediately as notice to the partnership, but is not effective in the case of fraud on the partnership committed by or with the consent of the partner who received the notice.

(f) A partner's knowledge, notice, or receipt of notification of a fact relating to the partnership is effective immediately as knowledge by, notice to, or receipt of notification by the partnership, but is not effective as such if the partner committed or consented to a fraud on the partnership.

SECTION 103. EFFECT OF PARTNERSHIP AGREEMENT; NONWAIVABLE PROVISIONS.

(a) Except as provided in subsection (b), a partnership agreement governs relations among the partners and between the partners and the partnership. To the extent the partnership agreement does not otherwise provide, this [Act] governs relations among the partners and between the partners and the partnership.

(b) A partnership agreement may not:

(1) vary the rights and duties under Section 105 except to eliminate the duty to provide copies of statements to all the partners;
(2) unreasonably restrict a partner's right of access to books and records under Section 403(b);

(3) eliminate the duty of loyalty under Section 404(b);

(4) unreasonably reduce the duty of care under Section 404(d);

(5) eliminate the obligation of good faith and fair dealing under Section 404(e);

(6) vary the power to withdraw as a partner under Section 601(1), except to require the notice to be in writing;

(7) vary the right to expulsion of a partner by a court in the events specified in Section 601(5);

(8) vary the requirement to wind up the partnership business in cases specified in Section 801(4), (5), or (6); or

(9) restrict rights of third parties under this [Act].

SECTION 104. SUPPLEMENTAL PRINCIPLES OF LAW.

(a) Unless displaced by particular provisions of this [Act], the principles of law and equity supplement this [Act].

(b) If an obligation to pay interest arises under this [Act] and the rate is not specified, the rate is that specified in [applicable statute].
SECTION 105. EXECUTION, FILING, AND RECORDING OF STATEMENTS.

(a) A statement may be filed in the office of [the Secretary of State]. A certified copy of a statement that is filed in an office in another state may be filed in the office of [the Secretary of State]. Either filing has the effect provided in this [Act] with respect to partnership property located in or transactions that occur in this State.

(b) A certified copy of a statement that has been filed in the office of the [Secretary of State] that is recorded in the office for recording transfers of real property shall have the effect provided for recorded statements in this [Act]. A recorded statement that is not a certified copy of a statement filed in the office of the [Secretary of State] shall not have the effect provided for recorded statements in this [Act].

(c) A statement filed by a partnership must be executed by at least two partners. Other statements must be executed by a partner or other person authorized by this [Act]. An individual who executes a statement as, or on behalf of, a partner or other person named as a partner in a statement shall personally declare under penalty of perjury that the contents of the statement are accurate.
(d) A person authorized by this [Act] to file a statement may amend or cancel the statement by filing an amendment or cancellation that names the partnership, identifies the statement, and states the substance of the amendment or cancellation.

(e) A person who files a statement pursuant to this section shall promptly send a copy of the statement to every partner and to any other person named as a partner in the statement. Failure to send a copy of a statement to a partner or other person does not limit the effectiveness of the statement as to a person not a partner.

(f) The [Secretary of State] may collect a fee for filing or providing a certified copy of a statement. The [officers responsible for] recording transfers of real property may collect a fee for recording a statement.

SECTION 106. LAW GOVERNING INTERNAL AFFAIRS. The law of the state in which a partnership has its chief executive office govern the partnership's internal affairs.

SECTION 107. PARTNERSHIP SUBJECT TO AMENDMENT OR REPEAL OF [ACT]. A partnership governed by this [Act] is subject to any amendment or repeal of this [Act].
ARTICLE 2
NATURE OF PARTNERSHIP

SECTION 201. PARTNERSHIP AS ENTITY. A partnership is an entity.

SECTION 202. CREATION OF PARTNERSHIP.

(a) Except as provided in subsection (b), the association of two or more persons to carry on as co-owners a business for profit creates a partnership, whether or not the persons intend to create a partnership.

(b) An association created under a statute other than this [Act], a predecessor law, or comparable law of another jurisdiction is not a partnership.

(c) In determining whether a partnership is created, the following rules apply:

(1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

(2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.
(3) The receipt by a person of a share of the profits of a business is prima facie evidence that the person is a partner in the business, but that inference may not be drawn if the profits were received in payment:

(i) of a debt by installments or otherwise;

(ii) for services as an independent contractor or of wages or other compensation to an employee;

(iii) of rent;

(iv) of an annuity or other retirement or health benefit to a beneficiary, representative, or designee of a deceased or retired partner;

(v) of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral; or

(vi) of consideration for the sale of the goodwill of a business or other property by installments or otherwise.

(d) Except as provided by Section 308, persons who are not partners as to each other are not partners as to other persons.
(e) A partnership created under this [Act] is a
general partnership, and the partners are general
partners of the partnership.

SECTION 203. PARTNERSHIP PROPERTY. Property
transferred to or otherwise acquired by a partnership is
property of the partnership and not of the partners
individually.

SECTION 204. WHEN PROPERTY IS PARTNERSHIP PROPERTY.

(a) Property is partnership property if acquired:
(1) in the name of the partnership; or
(2) in the name of one or more partners with an
indication in the instrument transferring title to the
property of the person's capacity as a partner or of the
existence of a partnership, but without an indication of
the name of the partnership.

(b) Property is acquired in the name of the
partnership by a transfer to:
(1) the partnership in its name; or
(2) one or more partners in their capacity as
partners in the partnership, if the name of the
partnership is indicated in the instrument transferring
title to the property.

(c) Property is presumed to be partnership
property if purchased with partnership assets, even if
not acquired in the name of the partnership or of one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership.

(d) Property acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and without use of partnership assets, is presumed to be separate property, even if used for partnership purposes.
ARTICLE 3

RELATIONS OF PARTNERS TO PERSONS DEALING WITH PARTNERSHIP

SECTION 301. PARTNER AGENT OF PARTNERSHIP. Subject to the effect of a statement of partnership authority pursuant to Section 303:

(1) Each partner is an agent of the partnership for the purpose of its business. Any act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the usual way the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner has no authority to act for the partnership in the particular matter and the person with whom the partner is dealing knows or has received notice that the partner lacks authority.

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

SECTION 302. TRANSFER OF PARTNERSHIP PROPERTY.

(a) Subject to the effect of a statement of partnership authority pursuant to Section 303:
(1) Partnership property held in the name of the partnership may be transferred by an instrument of transfer executed by any partner in the partnership name.

(2) Partnership property held in the name of one or more partners with an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, but without an indication of the name of the partnership, may be transferred by an instrument of transfer executed by the persons in whose name the property is held.

(3) A partnership may recover property transferred under this subsection if it proves that execution of the instrument of transfer did not bind the partnership under Section 301, unless the property was transferred by the initial transferee or a person claiming through the initial transferee to a subsequent transferee who gave value without having notice that the person who executed the instrument of initial transfer lacked authority to bind the partnership.

(b) Partnership property held in the name of one or more persons other than the partnership, without an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, may be transferred free of
any claims of the partnership or the partners by the persons in whose name the property is held to a transferee who gives value without having notice that it is partnership property.

(c) If a person holds all of the partners' interests in the partnership, all of the partnership property vests in that person. That person may execute documents in the name of the partnership to evidence vesting of the property in that person and may file or record those documents.

SECTION 303. STATEMENT OF PARTNERSHIP AUTHORITY.

(a) A partnership may file a statement of partnership authority, which:

(1) must include:

(i) the name of the partnership;

(ii) the street address of its chief executive office and of an office in this State, if any;

(iii) the names and mailing addresses of all the partners or of an agent appointed and maintained by the partnership for the purpose of subsection (b); and

(iv) a statement specifying the names of the partners authorized to execute an instrument transferring real property held in the name of the partnership; and
(2) may include a statement of the authority, or a limitation on the authority, of some or all of the partners to enter into other transactions on behalf of the partnership and any other matter.

(b) If a statement of partnership authority names an agent, the agent shall maintain a list of the names and mailing addresses of all of the partners and make it available to any person on request for good cause shown.

(c) If a filed statement of partnership authority is executed pursuant to Section 105(c) and states the name of the partnership but does not contain all of the other information required by subsection (a), the statement nevertheless operates with respect to a person not a partner as provided in subsections (d) and (e).

(d) Except as provided in subsections (e), (f), and (g), a filed statement of partnership authority supplements the authority of a partner to enter into transactions on behalf of the partnership as follows:

(1) Except for transfers of real property, a grant of authority contained in a filed statement of partnership authority is conclusive in favor of a person who gives value without knowledge to the contrary, so long as and to the extent that a limitation on that authority is not then contained in another filed statement. A filed cancellation of a limitation on authority revives the previous grant of authority.
(2) A grant of authority to transfer real property held in the name of the partnership contained in a certified copy of a filed statement of partnership authority recorded in the office for recording transfers of that real property is conclusive in favor of a person who gives value without knowledge to the contrary, so long as and to the extent that a certified copy of a filed statement containing a limitation on that authority is not then recorded in the office for recording transfers of that real property. The recording in the office for recording transfers of that real property of a certified copy of a filed cancellation of a limitation on authority revives the previous grant of authority.

(e) A person not a partner is deemed to know of a limitation on the authority of a partner to transfer real property held in the name of the partnership if a certified copy of the filed statement containing the limitation on authority is recorded in the office for recording transfers of that real property.

(f) Except as provided in subsection (e) and Sections 704 and 806, a person not a partner is not deemed to know of a limitation on the authority of a partner merely because the limitation is contained in a filed statement.
(g) Unless earlier canceled, a filed statement of partnership authority is canceled by operation of law five years after the date on which the statement, or the most recent amendment, was filed with the [Secretary of State].

SECTION 304. STATEMENT OF DENIAL. A partner or other person named as a partner in a filed statement of partnership authority or in a list maintained by an agent pursuant to Section 303(b) may file a statement of denial stating the name of the partnership and the fact that is being denied, which may include denial of a person's authority or status as a partner. A statement of denial is a limitation on authority to the extent provided in Section 303(d) and (e).

SECTION 305. PARTNERSHIP LIABLE FOR PARTNER'S ACTIONABLE CONDUCT.

(a) A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership.

(b) If, in the course of its business, a partnership receives money or property of a person not a
partner which is misapplied by a partner while it is in the custody of the partnership, the partnership is liable for the loss.

SECTION 306. PARTNER'S LIABILITY. All partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.

SECTION 307. ACTIONS BY AND AGAINST PARTNERSHIP AND PARTNERS.

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

(b) An action may be brought against the partnership and any or all of the partners in the same action or in separate actions.

(c) A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is a judgment against the partner.

(d) A judgment creditor of a partner may not levy execution against the assets of the partner to satisfy a judgment based on a claim against the partnership unless:

(1) a judgment based on the same claim has been obtained against the partnership and a writ of execution
on the judgment has been returned unsatisfied in whole or in part;

(2) an involuntary case under Title 11 of the United States Code has been commenced against the partnership and has not been dismissed within 60 days after commencement, or the partnership has commenced a voluntary case under Title 11 of the United States Code and the case has not been dismissed;

(3) the partner has agreed that the creditor need not exhaust partnership assets;

(4) a court grants permission to the judgment creditor to levy execution against the assets of a partner based on a finding that partnership assets subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of partnership assets is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's equitable powers; or

(5) liability is imposed on the partner by law or contract independent of the existence of the partnership.

(e) This section applies to any partnership liability or obligation resulting from a representation by a partner or purported partner under Section 308(a) or (b).
SECTION 308. PURPORTED PARTNER.

(a) If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, the purported partner is liable to a person to whom the representation is made, and who relying on the representation, enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported partner's consent, is made in a public manner, the purported partner is liable to a person who relies upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable as if the purported partner were a partner. If no partnership liability results, the purported partner is liable jointly and severally with any other person consenting to the representation.

(b) If a person is thus represented to be a partner in an existing partnership, or with one or more persons not partners, the purported partner is an agent of persons consenting to the representation to bind them to the same extent and in the same manner as if the purported partner were a partner, with respect to persons who enter into transactions in reliance upon the
representation. If all the partners of the existing partnership consent to the representation, a partnership act or obligation results. If fewer than all the partners of the existing partnership consent to the representation, the person acting and the partners consenting to the representation are jointly and severally liable.

(c) A person is not a partner in a partnership solely because the person is named by another in a statement of partnership authority.

(d) A person does not continue to be a partner solely because of a failure to file a statement of dissociation or to amend a statement of partnership authority to indicate the partner's dissociation from the partnership.

SECTION 309. LIABILITY OF INCOMING PARTNER. A person admitted as a partner into a partnership is liable for all obligations of the partnership arising before the person's admission as if the person had been a partner when the obligations were incurred, but this liability may be satisfied only out of partnership property.
ARTICLE 4

RELATIONS OF PARTNERS TO EACH OTHER AND TO PARTNERSHIP

SECTION 401. PARTNER'S RIGHTS AND DUTIES.

(a) A partnership shall establish an account for each partner, which must be credited with an amount equal to the cash plus the value of any other property, net of the amount of any liabilities, the partner contributes to the partnership and the partner's share of the partnership profits. Each partner's account must be charged with an amount equal to the cash plus the value of any other property, net of the amount of any liabilities, distributed by the partnership to the partner and the partner's share of the partnership losses.

(b) A partnership shall credit each partner's account with an equal share of the partnership profits, and shall charge each partner with a share of the partnership losses, whether capital or operating, in proportion to the partner's share of the profits.

(c) A partnership shall indemnify each partner for payments reasonably made and liabilities reasonably incurred by the partner in the ordinary and proper conduct of the business of the partnership or for the preservation of its business or property.
(d) A partnership shall repay a partner who, in aid of the partnership, makes a payment or advance beyond the amount of capital the partner agreed to contribute.

(e) A payment made by a partner which gives rise to a partnership obligation under subsection (c) or (d) constitutes a loan to the partnership. Interest accrues from the date of the payment or advance.

(f) Each partner has equal rights in the management and conduct of the partnership business.

(g) A partner may use or possess partnership property only on behalf of the partnership.

(h) A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership.

(i) A person may become a partner only with the consent of all the partners.

(j) A difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners. An act outside the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the consent of all the partners.

(k) This section does not affect the obligations of a partnership to other persons under Section 301.
SECTION 402. DISTRIBUTIONS IN KIND. A partner has no right to receive, and may not be required to accept, a distribution in kind.

SECTION 403. PARTNER'S RIGHT TO INFORMATION.

(a) A partnership shall keep its books and records, if any, at its chief executive office.

(b) A partnership shall provide partners and their agents and attorneys access to its books and records. It shall provide former partners and their agents and attorneys access to books and records pertaining to the period during which they were partners. The right of access provides 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.

(c) Each partner and the partnership, on demand, shall furnish to a partner, and the legal representative of a deceased partner or partner under legal disability, to the extent just and reasonable, complete and accurate information concerning the partnership.
SECTION 404. GENERAL STANDARDS OF PARTNER'S CONDUCT.

(a) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in this section.

(b) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

1. to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner without the consent of the other partners in the conduct and winding up of the partnership business or from a use or appropriation by the partner of partnership property or opportunity;

2. to refrain from dealing with the partnership in the conduct or winding up of the partnership business, as or on behalf of a party having an interest adverse to the partnership without the consent of the other partners; and

3. to refrain from competing with the partnership in the conduct of the partnership business without the consent of the other partners before the dissolution of the partnership.

(c) A partner's duty of loyalty may not be eliminated by agreement, but the partners may by agreement identify specific types or categories of

25
activities that do not violate the duty of loyalty, if not manifestly unreasonable.

(d) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(e) A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistent with the obligation of good faith and fair dealing. The obligation of good faith and fair dealing may not be eliminated by agreement, but the partners may by agreement determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable.

(f) A partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the partner's conduct furthers the partner's own interest. A partner may lend money to and transact other business with the partnership. The rights and obligations of a partner who lends money to or transacts business with the partnership are the same as those of a person who is not a partner, subject to other applicable law.
(g) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.

SECTION 405. PARTNER'S LIABILITY TO PARTNERSHIP. A partner is liable to the partnership for a breach of the partnership agreement, or for the violation of duty to the partnership, causing harm to the partnership.

SECTION 406. REMEDIES OF PARTNERSHIP AND PARTNERS.

(a) A partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of duty to the partnership, causing harm to the partnership.

(b) A partner may maintain an action against the partnership or another partner for legal or equitable relief, including an accounting as to partnership business, to:

(1) enforce a right under the partnership agreement;

(2) enforce a right under this [Act], including:

(i) the partner's rights under Sections 401, 403, and 404;
(ii) the partner's right on dissociation to have the partner's interest in the partnership purchased pursuant to Section 701 or enforce any other right under Article 6 or 7; or

(iii) the partner's right to compel a dissolution and winding up of the partnership business under Section 801 or enforce any other right under Article 8; or

(3) enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.

(c) The accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law.

SECTION 407. CONTINUATION OF PARTNERSHIP BEYOND DEFINITE TERM OR PARTICULAR UNDERTAKING.

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

(b) A continuation of the business by the partners or those of them who habitually acted in the business during the term or undertaking, without any settlement or liquidation of the partnership business, is prima facie evidence of an agreement that the business will not be wound up.

(b) If the partners, or those of them who habitually acted in the business during the term or undertaking, continue the business without any settlement or liquidation of the partnership, they are presumed to have agreed that the business will not be wound up.
ARTICLE 5
TRANSFEREES AND CREDITORS OF PARTNER

SECTION 501. PARTNER'S INTEREST IN PARTNERSHIP
PROPERTY NOT TRANSFERABLE. A partner is not a co-owner of partnership property and has no interest that can be transferred, either voluntarily or involuntarily, in partnership property.

SECTION 502. PARTNER'S TRANSFERABLE INTEREST IN PARTNERSHIP
(a) The only transferable interest of a partner in the partnership is the partner's interest in distributions. The interest is personal property.

(b) A transferee of a partner's transferable interest in the partnership has the right to cause a winding up of the partnership business as provided in Section 801(6).

SECTION 503. TRANSFER OF PARTNER'S TRANSFERABLE INTEREST.
(a) A transfer, in whole or in part, of a partner's transferable interest in the partnership:

(1) is permissible;

(2) does not by itself cause a winding up of the partnership business; and
(3) does not, as against the other partners or the partnership, entitle the transferee, during the continuance of the partnership, to participate in the management or conduct of the partnership business, to require access to information concerning or an account of partnership transactions, or to inspect or copy the partnership books or records.

(b) A transferee of a partner's transferable interest in the partnership is entitled to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled. Upon transfer, the transferor retains the rights and duties of a partner other than the interest in distributions transferred.

(c) If an event causes a dissolution and winding up of the partnership business under Section 801, a transferee is entitled to receive, in accordance with the transfer, the net amount otherwise distributable to the transferor. In a dissolution and winding up, a transferee may require an accounting only from the date of the last account agreed to by all of the partners.

(3) Until receipt of notice of a transfer, a partnership has no duty to give effect to the transferee's rights under this section.

See § 31A
(b) A transferee of a partner's transferable interest in the partnership has a right:

(1) to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled;

(2) to receive, in accordance with the transfer, the net amount otherwise distributable to the transferor upon the dissolution and winding up of the partnership business; and

(3) to seek under Section 801(6) a judicial determination that it is equitable to wind up the partnership business.

(c) In a dissolution and winding up, a transferee is entitled to an accounting only from the date of the last account agreed to by all of the partners.

(d) Upon transfer, the transferor retains the rights and duties of a partner other than the interest in distributions transferred.

(e) Until receipt of notice of a transfer, a partnership has no duty to give effect to the transferee's rights under this section.
SECTION 504. PARTNER'S TRANSFERABLE INTEREST SUBJECT TO CHARGING ORDER.

(a) On application by a judgment creditor of a partner or partner's transferee, a court having jurisdiction may charge the transferable interest of the debtor partner or transferee to satisfy the judgment. The court may appoint a receiver of the debtor's share of the distributions due or to become 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) A charging order constitutes a lien on the judgment debtor's transferable interest in the partnership. The court may order a foreclosure of the interest subject to the charging order at any time and upon conditions it considers appropriate. The purchaser at the foreclosure sale has the rights of a transferee.

(c) At any time before foreclosure, an interest charged may be redeemed:

   (1) by the judgment debtor;
   (2) with property other than partnership property, by one or more of the other partners; or
   (3) with partnership property, by one or more of the other partners with the consent of all the partners whose interests are not so charged.
(d) This [Act] does not deprive a partner of a right under exemption laws with respect to the partner's interest in the partnership.

(e) This section provides the exclusive remedy by which a judgment creditor of a partner or partner's transferee may satisfy a judgment out of the judgment debtor's transferable interest in the partnership.
SECTION 601. EVENTS CAUSING PARTNER'S DISSOCIATION.

A partner is dissociated from a partnership upon:

(1) receipt by the partnership of notice of the partner's express will to withdraw as a partner or upon any later date specified in the notice;

(2) an event agreed to in the partnership agreement as causing the partner's dissociation;

(3) the partner's expulsion pursuant to the partnership agreement;

(4) the partner's expulsion by the unanimous vote of the other partners if:

   (i) it is unlawful to carry on the partnership business with that partner;

   (ii) there has been a transfer of all or substantially all of that partner's transferable interest in the partnership, other than a transfer for security purposes, or a court order charging the partner's interest, which has not been foreclosed;

   (iii) within 90 days after the partnership notifies a corporate partner that it will be expelled because it has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business has been suspended by the
jurisdiction of its incorporation, there is no revocation of the certificate of dissolution or no reinstatement of its charter or its right to conduct business; or

(iv) a partnership that is a partner has been dissolved and its business is being wound up;

(5) on application by the partnership or another partner, the partner's expulsion by judicial determination because:

(i) the partner engaged in wrongful conduct that adversely and materially affected the partnership business;

(ii) the partner willfully or persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners under Section 404; or

(iii) the partner engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with the partner;

(6) the partner's:

(i) becoming a debtor in bankruptcy;

(ii) executing an assignment for the benefit of creditors;

(iii) seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of
that partner or of all or substantially all of that partner's property; or

(iv) failing, within 90 days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the partner or of all or substantially all of the partner's property obtained without the partner's consent or acquiescence, or failing within 90 days after the expiration of a stay to have the appointment vacated;

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

(i) the partner's death;

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

(iii) a judicial determination that the partner has otherwise become incapable of performing the partner's duties under the partnership agreement;

(8) 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, distribution of the trust's entire transferable interest in the partnership, but not merely the substitution of a successor trustee;

(9) 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, distribution of the estate's entire transferable interest in the
partnership, but not merely the substitution of a successor personal representative; or

(10) termination of a partner who is not an individual, partnership, corporation, trust, or estate.

SECTION 602. PARTNER'S WRONGFUL DISSOCIATION.

(a) A partner's dissociation is wrongful only if:

(1) it is in breach of an express provision of the partnership agreement; or

(2) in the case of a partnership for a definite term or particular undertaking, before the expiration of the term or the completion of the undertaking:

(i) the partner withdraws by express will, unless the withdrawal follows the dissociation of another partner and results in a right to dissolve the partnership under Section 801(2)(i);

(ii) the partner is expelled by judicial decree under Section 601(5); or

(iii) in the case of a partner who is not an individual, trust other than a business trust, or estate, the partner is expelled or otherwise dissociated because it willfully dissolved or terminated.

(b) A partner who wrongfully dissociates is liable to the partnership and to the other partners for damages caused by the dissociation. That liability is
in addition to any other liability of the partner to the partnership or to the other partners.

SECTION 603. EFFECT OF PARTNER'S DISSOCIATION.

(a) A dissociated partner's interest in the partnership must be purchased pursuant to Article 7 unless the partner's dissociation results in a dissolution and winding up of the partnership business under Article 8.

(b) Upon a partner's dissociation, that partner's right to participate in the management and conduct of the partnership business is terminated, except as provided in Section 804, and that partner's duties (i) under Section 404(b)(1) and (2) and (d) continue only with regard to matters or events that occurred before the dissociation, and (ii) under Section 404(b)(3) terminate.

(a) If a partner's dissociation results in a dissolution and winding up of the partnership business, Article 8 applies; otherwise, Article 7 applies.

(b) Upon a partner's dissociation:

(1) the partner's right to participate in the management and conduct of the partnership business terminates, except as provided in Section 804;

(2) the partner's duty of loyalty under Section 404(b)(3) terminates; and

(3) the partner's duty of loyalty under Section 404(b)(1) and (2) and duty of care under Section 404(d) continue only with regard to matters arising or events occurring before the dissociation.
SECTION 701. PURCHASE OF DISSOCIATED PARTNER'S INTEREST.

(a) If a partner is dissociated from a partnership without resulting in a dissolution and winding up of the partnership business under Section 801, the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b).

(b) The buyout price of a dissociated partner's interest is the amount that would have been distributable to the dissociating partner under Section 808(b) if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership were wound up as of that date. In either case, the sale price of the partnership assets must be determined on the basis of the amount that would be paid by a willing buyer to a willing seller, neither being under any compulsion to buy or sell, and with knowledge of all relevant facts.
Interest must be paid from the date of dissociation to the date of payment.

(c) Damages for wrongful dissociation under Section 602(b), and all other amounts owing, whether or not presently due, from the dissociated partner to the partnership, must be offset against the buyout price. Interest must be paid from the date the amount owed becomes due to the date of payment.

(d) A partnership shall indemnify a dissociated partner against all partnership liabilities incurred before the dissociation, except liabilities then unknown to the partnership, and against all partnership liabilities incurred after the dissociation, except liabilities incurred by an act of the dissociated partner under Section 702. For purposes of this subsection, a liability not known to a partner other than the dissociated partner is not known to the partnership.

(e) If no agreement for the purchase of a dissociated partner's interest is reached within 120 days after a written demand for payment, the partnership shall pay, or cause to be paid, in cash to the dissociated partner the amount the partnership estimates to be the buyout price and accrued interest, reduced by any offsets and accrued interest under subsection (c).
(f) If a deferred payment is authorized under subsection (h), the partnership may tender a written offer to pay the amount it estimates to be the buyout price and accrued interest, reduced by any offsets under subsection (c), stating the time of payment, the amount and type of security for payment, and the other terms and conditions of the obligation.

(g) The payment or tender required by subsections (e) or (f) must be accompanied by the following:

(1) a statement of partnership assets and liabilities as of the date of dissociation;

(2) the latest available partnership balance sheet and income statement, if any;

(3) an explanation of how the estimated amount of the payment was calculated; and

(4) written notice that the payment is in full satisfaction of the obligation to purchase unless, within 120 days after the written notice, the dissociated partner commences an action to determine the buyout price, any offsets under subsection (c), or other terms of the purchase obligation.

(h) A partner who wrongfully dissociates before the expiration of a definite term or the completion of a particular undertaking is not entitled to payment of any portion of the buyout price until the expiration of the term or completion of the undertaking, unless the
partner establishes to the satisfaction of the court that earlier payment will not cause undue hardship to the business of the partnership. A deferred payment must be adequately secured and bear interest.

(i) A dissociated partner may maintain an action against the partnership, pursuant to Section 406(b)(2)(ii), to determine the buyout price of that partner's interest, any offsets under subsection (c), or other terms of the obligation. The action must be commenced within 120 days after the partnership has tendered payment or an offer to pay or within one year after written demand for payment if no payment or offer to pay is tendered. The court shall determine the buyout price of the dissociated partner's interest, any offset due under subsection (c), and accrued interest, and enter judgment for any additional payment or refund. If deferred payment is authorized under subsection (h), the court shall also determine the security for payment and other terms of the obligation to purchase. The court may assess reasonable attorney's fees and the fees and expenses of appraisers or other experts for a party to the action, in amounts the court finds equitable, against any other party, if the court finds that the other party acted arbitrarily, vexatiously, or not in good faith, including the partnership's failure to
tender payment or an offer to pay or to comply with the requirements of subsection (g).

SECTION 702. DISSOCIATED PARTNER'S POWER TO BIND AND LIABILITY TO PARTNERSHIP.

(a) For two years after a partner dissociates without resulting in a dissolution and winding up of the partnership business, the partnership, including a surviving partnership under Article 9, is bound by an act of the dissociated partner that would have bound the partnership under Section 301 before dissociation only if the other party to the transaction:

   (i) reasonably believed when entering the transaction that the dissociated partner was a partner at that time;

   (ii) did not have notice of the partner's dissociation; and

   (iii) is not deemed to have notice under notice under Section 303(e) or Section 704.

(b) A dissociated partner is liable to the partnership for any loss caused to the partnership arising from an obligation incurred by the dissociated partner after dissociation for which the partnership is liable under subsection (a).
SECTION 703. DISSOCIATED PARTNER'S LIABILITY TO OTHER PERSONS.

(a) A partner's dissociation does not of itself discharge the partner's liability for a partnership obligation incurred before dissociation. A dissociated partner is not liable for a partnership obligation incurred after dissociation except as provided in subsection (b).

(b) A partner who dissociates without resulting in a dissolution and winding up of the partnership business is liable as a partner to the other party in a transaction entered into by the partnership, or a surviving partnership under Article 9, within two years after the partner's dissociation, only if the other party to the transaction:

1. reasonably believed when entering the transaction that the dissociated partner is a partner at that time;
2. and
3. does not have notice of the partner's dissociation; and
4. is not deemed to have notice under Section 303(e) or Section 704.

(c) By agreement with the partnership creditor and the partners continuing the business, a dissociated partner may be released from liability for a partnership obligation.
(d) A dissociated partner is released from liability for a partnership obligation if a partnership creditor, with notice of the partner's dissociation but without the partner's consent, agrees to a material alteration in the nature or time of payment of a partnership obligation.

SECTION 704. STATEMENT OF DISSOCIATION.

(a) A dissociated partner or the partnership may file a statement of dissociation stating the name of the partnership and that the partner is dissociated from the partnership. A statement of dissociation is a limitation on the authority of a dissociated partner for the purposes of Section 303(d) and (e).

For the purposes of Sections 702 and 703(b), a person not a partner is deemed to have notice of the dissociation 90 days after the statement of dissociation is filed.

SECTION 705. CONTINUED USE OF PARTNERSHIP NAME.

Continued use of a partnership name, or a dissociated partner's name as part thereof, by the partners continuing the business does not of itself make the dissociated partner liable for an obligation of the partners or the partnership continuing the business.
ARTICLE 8
WINDING UP PARTNERSHIP BUSINESS

SECTION 801. EVENTS CAUSING DISSOLUTION AND WINDING UP OF PARTNERSHIP BUSINESS. A partnership is dissolved, and its business must be wound up, only upon:

(1) except as provided in Section 802, receipt by a partnership at will of notice from a partner, other than a partner who is dissociated under Section 601(2) through (10), of that partner's express will to withdraw as a partner, or upon any later date specified in the notice;

(2) in a partnership for a definite term or particular undertaking:

(i) except as provided in Section 802, within 90 days after a partner's wrongful dissociation under Section 602 or a partner's dissociation by death or otherwise under Section 601(6) through (10), receipt by the partnership of notice from another partner of that partner's express will to withdraw as a partner;

(ii) the express will of all the partners; or

(iii) the expiration of the term or the completion of the undertaking, unless all the partners agree to continue the business, in which case the partnership agreement is deemed amended retroactively to provide that the expiration or completion does not
result in the dissolution and winding up of the partnership business;

(3) an event agreed to in the partnership agreement resulting in the winding up of the partnership business, unless all the partners agree to continue the business, in which case the partnership agreement is deemed amended retroactively to provide that the event does not result in the dissolution and winding up of the partnership business;

(4) an event that makes it unlawful for all or substantially all of the business of the partnership to be continued, but any cure of illegality within 90 days after notice to the partnership of the event is effective retroactively to the date of the event for purposes of this section;

(5) on application by a partner, a judicial determination that:

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

(ii) another partner has engaged in conduct relating to the partnership business that makes it not reasonably practicable to carry on the business in partnership with that partner; or

(iii) it is not otherwise reasonably practicable to carry on the partnership business in conformity with the partnership agreement; or
(6) on application by a transferee of a partner’s transferable interest, a judicial decree that it is equitable to wind up the partnership business:

(i) if the partnership was for a definite term or particular undertaking at the time of the transfer or entry of the charging order that gave rise to the transfer, after the expiration of the term or completion of the undertaking; or

(ii) if the partnership was a partnership at will at the time of the transfer or entry of the charging order that gave rise to the transfer, at any time.

SECTION 802. DISSOLUTION DEFERRED 90 DAYS.

(a) Except as provided in subsection (b), a partnership of more than two persons is not dissolved until 90 days after receipt by the partnership of notice from a partner under Section 801(1) or (2)(i), and its business may be continued until that date as if no notice were received. Before that date, the partner who gave the notice may waive the right to have the partnership business wound up. If there is no waiver before that date, the partnership is dissolved and its business must be wound up.
(b) A partnership may be dissolved at any time during the 90-day period, and its business wound up, by the express will of at least half of the other partners.

(c) After receipt by the partnership of notice from a partner under Section 801(1) or (2)(i), the partner who gave the notice:

1. has no rights in the management and conduct of the partnership business if it is continued under subsection (a), but may participate in winding up the business under Section 804 if the partnership is dissolved on or before the expiration of the 90-day period pursuant to subsection (a) or (b);

2. is liable for obligations incurred during the period only to the extent a dissociated partner would be liable under Section 702(b) or Section 703(b), but is not liable for contributions for, and must be indemnified by the other partners against, any partnership liability incurred by another partner to the extent the liability is not appropriate for winding up the partnership business; and

3. with respect to profits or losses incurred during the period, shall be credited with a share of any profits but shall be charged with a share of any losses, only to the extent of profits credited for the period.

3. must be credited with the partner's share of any profits earned during the period and may be charged with the partner's share of any losses incurred during the period but only to the extent of profits credited during the period.
SECTION 803. PARTNERSHIP CONTINUES AFTER DISSOLUTION. A partnership continues after dissolution until the winding up of its business is completed, at which time the partnership is terminated.

SECTION 804. RIGHT TO WIND UP PARTNERSHIP BUSINESS.

(a) After dissolution, a partner who has not wrongfully dissociated has a right to participate in winding up the partnership's business, but on application of any partner, partner's legal representative, or transferee, the [designate the appropriate court], for good cause, may order judicial supervision of the winding up.

(b) The legal representative of the last surviving partner may wind up a partnership's business.

(c) A person winding up a partnership's business may preserve the partnership business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, settle and close the partnership's business, dispose of and transfer the partnership's property, discharge the partnership's liabilities, distribute the assets of the partnership pursuant to Section 808, and perform other necessary acts, including settlement of disputes by mediation or arbitration.
SECTION 805. PARTNER'S POWER TO BIND PARTNERSHIP AFTER DISSOLUTION. Subject to Section 806, a partnership is bound by a partner's act after dissolution that:

(1) is appropriate for winding up the partnership business; or

(2) would have bound the partnership under Section 301 before dissolution, if the other party to the transaction did not have notice of the dissolution.

SECTION 806. STATEMENT OF DISSOLUTION.

(a) After dissolution, a partner who has not wrongfully dissociated may file a statement of dissolution stating the name of the partnership and that the partnership has dissolved and is winding up its business.

(b) A statement of dissolution cancels a filed statement of partnership authority for the purposes of Section 303(d) and is a limitation on authority for the purposes of Section 303(e).

(c) For the purposes of Sections 301 and 805, a person not a partner is deemed to have notice of the dissolution and the limitation on the partners' authority as a result of the statement of dissolution 90 days after it is filed.
(d) After filing and, where appropriate, recording a statement of dissolution, the dissolved partnership may file and, where appropriate, record a statement of partnership authority which will operate with respect to a person not a partner as provided in Section 303(d) and (e) in any transaction, whether or not the transaction is appropriate for winding up the partnership business.

SECTION 807. PARTNER'S LIABILITY TO OTHER PARTNERS AFTER DISSOLUTION.

(a) Except as provided in subsection (b) and Section 802(c)(2), after dissolution a partner is liable to the other partners for the partner's share of any partnership liability incurred under Section 805.

(b) A partner who, with knowledge of the winding up, incurs a partnership liability under Section 805(2) by an act that is not appropriate for winding up the partnership business is liable to the partnership for any loss caused to the partnership arising from that liability.

SECTION 808. SETTLEMENT OF ACCOUNTS AMONG PARTNERS.

(a) In winding up the partnership business, the assets of the partnership must be applied to discharge its obligations to creditors, including partners who are
creditors. Any surplus must be applied to pay in cash the net amount distributable to partners in accordance with their right to distributions pursuant to subsection (b).

(b) Each partner is entitled to a settlement of all partnership accounts upon winding up the partnership business. In settling accounts among the partners, the profits and losses that result from the liquidation of the partnership assets must be credited and charged to the partners' accounts. The partnership shall make a distribution to a partner in an amount equal to that partner's positive balance. A partner shall contribute to the partnership an amount equal to that partner's negative balance.

(c) To the extent not taken into account in settling the accounts among partners pursuant to subsection (b), each partner shall contribute, in the proportion in which the partner shares partnership losses, the amount necessary to satisfy partnership obligations. If a partner fails to contribute, the other partners shall contribute, in the proportions in which the partners share partnership losses, the additional amount necessary to satisfy the partnership obligations. A partner or partner's legal representative may recover from the other partners any contributions the partner makes to the extent the amount
contributed exceeds that partner's share of the
partnership obligations.

(d) The estate of a deceased partner is liable
for the partner's obligation to contribute to the
partnership.

(e) An assignee for the benefit of creditors of a
partnership or a partner, or a person appointed by a
court to represent creditors of a partnership or a
partner, may enforce a partner's obligation to
contribute to the partnership.
ARTICLE 9
CONVERSIONS AND Mergers

section 901. conversion of partnership to limited partnership.

(a) A partnership may be converted to a limited partnership pursuant to this section.

(b) The terms and conditions of a conversion of a partnership to a limited partnership must be approved by all the partners or by a number or percentage specified for conversion in the partnership agreement.

(c) After the conversion is approved by the partners, the partnership shall file a certificate of limited partnership which satisfies the requirements of [section _____ of the State Limited Partnership Act] and includes:

(1) a statement that the partnership was converted to a limited partnership from a partnership;

(2) its former name; and

(3) a statement of the number of votes cast by the partners for and against the conversion and, if the vote is less than unanimous, the number or percentage required to approve the conversion under the partnership agreement.
(d) The conversion takes effect when the certificate of limited partnership is filed or at any later date specified in the certificate.

(e) A partner who becomes a limited partner as a result of the conversion remains liable as a partner for an obligation incurred by the partnership before the conversion takes effect. If the other party to a transaction with the limited partnership reasonably believes when entering the transaction that the limited partner is a general partner, the partner is liable for an obligation incurred by the limited partnership within 90 days after the conversion takes effect. The partner's liability for all other obligations of the limited partnership incurred after the conversion takes effect is that of a limited partner as provided in the [State Limited Partnership Act].

SECTION 902. CONVERSION OF LIMITED PARTNERSHIP TO PARTNERSHIP.

(a) A limited partnership may be converted to a partnership pursuant to this section.

(b) Notwithstanding a provision to the contrary in a limited partnership agreement, the terms and conditions of a conversion of a limited partnership to a partnership must be approved by all the partners.
(c) After the conversion is approved by the partners, the limited partnership shall cancel its certificate of limited partnership pursuant to [Section ______ of the State Limited Partnership Act].

(d) The conversion takes effect when the certificate of limited partnership is cancelled.

(e) A limited partner who becomes a partner as a result of the conversion remains liable only as a limited partner for an obligation incurred by the limited partnership before the conversion takes effect. The limited partner is liable as a partner for an obligation of the partnership incurred after the conversion takes effect.

SECTION 903. EFFECT OF CONVERSION; ENTITY UNCHANGED.

(a) A partnership or limited partnership that has been converted pursuant to this article is for all purposes the same entity that existed before the conversion.

(b) When a conversion takes effect:

(1) all property owned by the converting partnership or limited partnership remains vested in the converted entity;

(2) all obligations of the converting partnership or limited partnership continue as obligations of the converted entity; and
an action or proceeding pending against the converting partnership or limited partnership may be continued as if the conversion had not occurred.

SECTION 904. MERGER OF PARTNERSHIPS.

(a) Pursuant to a plan of merger approved as provided in subsection (c), a partnership may be merged with one or more partnerships or limited partnerships.

(b) The plan of merger must set forth:

(1) the name of each partnership or limited partnership that is a party to the merger;

(2) the name of the surviving entity into which the other partnerships or limited partnerships will merge;

(3) whether the surviving entity is a partnership or a limited partnership and the status of each partner;

(4) the terms and conditions of the merger;

(5) the manner and basis of converting the interests of each party to the merger into interests or obligations of the surviving entity, or into cash or other property in whole or part; and

(6) the street address of the surviving entity's chief executive office.

(c) The plan of merger must be approved:
(1) in the case of a partnership that is a party to the merger, by all the partners, or a number or percentage specified for merger in the partnership agreement; and

(2) in the case of a limited partnership that is a party to the merger, by the vote required for approval of a merger by the law of the state or foreign jurisdiction in which the limited partnership is organized and, in the absence of such specifically applicable law, by all the partners, notwithstanding a provision to the contrary in the partnership agreement.

(d) After a plan of merger is approved and before the merger takes effect, the plan may be amended or abandoned as provided in the plan.

(e) The merger takes effect on the later of:

(1) the approval of the plan of merger by all parties to the merger, as provided in subsection (c);

(2) the filing of all documents required by law to be filed as a condition to the effectiveness of the merger; or

(3) any effective date specified in the plan of merger.
SECTION 905. EFFECT OF MERGER.

(a) When a merger takes effect:

(1) every partnership or limited partnership that is a party to the merger other than the surviving entity ceases to exist;

(2) all property owned by each of the merged partnerships or limited partnerships vests in the surviving entity;

(3) all obligations of every partnership or limited partnership that is a party to the merger become the obligations of the surviving entity; and

(4) an action or proceeding pending against a partnership or limited partnership that is a party to the merger may be continued as if the merger had not occurred, or the surviving entity may be substituted as a party to the action or proceeding.

(b) The [Secretary of State] of this State is the agent for service of process in an action or proceeding against a surviving foreign partnership or limited partnership to enforce an obligation of a domestic partnership or limited partnership that is a party to a merger. The surviving entity shall promptly notify the [Secretary of State] of the mailing address of its chief executive office and of any change of address. Upon receipt of process, the [Secretary of State] shall mail
a copy of the process to the surviving foreign partnership or limited partnership.

(c) A partner of the surviving partnership or limited partnership is liable for:

(1) all obligations of a party to the merger for which the partner was personally liable before the merger;

(2) all other obligations of the surviving entity incurred before the merger by a party to the merger, but those obligations may be satisfied only out of property of that entity; and

(3) all obligations of the surviving entity incurred after the merger takes effect.

(d) If the obligations incurred before the merger by a party to the merger are not satisfied out of the property of the surviving partnership or limited partnership, the partners of that party immediately before the effective date of the merger shall contribute the amount necessary to satisfy that party's obligations to the surviving entity, in the manner provided in Section 808(c) as if the merged party were dissolved.

(e) A partner of a party to a merger who does not become a partner of the surviving partnership or limited partnership is dissociated from the entity, of which that partner was a partner, as of the date the merger takes effect. The surviving entity shall cause the
partner's interest in the entity to be purchased under Section 701. The surviving entity is bound under Section 702 by an act of a partner dissociated under this subsection, and the partner is liable under Section 703 for transactions entered into by the surviving entity after the merger takes effect.

SECTION 906. STATEMENT OF MERGER.

(a) After a merger, the surviving partnership or limited partnership may file a statement that one or more partnerships or limited partnerships have merged into the surviving entity.

(b) A statement of merger must contain:

(1) the name of each partnership or limited partnership that is a party to the merger;

(2) the name of the surviving entity into which the other partnerships or limited partnership were merged;

(3) the street address of the surviving entity's chief executive office and of an office in this State, if any; and

(4) whether the surviving entity is a partnership or limited partnership.

(c) Except as provided in subsection (d), for the purposes of Section 302, property of the surviving partnership or limited partnership which before the
merger was held in the name of another party to the merger is property held in the name of the surviving entity upon filing a statement of merger.

(d) For the purposes of Section 302, real property of the surviving partnership or limited partnership which before the merger was held in the name of another party to the merger is property held in the name of the surviving entity upon recording a certified copy of the statement of merger in the office for recording transfers of that real property.

(e) A filed and, where appropriate, recorded statement of merger, executed and declared to be accurate pursuant to Section 105(c), stating the name of a partnership or limited partnership that is a party to the merger in whose name property was held before the merger and the name of the surviving entity, but not containing all of the other information required by subsection (b), operates with respect to the partnerships or limited partnerships named to the extent provided in subsections (c) and (d).

SECTION 907. NONEXCLUSIVE. This article is not exclusive. Partnerships or limited partnerships may be converted or merged in any other manner provided by law.
ARTICLE 10
MISCELLANEOUS PROVISIONS

SECTION 1001. 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.

SECTION 1002. SHORT TITLE. This [Act] may be cited as the Uniform Partnership Act (1992).

SECTION 1003. SEVERABILITY. 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.

SECTION 1004. EFFECTIVE DATE. This [Act] takes effect . . . . . . . . . . . . .

SECTION 1005. REPEALS. The following acts and parts of acts are repealed: [the State Partnership Act as
amended and in effect immediately prior to the adoption of this [Act].

SECTION 1006. APPLICATION TO EXISTING RELATIONSHIPS.

(a) Except as otherwise provided in this section, this [Act] applies to all partnerships in existence on its effective date that were formed under the Partnership Act or any predecessor law providing for the formation, operation, and liquidation of partnerships.

(b) Section 802 does not apply to a partnership in existence on the effective date of this [Act] unless the partners agree otherwise.

(c) This [Act] does not impair the obligations of a contract existing when the [Act] takes effect or affect an action or proceeding begun or right accrued before this [Act] takes effect.

(d) A judgment against a partnership or a partner in an action commenced before the effective date of this [Act] may be enforced in the same manner as a judgment rendered before the effective date of this [Act].
A CRITIQUE OF THE
REVISED UNIFORM PARTNERSHIP ACT

Larry E. Ribstein
George Mason University School of Law
October 9, 1992
TABLE OF CONTENTS

I. NATURE AND FORMATION OF PARTNERSHIP ................................................................. 4
   A. CREATION OF PARTNERSHIP .................................................................................. 4
   B. OTHER RULES RELATING TO THE NATURE OF PARTNERSHIP ...................... 6
      1. PARTNERSHIP AS ENTITY ............................................................................... 6
      2. PARTNERSHIP PROPERTY .............................................................................. 7

II. RELATIONS OF PARTNERS TO PERSONS DEALING WITH THE PARTNERSHIP .......... 9
   A. PARTNER AS AGENT OR SERVANT ...................................................................... 9
      1. THE BASIC RULE OF AUTHORITY .................................................................. 9
      2. TRANSFERS OF RECORD TITLE ..................................................................... 12
      3. PARTNERS' WRONGFUL ACTS ...................................................................... 13
      4. THE STATEMENT OF PARTNERSHIP AUTHORITY ......................................... 13
   B. PARTNERS' LIABILITY .......................................................................................... 15

III. RELATIONS OF PARTNERS TO EACH OTHER AND TO PARTNERSHIP ..................... 18
   A. PARTNERS' FINANCIAL RIGHTS ........................................................................ 18
   B. PARTNERS' GOVERNANCE RIGHTS ................................................................... 19
   C. PARTNERS' INFORMATION RIGHTS ................................................................... 19
   D. FIDUCIARY DUTIES AND GOOD FAITH ............................................................ 21
      1. THE VAGUE DUTY OF LOYALTY .................................................................. 22
      2. "GOOD FAITH AND FAIR DEALING" ............................................................ 22
      3. NONWAIVABILITY OF FIDUCIARY DUTIES ................................................. 23
      4. STATUTORY LIMITATION OF FIDUCIARY DUTIES ........................................ 26
   E. REMEDIES ........................................................................................................... 27

IV. TRANSFEREES AND CREDITORS OF PARTNER ...................................................... 28
V. PARTNER DISSOCIATION .......................................................................................... 29
   A. DISSOCIATION AND DISSOLUTION IN GENERAL .......................................... 29
   B. CAUSES AND GENERAL CONSEQUENCES OF PARTNER DISSOCIATION ....... 29

VI. PARTNER'S DISSOCIATION WHEN BUSINESS NOT WOUND UP ...................... 33
   A. PURCHASE OF DISSOCIATED PARTNER'S INTEREST .................................... 33
      1. DUTY TO PURCHASE ..................................................................................... 33
      2. VALUATION OF PARTNER'S INTEREST ......................................................... 34
      3. INDEMNIFICATION ......................................................................................... 35
      4. PAYMENTS TO WRONGFULLY DISSOCIATING PARTNERS ......................... 37
      5. PROCEDURES FOR PAYMENT ....................................................................... 37
   B. TERMINATION OF DISSOCIATED PARTNER'S LIABILITY AND POWER TO BIND 38

VII. WINDING UP PARTNERSHIP BUSINESS ............................................................... 39
   A. EVENTS CAUSING DISSOLUTION AND WINDING UP ..................................... 40
   B. DEFERRAL OF DISSOLUTION ............................................................................ 42
   C. DISSOLUTION AND SUCCESSOR LIABILITY .................................................... 44
D. PARTNER'S POST-DISSOLUTION LIABILITY AND POWER TO BIND ........ 44
E. SETTLEMENT OF ACCOUNTS AMONG PARTNERS ........................................ 46
VIII. CONVERSIONS AND Mergers ................................................................. 47
IX. APPLICATION AND EFFECT OF RUPA ..................................................... 49
   A. EFFECT OF PARTNERSHIP AGREEMENT ............................................... 49
   B. CHOICE OF LAW .................................................................................. 50
   C. AMENDMENT OR REPEAL OF ACT ...................................................... 51
   D. APPLICATION TO PRE-RUPA PARTNERSHIPS ....................................... 51
   E. APPLICATION TO LIMITED PARTNERSHIPS ......................................... 52
   F. UNIFORMITY ......................................................................................... 53
XI. SUMMARY, CONCLUSIONS AND RECOMMENDATIONS ............................. 53
The National Conference of Commissioners on Uniform State Laws has approved the Revised Uniform Partnership Act\(^1\) which makes several significant changes from the venerable Uniform Partnership Act.\(^2\) This Article describes and critiques important aspects of RUPA.\(^3\) It concludes that there are serious about whether RUPA is a suitable replacement for the UPA.

The Act's weaknesses result fundamentally from its failure to serve the appropriate functions of a new uniform partnership law.\(^4\) Among other things, the uniform law should provide a "standard form contract" for parties to relatively small, informal firms that are unlikely to draft customized provisions, and should change existing partnership law only if the costs of change in terms of reduced uniformity\(^5\) and stability are clearly outweighed by the benefits of modernizing the statute. Instead, the Act mistakenly provides an agreement that is appropriate for partnerships generally. More seriously, it changes the existing black letter without adequate regard

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*© 1992 Larry E. Ribstein. Valuable comments were contributed by Peter Letsou of George Mason and the following members of the ABA Ad Hoc Subcommittee on the Revised Uniform Partnership Act: Gerald V. Niesar (Chair), Michael L. Gravelle, James L. Jerue, Robert Keatinge, Martin I. Lubaroff, Thurston R. Moore, Paul McCarthy, William G. Pusch, Lauris G.L. Rall and Anthony van Westrum. The final product is my own and does not represent the views of the American Bar Association or the Ad Hoc Subcommittee.

\(^1\) UNIFORM PARTNERSHIP ACT (1992), approved August 4, 1992 (hereafter referred to as "RUPA"). The references to the Comments in this Article are to the Comments published with the UNIFORM PARTNERSHIP ACT (Draft for Approval, 1992). Final Comments are being prepared by NCCUSL.

\(^2\) UNIFORM PARTNERSHIP ACT (1914), 6 U.L.A. 1 (1969) (hereafter "UPA").

\(^3\) I have already commented on a previous version of RUPA, the 1990 draft. See Larry E. Ribstein, A Mid-Term Assessment of the Project to Revise the Uniform Partnership Act, 46 BUS. LAW. 111 (1990). The current article, while intended to be a comprehensive discussion of important matters under the current draft, emphasizes matters either changed from the 1990 draft or not discussed fully in my first article. For discussions of UPA provisions that are not significantly altered by RUPA, including some suggested revisions, see generally A. Bromberg & L. Ribstein, BROMBERG AND RIBSTEIN ON PARTNERSHIP (1988 & Supp.).

\(^4\) I proposed these criteria in my critique of an earlier draft of RUPA. See Ribstein, supra note 3 at 113-14.

\(^5\) There is an additional question, which casts in doubt the entire RUPA project, of whether there is any justification for a uniform law. Although this article accepts the basic premise of a uniform partnership law, it is worth noting that there is some justification for allowing partnership law to continue to develop, as has corporate law, by a process of state competition. See generally, Larry E. Ribstein, A Theory of Uniform Laws, (ms. 1992).
to the serious costs of making the law non-uniform and of unsettling eighty years of case law under the UPA.

In brief, this Article concludes that RUPA weakens existing partnership law in the following ways:

1. It will increase third parties' costs of dealing with partnerships by reducing their ability to rely on apparent authority or record title and by making it much more difficult for them to collect judgments from individual partners.

2. It may frustrate partners' expectations by imposing new formalities and other accounting requirements.

3. It restricts private ordering by denying enforcement of, among other agreements, waivers of disclosure requirements and fiduciary duties.

4. It introduces new and potentially confusing rules in connection with partnership breakup without solving the most important dissolution-related problems under current law.

As a result of these serious flaws, this Article concludes that RUPA should not be adopted by the states and that, whether or not it is widely adopted, it may reduce the usefulness of the partnership form.

I. NATURE AND FORMATION OF PARTNERSHIP

This Part discusses RUPA's provisions on the definition and creation of partnership, as well as other provisions in Article 2 relating to the "nature of partnership."

A. Creation of Partnership

Because general partnerships can be formed without a filing, the general partnership act must define the types of businesses to which its provisions apply. UPA § 6(1) provides that "a partnership is an association of two or more persons to carry on as co-owners a business for profit." UPA § 7 includes "rules for determining the existence of a partnership," the most important of which, § 7(4), provides that profit-sharing is prima facie evidence of partnership except where profits are paid in connection with certain relationships. Together, these rules and definition provide that partnership is (1) intentional; (2) a business relationship; (3) a for-profit relationship; and (4) a relationship among parties that have joint responsibility for business affairs. This definition works reasonably well in the sense that firms conforming with the definition are likely to be suited to the default rules provided by the statute: equal profit and loss sharing, mutual agency and control,

6 See, generally, Bromberg & Ribstein, supra note 3, Chapter 2.
control over membership in the firm, and personal liability of all owners.

Although the definition is somewhat imprecise and has engendered substantial litigation, 80 years of case law under the UPA have done much to clarify the law. There is also a necessary tradeoff between uncertainty costs and the costs of providing unsuitable rules. Excessive specificity could frustrate parties' expectations by causing relationships to be defined as non-partnerships that are appropriate for the default rules provided in the statute. In any event, since a relationship that does not fit within the partnership definition will be defined by the general law of agency, contracts, or property, a broad but imprecise definition of partnership does not necessarily increase adjudication or uncertainty costs. In short, although the UPA's definition of partnership may not have been perfect, there is little justification for changing it.

RUPA wisely continues most of the UPA's fairly workable definition of partnership provisions. This is a significant improvement over the 1990 RUPA draft, which had changed the UPA in several confusing ways. However, the current RUPA draft does retain one potentially troublesome change: it includes in the list of profit-sharing relationships that are not presumptively partnerships one involving "a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral." This change obviously was intended to expand creditors' safe harbor to include additional categories of creditors that the courts might classify as partners. However, the change may actually increase creditors' exposure. RUPA, like the UPA, characterizes interest on a loan as a protected relationship. Thus, creditors are not necessarily partners even if they are deemed to be profit-sharers. Moreover, creditors described by the new language have a good chance of being deemed non-profit-sharers, and therefore clearly not partners, under the UPA. RUPA, however, puts these creditors in the weaker position of profit-sharers who may be partners.

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8 See RUPA § 202(c)(v); Ribstein, supra note 3 at 120.

9 See RUPA § 202(c)(v).

10 For a recent case involving this fact situation and holding against partnership, see Savers Federal Savings & Loan Association v. Amberley Huntsville, Ltd., 934 F.2d 1201 (11th Cir. 1991) (Ala. law: agreement to pay 20% of the value of the property at termination of loan did not constitute profit sharing that supports partnership because loan agreement made clear that creditor did not bear the risk of loss of principal, and agreement expressly provided that parties were not partners).
B. Other Rules Relating to the Nature of Partnership

Article 2 also includes provisions on the "partnership as entity" and rules on "partnership property."

1. Partnership as Entity

RUPA § 201 provides that "a partnership is an entity." The provision obviously is intended to end the confusion that arose out of the UPA's apparent adoption of the aggregate theory of partnership. However, because it is based on a fundamental misunderstanding of the aggregate/entity distinction, the provision will cause even more confusion of its own. "Aggregate" and "entity" are simply shorthand ways of characterizing partnership features. A partnership under both the UPA and RUPA is an "entity" insofar as, for example, the partnership may own property in its own name, but an "aggregate" to the extent that the partnership dissolves merely because of a change in membership.

"Entity" and "aggregate" cause mischief when courts use one of the terms to characterize the partnership relationship and then mistakenly derive consequences from that characterization. For example, the tax treatment of partnerships and corporations should not, but does, depend on whether the non-tax elements of its standard form can be characterized as "entity" or "aggregate." RUPA will do no more than simply reverse the mistake from an erroneous misuse of the aggregate theory to an erroneous misuse of the entity theory. Indeed, the new provision may even compound the problem by adding statutory authority for the mistake where there was none before.

The draft Comments include a good example of the misunderstanding of the aggregate/entity distinction. The Comment to the "entity" provision states:

Giving clear expression to the entity nature of a partnership is intended to allay previous concern that a deed is necessary to convey title from an "old" partnership to a "new" partnership when there is a change in the case of partners. Cases such as *Fairway Development Co. v. Title Ins. Co.*, 621 F.Supp. 120 (N.D.Ohio 1985), are overruled.

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11 For a discussion of the problems caused by the UPA in this respect, see Bromberg & Ribstein, *supra* note 3 § 1.03.

12 See *id.*; Ribstein, *supra* note 3 at 113-14.

The basic question in the Fairway situation, however, is whether the partnership's dissolution created a "new" partnership under the title insurance contract. That depends on the terms of the contract and on what happens in a dissolution, not on whether the partnership is, in some general conceptual sense, an "entity." RUPA should have solved the Fairway problem by fixing the underlying dissolution problem. This, of course, it did not do.\textsuperscript{14} Even if the Fairway result should turn on whether the partnership is an "entity," it plainly does not. If the partnership is an "entity," dissolution simply creates a new entity.

In any event, RUPA itself is inconsistent with its "entity" characterization of partnership. It clearly continues the "aggregate" theory in such critical respects as retaining personal liability of partners\textsuperscript{15} and providing for dissolution on partner dissociation.\textsuperscript{16}

As I said earlier, the statute should resolve the aggregate/entity confusion by defining the partnership "as an entity or aggregate as the context may require."\textsuperscript{17} Maybe, though, the proper approach, would be simply to eliminate these terms from the statute.

2. Partnership Property

RUPA, like the UPA, includes rules regarding ownership of property.\textsuperscript{18} RUPA § 203 now makes clear that partnership property is owned by the partnership itself rather than by the individual partners. This helpfully eliminates the confusion created by the UPA's "tenancy in partnership," which simultaneously made partners the nominal owners of partnership property and systematically negated their individual ownership rights.\textsuperscript{19}

The same praise cannot be extended to RUPA §204 on what property is owned by the partnership. UPA §8 was one of those most

\textsuperscript{14} See infra Subpart VII (A).

\textsuperscript{15} See RUPA §306-07, discussed in infra Subpart II (B).

\textsuperscript{16} See RUPA §801, discussed in infra Subpart VII (A).

\textsuperscript{17} See Ribstein, supra note 3 at 116 (emphasis in original). By "context" I mean the entire legal and factual context and not merely the context within the partnership statute of the specific provision that relates to the case.

\textsuperscript{18} It is not clear why these rules are included in the UPA's article on the "nature of partnership." It would have made more sense to place these rules in a separate article on partnership property.

\textsuperscript{19} See Bromberg & Ribstein, supra note 3 §§4.04-4.05; Ribstein, supra note 3 at 124 (commenting on equivalent provision in earlier RUPA draft).
in need of change. Given the informality of the "standard form" partnership that is the subject of the partnership act, questions inevitably will arise as to whether property is owned by the partnership or by the individual partners. If there were no partnership law, the questions would be resolved by property law, which may frustrate the expectations of both the members and third parties dealing with a business. Third parties need a low-cost method of determining what property is owned by the partnership so that they can adjust credit and other costs accordingly. The partners are in the best position to provide this information. Put another way, the investigation and uncertainty costs third parties may seek to charge to the business if they cannot easily determine what it owns probably will exceed the partners' costs of clarifying property ownership. The UPA, however, does not address this problem beyond providing in §8(2) that property acquired with partnership funds is partnership property.

The 1990 RUPA draft had clarified the UPA somewhat by adding three more precise rules for determination of ownership of partnership property: (1) Property is deemed to be owned by the partnership if acquired in partnership name; (2) property is presumed to be owned by individual partners if purchased in individual name without partnership assets; and (3) if the property is such that its title is customarily recorded, and record title is other than in the partnership name, it is not partnership property even if was purchased with partnership assets. Under the last provision, a partner's creditor or other third party who relied on record title would be protected. This makes sense in light of the policy discussed in the preceding paragraph, was consistent with case law in some states, and was an important aspect of the Georgia statute on which the RUPA provision was purportedly based. Final RUPA nevertheless deleted this last provision. It is not clear why the drafters made this change. Nor is it clear why property purchased in partnership name should always be regarded as partnership property, but property purchased in separate name should only be presumed to be separate property.

20 See RUPA (1990), § 8, discussed in Ribstein, supra note 3 at 122-23.


22 See GA. CODE ANN. § 14-8-8, discussed in the Comment to RUPA § 204. For a discussion of the importance of record title under the Georgia provision, see Larry E. Ribstein, An Analysis of Georgia's New Partnership Law, 36 MERCER L. REV.443, 481-82 (1985).

23 The draft comments compound the confusion by purportedly relying on the Georgia statute that does protect third parties and extensively quoting my explanation of the Georgia statute's emphasis on the written record. See Comment to RUPA § 204, quoting Ribstein, supra note 22 at 481-82.
Although RUPA has somewhat clarified the rules regarding determination of ownership of partnership property, its net effect may be to create even more confusion in this area. A state that had settled case law under the UPA on the determinative effect of record title as to third parties now may be forced to abandon this clear rule in the face of RUPA's mere presumption of ownership in this situation. This is a good example of how a provision that is arguably better than the UPA does not, in fact, improve partnership law.

II. RELATIONS OF PARTNERS TO PERSONS DEALING WITH THE PARTNERSHIP

Article 3 of RUPA deals with the partnership's relationship with third parties. This includes three separate subjects: (1) a partner's power as agent or servant to bind the firm; (2) the liability of individual partners to third parties; and (3) acts of purported partners.

A. Partner as agent or servant

The RUPA drafts have all adopted basically the same approach as the UPA concerning the partner's power to bind the partnership. Indeed, little change was necessary, since the UPA had worked fairly well in this respect, and in any event had been well glossed by case law. Nevertheless, even in this area RUPA confuses the law in subtle ways.

1. The Basic Rule of Authority

RUPA § 301, like UPA § 9(1), provides that each partner has the power to bind the partnership by an act that is "for apparently carrying on in the usual way the partnership business." RUPA changes the prior law as to the partner's basic agency authority in three important ways. First, RUPA changes the circumstances in which a third party is barred from holding the partnership responsible for an act within the partner's "apparently...usual" authority. UPA § 9(1) provides that an "apparently...usual" act does not bind the partnership if the third party "has knowledge of the fact that [the partner] has no such authority." The UPA, therefore, requires a fairly high degree of awareness of lack of authority on the part of the third party to avoid binding the partnership for apparently

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24 This case law is discussed in Bromberg & Ribstein, supra note 3 at 3:12-3:17.

25 RUPA adds "business of the kind carried on by the partnership." As explained by the Comment to § 301, this is consistent with case law under the section. See Bromberg & Ribstein, supra note 3, at 4:9-4:10, n. 11.
authorized acts. This makes sense. It gives the partnership the incentive to reduce the costs of all third parties dealing with it to the extent that it can cheaply do so by adjusting partners' apparent authority, while the third party cannot bind the partnership if he knows but fails to act on relevant information concerning the partner's authority.

By contrast, RUPA § 301(1) provides that the act is not binding as to a third party who "knows or has received a notice that the partner lacks authority." The italicized language is defined in RUPA §102(d), which provides that a person "receives a notice" of a fact when a "notice" is delivered under certain circumstances even if the person does not actually learn the fact. RUPA distinguishes between receiving notice and having notice. RUPA §102(b) provides that a person "has notice of a fact" if the person knows it has received a notice of it, or "has reason to know it exists from all of the facts known to that person at the time in question." In short, a person may "receive" notice but not "have" it because he neither knows nor should know it, or may "have" notice even if the other party has not delivered it.

This distinction makes superficial sense, since it permits a party who has delivered a communication to rely on the other's receiving it. The problem is that RUPA never says what "notice" is. For example, a third party may or may not have "notice" of lack of authority merely because he has a copy of a lengthy partnership agreement that includes provisions generally limiting the partner's authority. The determination inevitably will turn on a fact-specific inquiry as to the diligence of both the giver and the receiver of "notice." In other words, under RUPA even if a partner is apparently acting in the usual course of business, the partnership is not bound if the third party does not know of a restriction on the partner's authority but should have known of it. While this issue is sometimes unclear under the UPA, the stronger knowledge requirement and ample UPA case law provide guidance and protection.

26 UPA § 3(1) defines "knowledge" as including both "actual knowledge" and "knowledge of such other facts as in the circumstances shows bad faith."

27 RUPA § 301(1) (emphasis supplied).

28 RUPA § 102(b)(3). RUPA adds to the confusion by providing that "a person knows a fact if the person has knowledge of it," and not otherwise defining "knowledge." Id. § 102(a).

29 See Green River Associates v. Mark Twain Kansas City Bank, 808 S.W. 2d 894 (Mo. App. 1991)(since bank knew partnership agreement required deposit of proceeds of loan in partnership account, it could not rely on any apparent authority of general partner to deposit elsewhere, so partnership not liable for repayment of misappropriated proceeds); First National Bank and Trust Co. v. Scherr, 467 N.W.2d 427 (N.D. 1991)(under U.P.A. Sec. 9(4) and agency law, bank that earlier relied on authority of one partner to borrow for partnership could not continue to do so after it had knowledge from partnership agreement and signature card that consent of both partners...
Accordingly, under RUPA third parties dealing with RUPA partnerships would be well-advised in all transactions of any significance, no matter how "apparently... usual," to obtain written evidence of the partner's authority.30

A second change RUPA makes in the partner's agency authority makes things a bit more difficult for the partnership. The UPA provides that a third party is bound by restrictions on the partner's authority of which he is aware both where the restrictions apply to the partner's general power to bind in "apparently... usual" transactions under § 9(1), and where the restriction applies to the partner's authority created in some other way under § 9(4). RUPA, however, does not include the latter provision, and so provides no way outside the limited circumstances governed by a "statement of partnership authority"31 that the partnership can restrict apparent or other authority to bind as to non-"apparently... usual" acts. For example, it is not clear under RUPA whether a managing partner who has been given generally wide power to bind the firm can bind the firm in an extraordinary transaction as to a third party who knows facts at least strongly indicating that the partner lacks this authority. Although it may seem clear that the transaction is not binding under ordinary agency law, RUPA undercuts this conclusion by deliberately omitting the UPA provision that clearly dictates this result.

Third, RUPA omits the UPA's categories of presumptively nonbinding transactions.32 The UPA's list needed revision in light of modern practice.33 Yet it is important to include such a list in order to provide some presumptive "standard form" restrictions on partners' authority for informal partnerships. Such restrictions are particularly necessary in light of RUPA changes discussed immediately above that may make it easier for a third party to bind the partnership to acts that are not "apparently... usual." Moreover, deleting the list leaves unclear the continuing relevance of the deleted categories.

In general, the problem with RUPA's changes in Article 3 is not that they are clearly wrong, but that they are debatable policy.

30 This might be done by filing a "statement of partnership authority" under RUPA § 303. See infra Subsection II (A)(4).

31 See RUPA § 303 (d)-(e).

32 See UPA § 9(3).

Since RUPA unsettles an area of partnership law that necessarily depends for clarity on decades of case law, it should only have made changes that were clearly warranted.

2. Transfers of Record Title

UPA §10 clarifies that even unauthorized transfers of partnership real property in the names of the title-holders bind the partnership against grantees who justifiably relied on record title. The provision has worked reasonably well with a few exceptions: it is unjustifiably limited to real property transactions; it is unclear as to whether the partnership or an immediate grantee has the burden of proving whether the conveyance was authorized; it cross-references only the "apparently...usual" authority of partners, and therefore does not enforce actually authorized conveyances; and it includes vague provisions enforcing transfers of the partnership's "equitable" interest even by non-title-holders.

RUPA §302 fixes all of these problems. The provision applies to transfers of all types of property; it makes clear that the partnership has the burden of proving authority as against an immediate grantee of a conveyance of property held in the partnership name; it enforces a conveyance that is authorized under any part of the partner-authority provision; and it does not provide for enforcement of transfers outside the chain of title.

However, RUPA substitutes serious problems of its own. First, the section now applies to all property transfers, and not simply those involving record title. There is no reason why subsequent, or even immediate, grantees should receive the special protection of this section where they have not relied on a record of title.

Second, the section removes much of the subsequent grantee's protection by providing that the conveyance is not binding as to a grantee who had merely "notice," as distinguished from actual knowledge, of the lack of authority. Accordingly, a grantee who may be far removed from the partnership, and therefore from being able to check facts concerning authority, will be unable to rely even on a conveyance that is in the chain of title if he had any "reason to know" of the lack of authority "from all of the facts known to that person." Once again, as with ownership of property, RUPA reduces third parties' ability to rely on record title by holding that notice, rather than knowledge, defeats reliance. This denigration of the record's effect is particularly puzzling in light of RUPA §303(d)(2), which provides that a grant of authority in a filed

34 See RUPA § 302(a)(3).
35 See RUPA § 102(b)(3)(defining notice).
36 See supra subsection II(A)(2).
statement of partnership authority is effective in favor of transferees of real property without "knowledge to the contrary" (emphasis added).

Third, RUPA provides that a transfer of property held in individual partners' names without an indication in the transferring instrument of the partnership's interest or existence is binding against the partnership and individual title-holders if the transferee lacks "notice" that the property is partnership property. Thus, a third party who lacks notice that the property was partnership property may be able to enforce the conveyance against the title-holders even if he knew they had not authorized the conveyance. Conversely, a third party who has written authorizations from all of the partners in their individual capacities but is on notice of the existence of a partnership entity cannot be sure that the "partnership" will not claim the property. These rules overemphasize the technical chain of title in informal situations where technicalities are often disregarded. Moreover, because the subsection apparently applies only to an immediate "transferee" from the partnership, it leaves unclear the treatment of remote transferees.

3. Partners' Wrongful Acts

RUPA § 305 replaces UPA §§13 and 14 as to the partnership's liability for partners' wrongful acts. The RUPA provision makes several helpful changes from the UPA, including permitting suits by partners and by eliminating UPA language that had allowed the partnership to take on the acting partner's immunity from suit. However, as in the earlier draft, this provision still erroneously eliminates liability formerly provided for in UPA § 14(a) where a partner receives client funds while acting within her apparent authority and then immediately absconds with them.

4. The Statement of Partnership Authority

RUPA's most successful provisions are those allowing partnerships to create some certainty in their dealings with third

37 The same problems with using a "notice" rather than "knowledge" standards discussed in the preceding paragraph also apply in this context. Note that, by contrast, UPA § 10(3), which provides that the conveyance is enforceable only by a transferee "without knowledge," implies that the transferee must lack knowledge of the relevant facts, including both the identity of the owner and authority to convey.

38 See Comment to RUPA § 305; Ribstein, supra note 3 at 132-33 (discussing the first of these changes and recommending the second, which was adopted in this Draft).

39 See id. at 133 (noting that in this case the plaintiff may not be able to prove that the funds were "in the custody of the partnership" as required by RUPA § 305(b)).
parties through central filings.\textsuperscript{40} RUPA §303 permits a partnership to file "a statement of partnership authority" which (1) \textit{supplements} partners' authority by binding the partnership in favor of third parties who lack knowledge contrary to the statements in the document;\textsuperscript{41} and (2) \textit{limits} partners' authority to transfer real property.\textsuperscript{42} RUPA also requires notice to persons named in statements and allows them to file statements of denial of partnership status.\textsuperscript{43}

The main problem with the statement of partnership authority is not what RUPA allows the partnership to do, but what RUPA requires in order to take advantage of this provision. The general filing provision requires at least two partners execute any statement filed by the partnership,\textsuperscript{44} a provision that may not be waived by the partners. The statement also must include the names and addresses of \textit{all} partners (or of an agent who maintains a list of partners) and of all partners authorized to transfer real property,\textsuperscript{45} in both cases including partners whose authority is not dealt with in the statement. Finally, a person who files a statement must send a copy to every partner and person named as a partner.\textsuperscript{46}

These requirements do not impose undue burdens on the partners. The duty to send copies may be waived,\textsuperscript{47} and the duty to disclose the identities of all partners can be mitigated by using an agent. The problem with the statute is that it does not fully specify the penalties for noncompliance with formalities that have not been waived. The statute says only that failure to send a copy of the statement to a partner or person named as partner\textsuperscript{48} or to include all of the required information,\textsuperscript{49} does not change its effect as to non-partners. Thus, the partnership may not get the advantage of the

\textsuperscript{40} Filing and execution requirements for all statements are provided for in RUPA § 105. The statements of dissociation, dissolution and merger are discussed below in the sections relating to these events.

\textsuperscript{41} See RUPA §303(d).

\textsuperscript{42} See RUPA §303(e)-(f).

\textsuperscript{43} See id. §304. RUPA provides that a person is not a partner solely because he is named in a statement. See id. § 308(c). However, does not preclude the statement from having significant effect in this regard.

\textsuperscript{44} See RUPA §105(c).

\textsuperscript{45} See RUPA § 303(a).

\textsuperscript{46} See id. § 105 (c), (e).

\textsuperscript{47} See RUPA §103(b)(1).

\textsuperscript{48} See id. § 105(e).

\textsuperscript{49} See id. §303(c).
preclusive effect of §303 if a single partner does not receive a copy. This is an unjustified windfall for the third party who otherwise would be bound by the statement, and obviously does not protect the partner who was not notified of the statement. Also, the statement may fail to protect the partnership or a third party if it is executed only by one partner. The courts might protect the unaware or inadvertent by enforcing "de facto" statements, but this would introduce precisely the sort of unpredictability the statute is intended to eliminate. The statute should omit or further limit the effect of requirements that are not essential to the statute's basic purpose of establishing the authority of particular partners.

Despite these criticisms, §303 is a welcome addition to the partnership statute. Unfortunately, it is made particularly necessary by other RUPA provisions that would confuse and unsettle existing law on partners' authority. Thus, the authority provisions taken as a whole mean that, rather than simplifying partnership law for informal firms, the RUPA has complicated partners' authority to the point that all partnerships should enter the formal safe harbor of §303.

B. Partners' Liability

RUPA §307 provides, consistent with RUPA's general entity approach,50 that a partnership may sue and be sued in its own name.51

RUPA §§306 and 307 continue the individual liability of partners for partnership debts provided for in UPA §15, but significantly change the nature of this liability. Section 306 provides that all partner liability is joint and several, rather than joint and several only for partners' wrongful acts as under UPA §15. As noted in the Comment to §306, this eliminates creditors' burden of finding and suing all partners as may be required in some states for joint liability. But §307(d)'s "exhaustion" requirement is similar in effect to most states' rules for joint liability.52 It prevents creditors from

50 *See id. § 201, discussed supra in subsection I(B)(1).*

51 RUPA § 307(a).

52 *See Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis, 849 F.2d 264, 271 (7th Cir. 1988)(Ill. law); Commonwealth Capital Investment Corp. v. McLemore, 302 N.W.2d 222, 225 (Mich. App. 1980); Diamond National Corp. v. Thunderbird Hotel, Inc., 85 Nev. 271, 454 P.2d 13, 15 (1969). For joint and several liability, which is imposed under U.P.A. § 15(a) for partners' wrongful acts, the traditional rule is that the liability is individual and may be enforced without exhaustion. *See Foster v. Daon Corp., 713 F.2d 149, 151 (5th Cir. 1983)(Tex. law); Head v. Vulcan Painters, Inc., 541 So.2d 11 (Ala. 1989); Head v. Henry Tyler Construction Corp., 539 So.2d 196, 199 (Ala. 1988); Catalina Mortgage Co. v. Monier, 800 P.2d 574 (Ariz. 1990, en banc); Phillips v. Cook, 239 Md. 215, 210 A.2d 743, 746-47 (1965). For a general discussion of the exhaustion requirement see II Bromberg & Ribstein, *supra* note 3 § 5.08(d)-(g).*
levying against partners of non-bankrupt partnerships without first levying unsuccessfully against the partnership or convincing a court that levy would be unsuccessful.

RUPA's new exhaustion requirement makes some sense. Exhaustion is consistent with current partnership law that requires application of partnership property to pay liabilities and partner contributions to make up any shortfall, and with bankruptcy law that lets the trustee pursue general partners only if partnership assets are insufficient. Requiring exhaustion obviously helps protects partners' assets by saving them the expense of paying the creditor and then maintaining an indemnification action against the firm. At the same time, it does not frustrate most creditors' expectations. Contract creditors generally rely on the firm's assets because it is usually more trouble than it is worth for them to track the wealth of individual partners. Where creditors do find it worthwhile to rely on individual partners, they can and do obtain guarantees that permit direct actions against the partners. Thus, the exhaustion requirement may not significantly increase partnerships' credit costs.

Yet there are also substantial arguments against switching to an exhaustion rule. Requiring exhaustion for both joint and joint and several liability will increase litigation costs for tort creditors who formerly could sue partners without exhaustion, and who have no opportunity to contract around the rule. The exhaustion rule is also inappropriate for trade creditors of small, informal partnerships for which RUPA should be designed because such creditors are most likely to rely on individual partners' net worth.

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53 Id. § 307(c) also provides that a creditor must obtain a separate judgment against a partner before satisfying a judgment out of that partner's assets.

54 See UPA § 40(a), (c), (d). Note, however, that RUPA §808 significantly changes these provisions. See infra Subpart VII (E).


56 See Ribstein, supra note 13 at 430-31 (discussing this as a justification for limited liability in closely held firms).


58 As discussed immediately above, the general rule requires exhaustion in the case of joint liability, which UPA § 15 imposes for non-tort claims. RUPA § 307(d)(2) would enforce contracts for direct liability. The extent to which exhaustion increases tort creditors' costs depends, of course, on how onerous the exhaustion requirement if courts require only a single return of execution, exhaustion may not be a serious problem. On the other hand, exhaustion may be difficult if tort creditors must pursue partnership assets in several states.
The exhaustion rule is particularly inappropriate in light of the broad availability of various forms of limited liability, including limited liability companies. As long as firms easily can contract out of unlimited liability, there is little reason for the partnership standard form to move closer to limited liability through an exhaustion requirement. 59

Even if partners should be protected through an exhaustion rule, the RUPA rule may not be the right approach. Section 307(d)(3) requires exhaustion if that "is an appropriate exercise of the court's inherent equitable powers." The statute nowhere guides the court's exercise of discretion. Moreover, §307(d)(5) requires exhaustion if "liability is imposed on the partner by law or contract independent of the existence of the partnership." This exception clearly allows creditors to pursue partners directly if, for example, they have negligently supervised their colleagues. It may even preserve the rule under which the "law" imposes joint and several liability on all partners for partnership torts. If so, §307 simply brings the law back to its starting point.

Finally, §307 has potentially undesirable effects on partnership bankruptcy. Section 307(d)(2) provides that exhaustion is not necessary if the partnership is the subject of a voluntary or involuntary bankruptcy proceeding. In other words, as soon as such a proceeding commences, the partners' individual assets are exposed to execution for partnership debts. This undoubtedly will deter partners from filing voluntary proceedings and therefore discourage the use of Chapter 11 to reorganize partnerships. It also may encourage creditors to bring involuntary proceedings solely as a way of reaching partners' individual assets even where bankruptcy is otherwise inappropriate.

RUPA §307 is not only doubtful policy, but also confuses existing state law. What was formerly "joint" liability in some states will be "joint and several" under RUPA. At the same time, RUPA would defeat the main point of that recharacterization by requiring exhaustion even under joint and several liability, although many states had made it a requirement only for joint liability. And it would cast further doubt on that already complicated state of affairs through its exceptions to the exhaustion requirement, particularly the one for "direct" liability. There is enough doubt about the wisdom and effect of RUPA's exhaustion rule that the RUPA drafters should have continued to allow the law to develop on a state-by-state basis as it had under the UPA.

59 Conversely, if partnership does move closer to limited liability through an exhaustion rule, this weakens the argument against expanding limited liability through the LLC form. See Ribstein, supra note 13 at 430-31.
III. RELATIONS OF PARTNERS TO EACH OTHER AND TO PARTNERSHIP

RUPA Article 4 provides rules concerning financial relationships and control rights among the partners of a going partnership. Most of these rules are, quite properly, subject to contrary agreement of the partners pursuant to RUPA § 103. Nevertheless, some of RUPA's new rules create potential problems.

A. Partners' Financial Rights

RUPA §401 generally retains the rules in UPA §18 concerning the partners' equal sharing in profits, loss sharing in relation to profits, rights to indemnification and compensation for services, and interest on advances. The mostly style differences from the UPA are discussed in the Comment to this Section. In retaining the UPA rules, RUPA misses an important opportunity to add clarity concerning the meanings of "profits" and "losses" and when a loss sharing agreement arises.

The major difference between UPA and RUPA regarding financial rights is RUPA's requirement that partnerships "establish an account for each partner" which is "credited with" partner contributions and shares of profits and "charged with" distributions and partner shares of losses. This change is questionable. Although the partners can contract around the requirement of accounts, the requirement may have serious and unpredictable consequences for the sort of small, informal, partnerships for which the statute is intended. Most such firms have nothing resembling partner "accounts," and indeed many were not even intentionally organized as "partnerships." In this situation, the requirement that such firms "shall establish" such accounts is unclear. Does it mean that RUPA's financial provisions do not apply to such firms or that some other penalty is applied? Alternatively, will the courts deem any firm that

60 Partner dissociation and dissolution are governed by RUPA Articles 6-8.

61 The exceptions are the right of access to books and records under RUPA § 403(b) and the obligation of good faith under § 404(d). See RUPA § 103(b)(2) and (3).

62 These rules are discussed generally in Bromberg & Ribstein, supra note 3 § 6.02.

63 See Ribstein, supra note 3 at 134-35.

64 A smaller difference is that RUPA §401(h) permits compensation for all winding up partners, and not merely for winding up after a partner's death as in UPA § 18(f). This change is criticized in Ribstein, supra note 3 at 135-36.

65 See RUPA § 401(a)-(b).
does not have the accounts to have contracted around the requirement? If so, the requirement has little significance.

Perhaps the capital accounts requirement in RUPA §401 is intended only to ensure that, on dissolution or breakup, the court will establish capital accounts for purposes of determining the partners' shares. If so, RUPA should not have affirmatively required the partners to keep capital accounts, but rather should have provided for capital accounts only in the distribution provision. In any event, even if this is all RUPA meant, it is misguided. Reconstructing the partners' accounts may be quite difficult and unnecessary in informal partnerships. Indeed, that is why RUPA eliminated the cumbersome requirement of a formal accounting in interpartner actions.

In short, while a provision for capital accounts makes good sense to any lawyer who has drafted a partnership agreement, it does not make sense for the partnership statute. Capital accounts belong in agreements, not in a statute that is designed specifically for firms that do not have agreements.

B. Partners' governance rights

The only significant change that RUPA makes in UPA regarding partners' governance rights is that RUPA § 401(j) makes clear that differences as to extraordinary matters not involving amendment of the partnership agreement can be made only by unanimous vote. By contrast, UPA § 18(h) explicitly provides for unanimity only for an "act in contravention of any agreement between the partners."

C. Partners' information rights

RUPA § 403 mostly incorporates UPA §§19 and 20 concerning, respectively, partnership books and partners' duty to render information. Section 403, unlike UPA §19, qualifies partners' right of access to partnership books by limiting inspection to business hours, permitting inspection by former partners only of books and records pertaining to the period during which they were partners, and allowing the partnership to charge for copies. The permission to charge for copies and the limitation to business hours make sense but are details that add little to prior law.

At the same time, RUPA fails to make important needed changes. First, RUPA retains the requirement of "demand" for information. The prior case law had overlooked the UPA §20

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66 See the discussion of the distribution provision, §808, infra Subpart VII (E).

67 See RUPA §406, discussed in infra Subpart III(E).

68 For discussion and approval of this change, see Ribstein, supra note 3 at 136.
"demand" requirement and compelled disclosure in other appropriate circumstances, consistent with the expectations of those in a fiduciary relationship. A change in the statute therefore would have been appropriate if only to align it with the case law. But RUPA unnecessarily complicates things by requiring disclosure on demand only "to the extent just and reasonable." The latter stipulation had been proposed in one state's variation on the UPA as a substitute for the demand requirement to make the section consistent with prior case law and adopted by an earlier RUPA draft. This combination of the "demand" and "just and reasonable" standards could be interpreted as overruling some cases that appropriately had permitted disclosure without demand when just and reasonable. As a result, partnerships governed by RUPA may have to enter into explicit agreements providing for disclosure. This drafting obligation is inconsistent with the partnership act's function of providing an agreement for informal partnerships.

Second, the RUPA precludes the parties from contracting to restrict access to books and records. The partners may have strong reasons to limit disclosure. For example, they might seek to protect confidential information, or to ensure that obstreperous partners cannot badger the firm with burdensome information requests. RUPA § 103(b)(2) provides that the partnership agreement may not "unreasonably restrict a partner's right of access to books and records under Section 403(b)." While this restriction may seem innocuous, in fact it is an unwarranted constraint on private ordering. It at least gives antagonistic or litigious partners a basis for challenging clear


70 See GA. CODE ANN. § 14-8-20.

71 See RUPA § 20 (1990 Draft).

72 Note that disclosure may be required even without demand under the obligation of "good faith and fair dealing." See RUPA §404 (e), discussed in infra subsection III (D) (2). If so, the elimination of the "demand" requirement is pointless and misleading.

73 This limitation apparently does not apply to restrictions on access by former partners. Such agreements may be particularly important in light of RUPA's new rule giving such partners access "to books and records pertaining to the period during which they were partners." On the one hand, former partners whose interests are being liquidated may want information, for example, regarding the period between the time of dissociation and the time of settlement of accounts on dissolution. On the other hand, access by former partners may raise troubling confidentiality problems. These points illustrate the difficulty of drafting specific rules that are right for all firms and, accordingly, the need to permit private contracting.
restrictions to access. At worst, the courts may broadly construe the
restriction. Not only is access to books among the few mandatory
rights relating to inter-partner relationships, but the restriction on
contracting is in addition to the mandatory obligation of "good faith
and fair dealing." Accordingly, a court is entitled to conclude that
the statute prohibits even good faith denials of access that
nevertheless fall within the nebulous "unreasonable" range. For
example, a court could invalidate as "unreasonable" an agreement
prohibiting a partner from using an agent other than his attorney,
particularly in light of the statute's explicit grant of access to "agents
and attorneys." The statute should avoid this potential for confusion
by not trying to over-legislate concerning "sport" cases that can
safely be entrusted to judicial discretion.74

Finally, RUPA § 403, like the equivalent UPA provision, awk-
wardly states a "duty" of the "partnership" to keep books and
records at a particular place without stating any penalty for breach of
the duty. It would be better simply to give partners the only right
they care about -- a right to inspect at the chief executive office.

D. Fiduciary duties and good faith

UPA § 21 provides simply and comprehensively that a partner
must account to the partnership for benefits appropriated without co-
partner consent. An enormous body of case law has evolved under
this section to deal with every variety of fiduciary breach.75
Accordingly, UPA §21 should be changed only with great care to
avoid unsettling a valuable stock of existing law.

RUPA §404 does make a couple of worthwhile changes to
UPA §21. The duty-of-loyalty language derived from the UPA omits
the UPA's confusing reference to conduct in the "formation" of the
firm which could refer to conduct prior to the beginning of the
parties' fiduciary relationship as partners. Also, the first sentence of
the section makes clear that the waivable duties of care and loyalty
are "the only fiduciary duties a partner owes." The Reporter noted
that this language would facilitate contracting around the duties.76
Unfortunately, however, this purpose is negated by the statute's
addition of the wild card good faith obligation and limitations on
contracting discussed below in this section.

Despite these salutary changes, for the reasons enumerated
below RUPA §404 is seriously misguided.

74 See Michael P. Dooley, Two Models of Corporate Governance, 47 BUS.

75 See generally Bromberg & Ribstein, supra note 3 §6.07.

76 See Donald J. Weidner, the Revised Uniform Partnership Act Midstream:
1. The vague duty of loyalty

RUPA § 404 unsettles the law by adding to the UPA a revised duty of loyalty (§ 404 (b)) and a duty of care (§ 404(d). The duty of care is an innocuous restatement of cases holding partners liable only for "gross negligence or willful misconduct." The duty of loyalty adds to the general UPA duty not to appropriate benefits without co-partner consent specific duties to refrain from self-dealing or competition with the partnership. These additional duties were added because, as noted immediately above, §404 now is intended to be an exhaustive list of duties. However, since the case law under the UPA had supported these duties under the UPA language alone, RUPA may imply that partners' duties have been expanded from prior law. The statute should negate this implication. It could do so while continuing to provide an exhaustive list by clarifying that the new categories are only subcategories of the original RUPA definition of the partner's fiduciary duties.

2. "Good faith and fair dealing"

Section 404 includes a new and undefined "obligation of good faith and fair dealing." This was criticized in my prior article and along similar grounds by another commentator. But the provision is important enough that it is worth some additional comments.

A statutory "obligation of good faith and fair dealing" hardly seems objectionable. A partnership agreement, like other contracts, is subject to judicial interpretation of the contract language in light of the parties' expectations. That is particularly so for long-term business relationships like partnerships which the parties cannot practicably plan in detail at the outset. In effect, this interpretation process requires the parties to act in "good faith" consistent with their mutual expectations rather than merely literally complying with their agreement. Since this principle ensures that the parties' conduct conforms with their underlying deal, the parties obviously cannot contract out of it. The parties can, however, vary the application of the principle in particular cases by varying their deal.

Section §404 is consistent with these observations in providing both that partners must act in good faith and that they cannot wholly contract out of this obligation. The Comment to § 404 points out that the "good faith" principle is derived from the Uniform Commercial Code, where it clearly serves the interpretation function described in this paragraph.

77 See Ribstein, supra note 3 at 140-41 (discussing law and policy of partners' duty of care).
78 See id. 137-39.
79 See Hynes, supra note 57 at 753-57.
The problem with "good faith" in RUPA is that §404(e) erroneously characterizes "good faith," together with other fiduciary duties, as a "standard[1] of partner's conduct." This subjects partners to a new and undefined duty in addition to those of loyalty and care. This is not much different from the serious mistake made in the earlier draft of characterizing "good faith" as one of the partners' "fiduciary duties." Including "good faith and fair dealing" as a separate obligation in the same section that defines fiduciary duties implies at least a close analogy between good faith and fiduciary duties. Yet fiduciary duties are a particular type of duty owed by one who exercises a discretionary power on behalf of another and not a principle that guides interpretations of all sorts of contracts. The confusion of these duties is apparent from a Comment saying that "good faith" includes the very affirmative disclosure obligation -- clearly one imposed only on fiduciaries -- that the drafters declined to include in §403. Only decades of case law can answer the many questions raised by this new duty. "Good faith and fair dealing" under RUPA is a litigator's dream.

3. Nonwaivability of fiduciary duties

The most important problem with RUPA §404 is that the duties of care and loyalty, and not merely the obligation of good faith, are among the provisions that cannot be waived in the partnership agreement under RUPA §103. The agreement can merely "identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable." Mandatory fiduciary duties are bad policy. Fiduciary duties can be costly to the partnership because they may unduly deter the agent from exercising his discretion, deprive the partnership of valuable deals, and expose the firm to wasteful litigation. Moreover, incentive compensation and other devices are available to constrain the agent to act in the principal's interests. For all these reasons, it may be quite sensible for a firm to contract out of fiduciary duties, and a statutory provision forbidding partners from doing so paternalistically precludes worthwhile contracts.

Moreover, mandatory fiduciary duties change decades of prior law under the UPA. UPA §21, the UPA's sole substantive fiduciary duty section, provides that a partner must account only for

80 See the Comment to §404 (explicitly providing that the substantive obligation of disclosure is part of this "obligation" of good faith).

81 See RUPA §404(c).

82 See generally, Henry N. Butler & Larry E. Ribstein, Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians 60 WASH. L. REV. 1 (1990). Indeed, even the Reporter to RUPA favored opting out of fiduciary duties. See Weidner, supra note 76.
those profits derived "without the consent of the other partners." Moreover, the partners may authorize partner compensation under the lead-in to UPA §18, which is no different in effect from allowing a partner to take partnership opportunities as part of his compensation. Consistent with these provisions, the courts have enforced partnership agreements permitting partners to compete with the partnership\textsuperscript{83} and to engage in self-dealing.\textsuperscript{84}

What is more, there is an internal conflict even within RUPA. RUPA §401, the counterpart to UPA §18, is subject to contrary agreement, and RUPA §404(b)(1) incorporates UPA §21, including the consent language. Accordingly, even under RUPA the courts may continue to allow partners to waive fiduciary duties.

Nonwaivability of the duties of loyalty and care was added at the last moment during final floor debate at the NCCUSL annual meeting. The Commissioners' may have been influenced by letters sent to all Commissioners just prior to the Annual Meeting, on July 17 and 27, by Melvin A. Eisenberg, Professor of Law at the University of California. Professor Eisenberg argued in his July 17 letter that fiduciary duty waivers should not be enforced because of the difficulties of planning for future events.\textsuperscript{85} It is certainly the case that partners cannot foresee all possible contingencies at the outset of their relationship. However, this applies both to costs and benefits of fiduciary duties. The partners' inability to foresee the future does not explain why they should be forced to permit future challenges to their actions, no matter how unpredictably harmful to the firm these challenges may be. Professor Eisenberg's July 17 letter also erroneously asserts that nonwaivability would be a "return to the format of the present Act."\textsuperscript{86}

Professor Eisenberg's July 27, 1992 letter adds that the provision permitting fiduciary duty waivers would be applied to limited partnerships under the limited partnership act,\textsuperscript{87} and argues that this would be unjustified because "it would be at best a bad joke to believe that limited partners in a publicly held limited partnership


\textsuperscript{84} See Wilson v. Button, 404 F.2d 309 (5th Cir. 1968); Hooper v. Yoder, 737 P. 2d 852 (Colo. 1987); Covalt v. High, 100 N.M. 700, 675 P.2d 999 (N.M.App. 1983). For a discussion of cases enforcing partnership provisions opting out of fiduciary duties, see II Bromberg & Ribstein, supra note 3 at 6.90-6.92.

\textsuperscript{85} See letter of Melvin Eisenberg to NCCUSL Commissioners, July 17, 1992, at 2-4.

\textsuperscript{86} Id. at 5.

\textsuperscript{87} See letter of Melvin Eisenberg to NCCUSL Commissioners, July 27, 1992 at 7.
can bargain about such provisions in any meaningful sense."**88** This conclusion is questionable on policy grounds. While limited partners usually do not bargain individually concerning fiduciary duty waivers, they are usually sophisticated or have sophisticated investment advisors. Indeed, there is no reason to think they are any less able as a group to understand fiduciary duty waivers than general partners.**89** In any event, limited partners are less exposed than general partners to costs from fiduciary breach because of their limited liability. Moreover, if waivers of fiduciary duties in limited partnerships are a "joke," it is apparent that Delaware, the country's leading business-formation jurisdiction, is not in on it, since Delaware recently enacted a comprehensive authorization of freedom of contract in limited partnerships.**90** Finally, even if authorizing fiduciary duty waivers in limited partnerships is bad policy, the appropriate solution is a provision in the limited partnership statute, not restricting contracting in all general partnerships.**91**

It is important to recognize that a court can find a fiduciary breach even under a partnership agreement that includes a broad enforceable waiver of fiduciary duties. The breach may not be within the language of the waiver, as where a partner not only competes with the firm as permitted by the waiver, but does so by making

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**88** *Id.* at 7.

**89** *Cf.* Larry E. Ribstein, *Unlimited Contracting in the Delaware Limited Partnership and its Implications for Corporate Law*, 17 J. CORP. L. 299 (1991) (comparing limited partners' and corporate shareholders' ability to understand fiduciary duty waivers).

**90** See Senate Bill No. 469 (Jun. 13, 1990), sec. 27, adding the following two subsections to 6 Del. Code. Sec. 17-1101:

(c) It is the policy of this chapter to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements.

(d) To the extent that, at law or in equity, a partner has duties (including fiduciary duties) and liabilities relating thereto to a limited partnership or to another partner, (1) any such partner acting under a partnership agreement shall not be liable to the limited partnership or to any such other partner for the partner's good faith reliance on the provisions of such partnership agreement, and (2) the partner's duties and liabilities may be expanded or restricted by provisions in a partnership agreement.

For a discussion of this provision, see Ribstein, *supra* note 89.

**91** This is related to the general issue of whether partnership law should be "delinked" from limited partnership law. *See infra* Subpart IX (E).
unauthorized use of confidential information. Moreover, even if the conduct is literally authorized by the provision, it may not be permitted under the "good faith" principle of enforcing the parties' basic expectations rather than the literal language of their agreement.

RUPA's method of dealing with this sort of problem -- permitting only waivers of "specific types or categories of activities" -- is wholly inappropriate. Under RUPA, even a reasonable waiver that operates consistently with the party's underlying deal would not be enforced if the waiver is not sufficiently "specific." Moreover, RUPA adds that even a specific waiver cannot be enforced if it is somehow "manifestly unreasonable." These qualifications of the scope of private ordering are so vague and so sure to invite litigation that they constitute a complete prohibition of waivers.

The restriction on waiver of the duty of due care is as questionable the one regarding the duty of loyalty. Although the partners usually will want at least a duty of gross negligence, they might also decide that the probability that a partner will be grossly negligent without a loyalty breach is low enough as not to be worth the costs and risks of litigation. Moreover, the partners may want to provide only for liability for gross negligence, and not for liability on such vague additional grounds as "intentional misconduct" or "knowing violation of law."

4. Statutory limitation of fiduciary duties

After forbidding the parties from making their own contracts, RUPA §404(f) makes its own abortive stab at writing a limitation of fiduciary duties:

A partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the partner's conduct furthers the partner's own interest. A partner may lend money to and transact other business with the partnership. The rights and obligations of a partner who lends money to or transacts business with the partnership are the same as those of a person who is not a partner, subject to other applicable law.

92 See Tri-Growth Centre City, Ltd. v. Sildorf, Burdman, Duignan & Eisenberg, 216 Cal. App. 3d 1139, 265 Cal. Rptr. 3309 (1989). For discussion of other cases in which the courts held that broad waivers did not permit the partner's conduct, see II Bromberg & Ribstein, supra note 3 at 6:92, n. 94 (supp.).

93 See supra subsection III(D)(2).

94 For discussions of the problems of interpreting such provisions, see Larry E. Ribstein, BUSINESS ASSOCIATIONS, 489 (2d ed. 1990); Harvey Gelb, Director Due Care Liability: An Assessment of the New Statutes, 61 TEMPLE L. REV. 13, 34-43 (1933).
To the extent that the rest of §404 explicitly limits partners' duties, it is unnecessary to add that the partner has no duties beyond those specified. The Comment says that the subsection is derived from a RULPA provision that essentially provides that partner creditors are treated like outside creditors subject to applicable debtor-creditor law. However, putting this language in a section on general standards of conduct erroneously implies that it limits partners' intra-partnership fiduciary duties. In general, this subsection makes the same mistake as the rest of §404: In attempting excessively to limit and guide the judicial function and to provide detailed agreements for parties, RUPA merely risks unsettling the existing law.

RUPA should have made only two changes in the UPA: (1) provide for an exclusive and exhaustive definition of fiduciary duties to enhance the role of private ordering; and (2) delete the reference to "formation" from UPA §21. Instead, RUPA §404 changes the UPA in ways that are so misguided that these problems alone may force firms to avoid the partnership form.

E. Remedies

RUPA §§405 and 406 replace UPA § 22 regarding remedies between a partner and the partnership and among the partners. UPA §22 provides only for a "right to an account," which involves a potentially lengthy proceeding resolving all pending matters among the partners. Cases under the UPA hold that the accounting proceeding is the partners' exclusive remedy for some causes of action arising out of partnership affairs. Because this rule introduced unnecessary procedural complexity it was long overdue for abolition.

RUPA §406(b) addresses exclusivity by providing that "a partner may maintain an action against the partnership or another partner for legal or equitable relief, including an accounting as to partnership business." This provision, however, does not go far enough because it could be interpreted as consistent with existing law. Partners always have been able to bring actions other than for accounting. The question is whether accounting is exclusive for some kinds of cases. Given the long history of the exclusivity rule and its wide following in the courts, it can be safely reversed only by

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95 See UNIFORM LIMITED PARTNERSHIP ACT (1985), §107.

96 See II Bromberg & Ribstein, supra note 3 §6.08(d).

97 The exclusivity rule and its exceptions are reviewed in id. § 6.08(b).

98 Abolition of the exclusivity rule by RUPA was advocated by ABA Report, supra note 33 at 152; Ribstein, supra note 3 at 141-42.
a clear statement that an accounting is not a prerequisite to exercise of a partner's remedies against the firm.

At the same time, §406(b) may go too far by unduly broadening individual partners' remedies. Partners clearly should be able to bring some kinds of litigation directly, as for recovery of distributions or indemnification. They should not, however, be able to sue individually on actions that belong to the firm because that lets any partner burden the firm with costly litigation. Firms also may want to avoid the potential excesses of derivative litigation and require suit only in the name of the firm. These concerns are made even more acute by §404's expansion of duties that such suits can enforce. Even the exclusivity rule is better than expanding partners' rights to sue because requiring formal accountings at least deters needless litigation by exposing the plaintiff to counterclaims. Accordingly, §406 should be revised to clarify that individual partners cannot sue on actions belonging to the firm. Moreover, in light of the potential costs of excessive litigation, the statute should make clear that partners can contract to limit remedies. Instead, the Comment to RUPA §406 says, without either support or basis in the black letter, that "partners may not contract away their Section 406 remedies for breach of the mandatory duties in Section 103."

IV. TRANSFERENCEES AND CREDITORS OF PARTNER

RUPA §§501-504 contain provisions analogous to UPA §§24-28 which clarify partners' power to convey their financial rights in the partnership and make them available to creditors. These provisions are essentially the same as the 1990 provisions discussed in my earlier article. To summarize briefly, RUPA makes an important contribution by clarifying that a partner is not a co-owner of specific partnership property and has no power to transfer such property. Although RUPA § 503(b) clarifies the effect of an assignment by providing that it transfers "distributions to which the

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99 This is the default rule suggested for limited liability companies in the Prototype Limited Liability Company Act. See ABA Ad Hoc Limited Liability Company Committee, PROTOTYPE LIMITED LIABILITY COMPANY ACT § 1102.

100 RUPA §406 is not one of the provisions listed in RUPA Section 103 as not being subject to contrary agreement. Contrary to the implication of the Comment to §406, it does not follow from the fact that a duty is mandatory that all aspects of the remedy are also mandatory. Indeed, ALI's Corporate Governance project explicitly provides to the contrary. See American Law Institute, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, Proposed Final Draft (1992) § 7.19 and Comments.

101 See Ribstein, supra note 3 at 124-27.

102 See RUPA § 501.

103 See id. § 502(a).
transferor would otherwise be entitled," it does not make clear whether "distributions" includes such items as partner compensation and repayment of advances. This is not clarified by the definition of "distribution" in §101(3) as "a transfer of cash or other property from a partnership to a partner in the partner's capacity as a partner, or to the partner's transferee." It is not clear what payments are made to partners other than in their capacity as such. Courts probably will interpret the term to include the equivalent of what would be available to a transferee of corporate stock, and therefore only amounts payable to the transferor in his capacity as a capital contributor, and not in his capacity as an employee or creditor. Finally, RUPA provides that a creditor who charges a partnership interest thereby obtains a "lien" on the interest without clarifying whether the charging order alone confers priority on the charging creditor.

V. PARTNER DISSOCIATION

RUPA Articles 6-8 deal with partner dissociation and partnership dissolution, while Article 9 deals with mergers and conversions. I will discuss each separately after summarizing RUPA's general structure.

A. Dissociation and dissolution in general

UPA §§29 and 31 provide that any dissociation causes dissolution. This adopts an extreme aggregate view of partnership that significantly interferes with continuity of the firm. RUPA Articles 6-8 appear to change this by clearly separating partner dissociation and dissolution: Article 6 identifies events that cause partner dissociation, Article 7 deals with buyout of a dissociated partner by a continuing firm and Article 8 deals with dissolution. These structural changes hide the fundamental similarity between RUPA and UPA: under both, a single partner can compel liquidation of the firm at any time. The only significant difference between the approaches of the two acts is that under RUPA a partnership that is continued by agreement after a partner's dissociation does not technically "dissolve."

B. Causes and general consequences of partner dissociation

RUPA § 601 identifies "events causing partner's dissociation." This provision improves on the UPA by adding some detail and clarity. For example, §601 defines dissociation for partners who are

104 See also id. § 502(a) (partner's "transferable interest" is his "interest in distributions").

105 See Ribstein, supra note 3 at 126.

106 See id. at 127.
trusts, partners and corporations. Section 602 defines "wrongful" dissociation, and clarifies that a dissociation is wrongful where a partner is dissociated by judicial decree for misconduct. Section 603 provides that the effect of a partner's dissociation is either purchase of the interest under Article 7 or dissolution under Article 8, and that a dissociated partner loses the right to participate in management and conduct of the partnership business other than in winding up under Article 8.

As discussed in my earlier article, one problem with the provisions permitting dissociation without dissolution is that they do not require written notice of dissociation. Requiring written notice would reduce uncertainty and litigation as to whether a member has withdrawn. While this would add formality to what may be an informal relationship, the benefits of this requirement outweigh the costs. Moreover, written notice of withdrawal is less formality than RUPA's buyout rules already impose on the firm and dissociating partners.

A second problem with the dissociation provisions is that the partners cannot contract around a partner's power to withdraw by express will. There are two potential criticisms of permitting partners to contract around the dissociation right. The first concerns openended liability, which is not a problem in corporations and

107 See RUPA § 601(8)-(10).

108 See Ribstein, supra note 3 at 146.

109 By requiring "notice" but not requiring that it be in writing, RUPA § 601 may even cause increased confusion as to whether a partner has dissociated.

110 See id.§701(e), (g) and (i).

111 See id. §103(b)(6). This is discussed in my earlier article, Ribstein, supra note 3 at 147. See also II Bromberg & Ribstein, supra note 3 at 7:33-7:34; Larry E. Ribstein, A Statutory Approach to Partner Dissociation, 65 WASH. U. L.Q. 357, 410-16 (1987). The Comment to § 601 says that the drafters were "aware of criticism of the basic rule that a partner has the power to be bought out at any time." However, the drafters curiously quote a portion of an article which concerns interpretation of the parties' agreement rather than the power to contract, Robert W. Hillman, Indissoluble Partnerships, 37 U. FLA. L. REV. 691 (1985).

The contract that should be enforced is one explicitly limiting a partner's power to dissociate. In other words, I do not suggest that a partnership for a particular term or undertaking should be interpreted as one prohibiting a partner from dissociating. For a contrary suggestion, see Hillman, supra this note at 731.

Note that RUPA §602(a)(1) confusingly suggests that the partners may contract around dissociation at will by providing that "[a] partner's dissociation is wrongful only if "it is in breach of an express provision of the partnership agreement." This probably is intended to refer only to contracts concerning the right to withdraw, as distinguished from the power to do so. The drafters should make this clear.
limited partnerships whose members may not be able to dissociate at will. However, the potential costs of continuing liability are not as great as they might appear. RUPA reduces the sting of such liability by requiring creditors, subject to their contrary agreement with the partners, to exhaust partnership assets before proceeding against individual partners. Moreover, even a partner who cannot dissociate can negotiate with his co-partners regarding indemnification for liability and with creditors for a release from individual liability for partnership debts.

A second possible argument against allowing contracts around the dissociation right is that the partners cannot predict the effects of the agreement over the course of the partnership. However, legislators and uniform law drafters are no better able to predict the long-term effects of the statutory rule for all partnerships. Moreover, courts can fill contracting gaps by considering whether partners' actions are in good faith accord with their underlying deal, and by expelling partners or dissolving partnerships in cases of partner misconduct. It is unnecessary to prohibit all agreements to protect partners from an occasional bad deal.

Whatever the potential costs of openended liability, partners should be able to decide the issue for themselves. Indeed, the partners can evade the prohibition by penalizing withdrawal through liquidated damages, a low buyout price or a noncompetition agreement. Thus, the rule forces courts to decide when penalty becomes a prohibition. In deciding this question, the courts may and should apply the same good faith interpretation principles that would condition enforcement of a straight waiver. In short, the prohibition not only is poor policy, but also is confusing and possibly meaningless in effect.

A final problem with the dissociation provisions is §603(b), which provides:

Upon a partner's dissociation, that partner's right to participate in the management and conduct of the partnership business is terminated, except as provided in Section 804, and that partner's duties (i) under Section 404(b)(1) and (2) and (d) continue only with regard to matters or events that occurred before the dissociation, and (ii) under Section 404(b)(3) terminate.

112 See RUPA § 307(d), discussed in infra Subpart II (B).

113 See RUPA §§601(5) (judicial expulsion) and 801(5) (judicial dissolution).


Since §603 is not one of the non-waivable provisions under §103, the partners apparently can waive the continuation of their fiduciary duties although, of course, under that section they cannot waive the duties themselves.

Under §603(b), a fiduciary duty action against a dissociated partner potentially involves questions concerning (1) Whether the partner breached his fiduciary duty; (2) whether the breach concerned "matters or events that occurred before the dissociation;" (3) whether the breach involved the duty not to compete, which does not continue after dissociation; and (4) whether the partners' agreement waived post-dissociation duties. To give an example of the confusion that may result under this provision, consider a claim that a law partner appropriated a fee from a client and a case he took with him after dissociating. If the attorney is deemed to be appropriating work in process that belongs to the firm, he may be liable if the appropriation is "with regard to" a pre-dissociation matter or event. On the other hand, if he is deemed to be competing with his former firm, or if his conduct is deemed to be with regard to a post-dissociation matter, he apparently has not breached his duty. This casts in doubt the continued authority of cases under the UPA that hold, for example, that former law partners may not appropriate the benefit of cases they continue to handle after leaving the firm.116

Section 603(b)'s confusing termination of fiduciary duties is unnecessary. RUPA §404 imposes fiduciary duties on any "partner." Section 603(b) assumes that term does not apply to a dissociated partner. However, nothing in RUPA prevents courts from holding that a dissociated partner retains some partnership attributes, including fiduciary duties. That would be consistent with RUPA's recognition of fiduciary duties in connection with "winding up"117 and that a dissociated partner may participate in winding up.118 It is also supported by the UPA cases referred to above holding that partners have fiduciary duties after dissociation. As a policy matter, the conditions that initially gave rise to the partners' fiduciary duties still exist as long as a former partner retains control over partnership property or management power.119


117 See RUPA §404(a)(1)-(2).

118 See RUPA §804.

VI PARTNER'S DISSOCIATION WHEN BUSINESS NOT WOUND UP

RUPA Article 7 provides for the consequences of dissociation when there is no dissolution pursuant to Article 8. By contrast, the UPA provides that dissociation necessarily causes dissolution. These consequences primarily include the buyout of the dissociated partner and the termination of the dissociated partner's liability and power to bind the firm.

A. Purchase of dissociated partner's interest

Section 701 provides for the purchase of a dissociated partner's interest. This is the counterpart to UPA §§38(2) and 42, which also provide for buyout of a dissociated partner where the firm is continued but only following dissolution of the firm.

1. Duty to Purchase

RUPA § 701(a) provides that "the partnership shall cause the dissociated partner's interest in the partnership to be purchased". This provision raises at least two questions. First, §701(a) gives the dissociated partner a right to be bought out by the partnership rather than by individual partners. By contrast, UPA §42 is phrased in terms of the dissociating partner's right to have the value of his interest paid but does not specify who must buy. The distinction may work against wrongful partners who must sell on credit in light of RUPA's insistence that the partnership is an "entity," and its exhaustion-of-assets requirement. The Comment to this subsection says that "cause to be purchased" "is intended accommodate both a purchase by the partnership and a purchase by another partner," but the black letter seems inconsistent with this intent.

A second question concerns the extent of partners' power to contract around the buyout right. Section 701(a) provides that the partnership "shall cause" the purchase. The draft commentary says this section "reflects Committee intent to make the buyout mandatory" and that "a total forfeiture provision would probably not be enforceable." Also, there is authority under the UPA forbidding "forfeiture" provisions. Yet §701 is not among non-waivable provisions listed in Section 103, which is an affirmative

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120 See RUPA § 701(h).
121 See RUPA § 201, discussed in supra Subpart I(B)(1).
122 See Comment to RUPA §701(a).
123 See Comment to §701(b).
124 See II Bromberg & Ribstein, supra note 3 at 7:144-7:145.
indication of contractual freedom that is not provided for in the UPA. Against this murky background, a court could hold that the buyout right is a fundamental aspect of the power to dissociate or, alternatively, that only termination of liability and authority is fundamental. This uncertainty and confusion about the buyout right is another reason why the statute should allow complete freedom of contract regarding the power to dissociate.\textsuperscript{125}

2. Valuation of partner's interest

UPA §42 provides that the dissociated partner is entitled to the "value of his interest in the dissolved partnership." RUPA §701(b) provides in considerably more detail that the dissociated partner is entitled to the value of his interest based on "the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner" that "would be paid by a willing buyer to a willing seller." As discussed in my previous article,\textsuperscript{126} RUPA's attempt to distinguish between "going concern" and "liquidation" value is confusing and destroys the precedential value of the case law interpreting the UPA.\textsuperscript{127}

RUPA also changes the UPA by eliminating the former partner's right to be paid a share of profits attributable to use of the partner's investment in the business from dissociation until time of payment. There is no apparent reason for eliminating this important right.\textsuperscript{128} Elimination of the right is particularly puzzling in light of RUPA §802(b)\textsuperscript{129} which apparently gives dissociating partners a right to a share of all net profits (not merely on invested capital) where dissolution is delayed for ninety days after dissociation. Investors generally expect to be paid for use of their invested capital. Moreover, unless the continuing partners must pay for the capital they are using, they may inefficiently prolong the business instead of winding it up. Accordingly, the parties probably would draft for this right in a fully specified agreement, and the statute should provide

\textsuperscript{125} For a discussion of contracting around the buyout right, see supra Subpart V(A).

\textsuperscript{126} See Ribstein, supra note 3 at 154-55.

\textsuperscript{127} The additional stipulation that the value must be determined "without the dissociated partner" obviously makes sense. For a discussion of this aspect of valuing a partnership business, see Larry E. Ribstein, \textit{A Theoretical Analysis of Professional Partnership Goodwill}, 70 NEB. L. REV. 36 (1991). However, by qualifying in this way only going concern value, the stipulation deepens the confusion already created by the distinction between going concern and liquidation value.

\textsuperscript{128} See II Bromberg & Ribstein, supra note 3 at 7:135 (explaining reasons for profits-or-interest election); Ribstein, supra note 3 at 155 (criticising deletion of profits-or-interest election from 1990 draft).

\textsuperscript{129} See infra Subpart VII(B).
this rule for the many informal partners who are unlikely to think of it on formation. Indeed, courts may continue to effectuate the parties' likely expectation in this regard even without explicit statutory authority.

3. Indemnification

RUPA § 701(d) provides:

A partnership shall indemnify a dissociated partner against all partnership liabilities incurred before the dissociation, except liabilities then unknown to the partnership, and against all partnership liabilities incurred after the dissociation, except liabilities incurred by an act of the dissociated partner under Section 702. For purposes of this subsection, a liability not known to a partner other than the dissociated partner is not known to the partnership.130

This improves on rather muddled indemnification provisions in UPA §38 that provided for no indemnification for rightfully withdrawing partners, a "discharge" for expelled partners and, as to wrongfully withdrawing partners, variously provided that they were indemnified "against all present or future liabilities" and "released" from "existing liabilities."131

But RUPA's indemnification provision is still too limited. First, the rule unjustifiably distinguishes between uncertainty as to future events concerning assets and guesses concerning liabilities. The dissociating partner does not share positively either in the oil well the partners learn about after the dissociation or in the sudden post-dissociation rise in property value. It follows that he also should not share negatively in the pre-dissociation "nuisance" suit that unexpectedly costs millions in punitive damages or in the product liability or malpractice suit asserted against the firm after dissociation but arising out of pre-dissociation conduct.

Second, as the above examples indicate, RUPA illogically distinguishes among types of unknown or contingent liabilities.132 Why should the suddenly exploding nuisance suit be distinguished

130 The 1990 draft had provided for indemnification of liabilities that had reduced the amount paid for her interest. As the Comment to RUPA § 701(d) states, this would have required a determination as to what liabilities were in fact not merely known but were also taken into account in valuation.

131 See II Bromberg & Ribstein, supra note 3 at 7:130-7:133.

from the suddenly exploding product? To be sure, the variance, or risk, attributable to unknown outcomes of known liabilities is probably larger than that regarding unknown liabilities. Yet this only raises the additional question of whether the firm or the dissociating partner should bear the risk. The answer is probably the continuing partners. Because the continuing partners as a group are in the best position to evaluate the firm's liabilities, the risk from their perspective is less than it is from the perspective of the dissociating partner.

Third, the RUPA provision unduly increases litigation cost. It may be hard to determine what liabilities were "known" to the partnership, particularly in light of RUPA's failure to define "knowledge." The ambiguities discussed immediately above raise additional proof problems. For example, does a partner "know" of a liability because he knew litigation might arise out of the firm's representation of a client? Also, it may not be clear whether known contingent liabilities were "incurred after the dissociation."

Fourth, the RUPA provision fails to consider adequately the allocation of drafting burdens and the appropriate design of statutory defaults. Most of the informal partnerships for which RUPA should be designed probably would prefer an inclusive indemnification rule because partners dissociating from such firms are likely to be in particularly poor position to learn about or protect themselves from liabilities asserted after dissolution. In any event, it is probably easier to contract out of a clear and inclusive default rule by specifying types of liabilities that are not covered than to contract out of the vague RUPA rule by specifying "unknown" liabilities or liabilities "incurred after the dissociation" that are covered.

These considerations support a default rule indemnifying dissociating partners against all liabilities for which the partner may be held liable. They at least compel clarification of any rule that restricts indemnification.

133 RUPA § 102(a) provides, not very helpfully, that "a person knows a fact if the person has knowledge of it."

134 Note in this regard the final sentence of id. §701(d): "For purposes of this subsection, a liability not known to a partner other than the dissociated partner is not known to the partnership." This sentence presumably does not mean what it seems to say, that if a single partner does not know of the liability, the partnership does not. Rather, it seems to mean that a liability that is known by a single partner is known by the partnership. It is not clear why RUPA attributes the knowledge of a partner to the partnership in this particular instance while deleting UPA §12 which generally attributes knowledge and notice of every partner to the partnership. Perhaps the reason has something to do with the allocation of the risk of contingency between dissociating and non-dissociating partners. As discussed in this subsection, this risk generally should be allocated to the partnership rather than the departing partner.

135 I recommended this rule in Ribstein, supra note Error! Bookmark not defined. at 421.
4. Payments to wrongfully dissociating partners

RUPA §702(c) changes the UPA penalty for wrongful dissociation by accelerating debts owed by the dissociating partner to the partnership but omitting the UPA provision denying wrongfully dissociating partners a share in the partnership goodwill. I criticized this aspect of the 1990 draft.\textsuperscript{136} In the informal partnership for which the statute should be designed, there is probably no goodwill associated with the firm (as distinguished from the individual continuing partners) in which the departing partner should share.\textsuperscript{137} Thus, there is a significant possibility of over-compensating dissociating partners on account of goodwill in this situation. If wrongful partners have a good chance of being overpaid, they obviously have a perverse incentive to leave prematurely. Accordingly, the default rule should deny compensation. In any event, it is at least a close enough question that the existing rule of non-compensation should not have been changed.

5. Procedures for payment

RUPA §701(e), (g) and (i) provide for detailed procedures regarding tender and payment of and suit for the value of a dissociated partner's interest based on the Model Business Corporation Act.\textsuperscript{138} Such procedures may surprise informal partnerships in which membership could change without anyone's realizing that they belonged to a "partnership" governed by these elaborate provisions. For example, a partner may find himself unexpectedly barred from suit because he did not commence an action within one year after an action that could be construed as a "written demand for payment."\textsuperscript{139} Or the partnership may find itself unexpectedly bound to pay attorney's fees and other expenses because it unreasonably failed to tender payment.\textsuperscript{140} It follows that the procedures should be proposed as "opt-in" provisions that can be adopted by partnerships.

\textsuperscript{136} See Ribstein, supra note 3 at 156. See also II Bromberg & Ribstein, supra note 3 at 7:123 (explaining and justifying the goodwill denial).

\textsuperscript{137} See generally Ribstein, supra note 127.

\textsuperscript{138} See Comment to RUPA §701; MODEL BUS. CORP. ACT §13.25 (1984).

\textsuperscript{139} See RUPA § 701(i). The same provision requires the dissociating partner to commence an action within 120 days of the partnership's tender of payment. However, this requirement probably will not prejudice informal partners because the partnership's tender of payment must be accompanied by a notice that suit must be commenced within 120 days. See RUPA §701(g).

\textsuperscript{140} Id.
B. Termination of dissociated partner's liability and power to bind

Because RUPA changes the UPA by providing that dissociation does not necessarily cause dissolution, it had to clarify the liability and authority of dissociating partners where the partnership does not dissolve. RUPA §§702 and 703(b) provide that the dissociated partner has authority to bind and liability for post-dissociation acts on the same basis as for pre-dissociation acts for two years after dissociation as to third parties who reasonably believed when entering the transaction that the dissociated partner remains a partner and lack notice of the dissociation.

The reasonable belief/notice requirements of RUPA §§702 and 703 are potentially confusing. This dual requirement arguably is justified in exonerating the partner and partnership that comply with the §102 notice requirement even if the third party "reasonably believes" the dissociated partner remains in the firm. Conversely, these provisions justifiably exonerate the firm that fails to give notice if the third party does not reasonably believe the partner is still in the firm. However, since §102(d) provides circularly that "notice" is given when it is delivered, without otherwise defining "notice," the difference between the "reasonably believes" and notice requirements is unclear. Moreover, since the notice requirements are not tied to the time of the transaction, a court could hold that a third party who reasonably believed that the partner was with the firm at the time of the transaction and was not notified of a later dissociation may hold the partner and partnership liable. Such a holding is not only literally consistent with the statute, but arguably makes sense in the situation in which the non-notified creditor is prejudiced by failing to press for payment when a partner leaves.

These provisions are additionally subject to RUPA §704, which permits the dissociated partner or the partnership to file a statement that a partner has dissociated from the partnership. Third parties are deemed to have notice 90 days after the filing of a statement of dissociation of the partner's dissociation and of the termination of the partner's authority to bind to the extent that such termination either cancels a supplement to partnership authority under RUPA §303(d) or restricts authority to transfer real property under §303(e). This device may be a reasonable way to let the partnership to cut off authority and liability after partner dissociation. However, it is obviously unrealistic to expect that trade creditors who deal repeatedly with a partnership will constantly check the public records to determine whether partners have

141 For a discussion of this problem in the context of partner authority, see supra subsection II(A)(1).

142 See supra subsection II(A)(4) (discussing limitations on partners' authority by means of a statement of partnership authority).
dissociated. Accordingly, it might have been better if the Act had squarely recognized that it was adopting what is, in effect, entity-based liability: a creditor in effect contracts for the liability of the firm, and expects to collect from whoever happens later to be a partner.\textsuperscript{143}

RUPA further complicates post-dissociation authority in §702(b), which was added in the floor debate at the NCCUSL annual meeting:

\( \text{(b) A dissociated partner is liable to the partnership for any loss caused to the partnership arising from an obligation incurred by the dissociated partner after dissociation, for which the partnership is liable under subsection (a).} \textsuperscript{144} \)

This is, in effect, a special duty to refrain from post-dissociation transactions which a partner breaches even if he has not acted carelessly or disloyally under §404. It is not clear why the Commissioners added this special duty or why they did not apply it to other kinds of unauthorized transactions. They did not have to provide separately for the duties of a dissociated partner since a partner's duties under §404 do not necessarily terminate after dissociation.\textsuperscript{145} Indeed, §702(b) itself implies this by referring to the dissociated member as a "partner." Finally, even if special liability is warranted, it may be difficult to isolate the "loss" from the unauthorized transaction in the sense of the excess of the transaction's cost less the revenue it generates.

VII. WINDING UP PARTNERSHIP BUSINESS

RUPA Article 8 deals with the situations in which the partnership is dissolved and its business is wound up. Although the UPA's extreme aggregate rule of dissolution at the will or upon the dissociation of any partner was outmoded,\textsuperscript{146} the RUPA drafters have left the UPA's basic approach intact. At the same time they make enough changes to invalidate many years of case law under the UPA.

\textsuperscript{143} The effect of §704 in cutting off post-dissociation authority invites a reexamination of the effect of the statement of partnership authority under §303. Because §704 forces creditors to check repeatedly for filings of statements of dissociation, letting partnerships limit authority even in non-real-property transactions might not significantly increase creditors' burdens. Similar observations apply to the §806 statement of dissolution. See infra Subpart VII(D).

\textsuperscript{144} RUPA §807(b) similarly provides for liability of a partner who binds the partnership to a post-dissolution going concern transaction.

\textsuperscript{145} See the discussion of RUPA §603(b) in supra Part V.

\textsuperscript{146} For recommendations that this rule be changed, see ABA Report, supra note 33 at __; Ribstein, supra note 3.
A. Events causing dissolution and winding up

RUPA § 801 provides that "a partnership is dissolved, and its business must be wound up" if (1) the partnership is at will and dissolution is desired by a partner who either has not dissociated or has dissociated by express will rather than by some other cause; (2) the partnership is for a definite term or particular undertaking, a partner has wrongfully dissociated or dissociated by bankruptcy or death (or an equivalent event for a partner who is not an individual), and another partner decides to withdraw or terminate the partnership; (3) an event occurs that the partners agreed should cause winding up; (4) it is unlawful to continue the business; or (5) a court so decrees.

To evaluate RUPA's dissolution provisions, consider the case of a small, informal partnership operating wholly without an agreement -- precisely the situation in which a partnership statute is most valuable, and therefore the situation for which the statute should be designed. Should a partner who wishes to leave have the right to compel winding up of the firm, or only the right to a buyout and indemnification against liabilities?

The question is not, as the RUPA drafters seem to assume, whether the partnership "should be" continued. Rather, since the partners can contract around the statute either at the time of their original agreement or at the time of a dissolution event, the appropriate question is whether the partners who wish to continue the firm should have negotiating leverage. If the leaving partner may compel liquidation, the firm nevertheless will continue if the other partners, in effect, purchase this right. If the rights are reversed, the firm will be liquidated if the leaving partner buys out the other partners and sells the firm.

In answering the critical question of whether the leaving or continuing partners should have negotiating leverage, it is important to keep in mind that the parties have made open-ended investments of their human and financial capital and personal credit in an ongoing business. It follows that the group would not want to give any member who wants out at any time the right to force the partners who want to continue to, in effect, pay for the right to do so. As a practical matter, the liquidation right puts the whole group at the mercy of any individual partner who can time the call to facilitate a takeover of the firm at an advantageous price. If these considerations reflect the partners' actual expectations, the right to compel liquidation effectively gives any party to a contract a unilateral power of modification. Although partners can always draft around the statutory rule, that is an unnecessary cost if most partnerships would prefer an alternative rule. Moreover, such a

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147 See generally Ribstein, supra note 111 at 384-389, 393-95 (discussing the risk of takeover and how a liquidation right increases this risk).
default rule exposes partnerships to risks from agreements that incompletely vary the statutory rule and is not a viable option for the very informal, often unintentional, partnerships for which the statute should be designed.

Notwithstanding these considerations, UPA §§31 and 38 give the leaving partner a right to compel liquidation. This rule was probably an application of the extreme aggregate view of partnership as an association among particular parties that necessarily ends when one of the parties wants it to. In other words, the UPA drafters probably did not consider carefully the costs of the liquidation right. Whatever the UPA drafters thought, eighty years of the UPA has demonstrated the inappropriateness of the liquidation right, as indicated by the standard practice of drafting around the right and the judicial decisions that have found some way to qualify it.

RUPA accordingly defies both logic and experience by refusing to change the UPA. The draft comments to §801 give the following reasons for retaining the UPA rule: (1) "partners ... are more likely to believe the firm will break up if anyone leaves"; (2) "the departing partner needs the leverage of a liquidation right to even the playing field when negotiating with the remaining partners"; (3) partners "should be entitled to have partnership liabilities ... paid off"; and (4) the RUPA rule is only a default rule which can changed by agreement, particularly in larger partnerships.

These reasons mostly beg the relevant questions. The first reason makes sense only if the partners are aware of the applicable legal rule. The second reason does not explain why the departing partner is likely to be mistreated, why any possible mistreatment is not fully dealt with through judicial dissolution or expulsion, or why the potentially helpless position of the partners who wish to continue the firm discussed above is not an equally serious concern. The fourth reason questionably assumes that, in the absence of contrary agreement, the leaving partner should be entitled to a liquidation right.

The third reason, the concern for payoff of partnership liabilities, is probably the best argument for dissolution at will. However, in light of the high potential costs of the dissolution right, the problem is best addressed by providing for a broad indemnification right. Instead, RUPA gets the balance wrong by

148 Some of these cases are reviewed in Ribstein, supra note 13 at 374-75.

149 These remedies are provided for in RUPA §§601(5), and 801(4)-(6). They are also designated in id. §§103(5)-(6) as not subject to the parties' contrary agreement. Accordingly, the Act provides for a sort of judicial "escape valve" that protects parties against oppressive effects of continuation agreements that could not have been anticipated at the time of the agreement.
providing for only a limited indemnification right. By giving leaving partners the dubious choice between blowing up the firm to ensure payment of liabilities or allowing the firm to continue and receiving only limited indemnification against liabilities, RUPA virtually ensures that the firm will be liquidated unless the partners have thought to provide for continuation by advance agreement.

Even if the RUPA drafters had good reasons for retaining dissolution at will, the statute does not make much sense in how it effectuates these intentions. Section 801(1) permits only a partner who has not dissociated, or who has dissociated by will, to seek liquidation. Thus, partners who have dissociated in other ways, particularly including a bankrupt partner or the estate of a deceased or incompetent partner, cannot compel liquidation. Yet in these situations the dissociating partner may have the greatest justification in seeking dissolution and therefore is least likely to be using dissolution to take over the firm.

More importantly, even if a partner always should have the right to cause liquidation of a partnership at will, it makes no sense to give that right to a partner in a partnership for a definite term or undertaking merely because some other partner has dissociated, as provided in both UPA § 38(2) and RUPA § 801(2)(i). The rule assumes that the dissociating partner was "crucial to the firm's success, and requiring the [other partners] to remain for the balance of the term without a key player is not what they bargained for." But rather than assuming that each partner is crucial to the success of the business, it is more logical to infer from the fact that the parties provided for a definite term or undertaking that premature liquidation prior to expiration of the term or undertaking would be particularly costly. Indeed, if the departing partner was crucial to the firm's success, this is precisely the situation in which there is the greatest risk that the partner would use his leverage to "hold up" his co-partners, and accordingly in which the other partners' right to avoid a liquidation would be most valuable.

B. Deferral of dissolution

Section 802 provides that where a partner gives notice of his will to dissolve the partnership, the partnership is continued without dissolution for ninety days, during which time the dissolving partner can waive his right, or at least half of the remaining partners can terminate the power to waive by voting to wind up the business. The main effect of this section is to defer technical "dissolution" of the firm, which may have unpleasant consequences under loan or other agreements pending buyout negotiations. However, this section does not helpfully resolve the problems discussed in subpart A because it leaves intact a single partner's right to compel liquidation.

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150 See RUPA §701(d), criticized in supra subsection VI (A) (4).

151 See Comment to RUPA §801.
Although §802 does not solve any problems, it certainly creates some. In the first place, the deferral of dissolution puts creditors in a quandary. If the dissociation causes dissolution the successor firm is not liable for the debts of the pre-dissolution firm, while if there is no dissolution the firm continues to be liable.\textsuperscript{152} Also, the limbo period between "notice" of dissolution and a partner vote or expiration of the 90-day period makes it difficult for creditors to determine whether partners' authority and liability is governed by the provisions concerning the continuing authority and liability of dissociating partners or the different provisions concerning partners of a dissolved firm. In particular, notice of dissolution is determinative as to post-dissolution authority, but not as to a partner's post-dissociation liability or power to bind the firm.\textsuperscript{153}

The limbo period also creates significant problems among the partners. Since the firm does not dissolve, the continuing partners can continue the business and, therefore, may dissipate the assets. At the same time, the dissociating partner necessarily has no role in management\textsuperscript{154} and therefore may be helpless to stop the dissipation. Section 802 reflects a political compromise that essentially splits the baby by allowing the partners to continue the business, while at the same time protecting the dissociating partner by providing that he can share in profits "but shall be charged with a share of any losses only to the extent of profits credited for the period." Since accounting "profits" and "losses" are mutually exclusive, the Commissioners must have meant that the dissociating partner gets profits but is not responsible for losses -- that is, a free ride. But this is arguably more than the dissociating partner deserves merely for being excluded from the business: The risk of asset dissipation is not large in the usual case, does not necessarily become larger just because a partner has dissociated, and in any event probably could not be prevented merely by a single partner's voting right in management.

In light of the important questions concerning partners' and creditors' rights during the "limbo" period, it is important to keep in mind that the existence and duration of the 90-day period may be in doubt since RUPA neither requires written notice of dissolution nor specifies the form by which more than half the remaining partners may express their will to dissolve within the 90 days.

Section 802 fails because the RUPA drafters' have misunderstood their role. The Commissioners have attempted to draft by a process of political compromise a specific agreement that they think partnerships generally ought to have. Instead, the

\textsuperscript{152} See infra Subpart VII(C).

\textsuperscript{153} See infra Subpart VII(D).

\textsuperscript{154} This is also the rule during the limbo period. See RUPA §802(c)(1).
Commissioners should have drafted a simple statute that suits the informal partnerships that are likely to be governed by the statute. The Commissioners' resulting compromise between dissolution at will and continuity is unworkable for any firm. Its confusing way of compensating dissociating partners for the remote risk of asset dissipation is not a suitable default for the very informal partnerships and their creditors that will unexpectedly confront the provision for the first time in dissolution-related litigation. Indeed, even dissolution-at-will is better than §802's compromise. At the same time, formal partnerships can (and in light of the problems just discussed would be well advised to) contract out of the provision. These firms almost certainly solve the "dissolution" problem simply by contracting out of RUPA's awkward dissolution at will, or at least by ensuring through their contracts with creditors that changes in the firm's personnel do not cause unexpected termination of loan agreements.

C. Dissolution and successor liability

UPA §41 provides for automatic assumption of the liabilities of a dissolved partnership by a successor firm that includes one or more of the partners of the dissolved firm. This continuity is valuable for creditors of the pre-dissolution firm. Without it, they would lose their direct right of action against the assets of the dissolved firm and have to pursue these assets through the partners' interests in the firm. This would frustrate creditor expectations where the business is continued under similar ownership.

There is, however, no provision in RUPA for successor liability. To be sure, successor liability is less of an issue under RUPA because the firm does not necessarily dissolve on partner dissociation as it does under UPA. But a winding up may entail sale of the firm as a going concern to some, or even all but one of, the partners of the dissolved firm in a transaction that is virtually identical to a dissociation. In that situation, creditors will be significantly worse off than they were in the equivalent situation under RUPA. Under RUPA, creditors not only must try to reach the dissolved firm's assets through cumbersome charging orders against individual partners, but can do so only after exhausting remedies against the dissolved partnership. Indeed, RUPA partnerships may eschew dissociation in favor of dissolution precisely in order to increase the difficulty of collection.

D. Partner's post-dissolution liability and power to bind

RUPA §805 provides that, subject to §806, the partnership is bound by post-dissolution acts that are either appropriate to winding up or, as to creditors without "notice" of the dissolution, are within

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155 The Comment to RUPA § 703 discusses the omission of this section.

156 See RUPA §307(d), discussed in supra Subpart II(B).
the acting partner's pre-dissolution authority. Section 806 lets the partnership file a statement of dissolution which is deemed to provide notice of dissolution 90 days after filing, and which immediately limits a partner's authority to the extent provided for in §303(d) and (e).\footnote{157}

Section 805, considered in isolation, expands the partnership's liability for post-dissolution acts compared to the UPA. Although UPA §35 provides that partners continue to have pre-dissolution authority as to third parties who lack notice of the dissolution, it also provides for exceptions that have been omitted from RUPA: creditors who had not extended credit prior to dissolution are entitled only to notice by publication;\footnote{158} and the partnership is not bound by acts of bankrupt partners\footnote{159} or by non-winding-up acts of partners where the partnership was dissolved because it was unlawful to carry on the business.\footnote{160} Moreover, the liability of partners who were unknown or inactive in affairs may be satisfied only out of partnership property.\footnote{161}

The expanded notice requirement under §805 treats dissolved partnerships differently from the way §702 treats partners who dissociate from a continuing partnership: the authority of dissociating partners is terminated after two years even as to creditors who lack notice of the dissociation,\footnote{162} and the act is binding only as to creditors who not only do not have notice of the dissociation, but also "reasonably believe[]" at the time of the transaction that the dissociated partner is a partner. Thus, whether a partner's post-dissociation act binds the partnership may depend on whether the dissociation resulted in a dissolution. That, in turn, is

\footnote{157} This refers to the statement of partnership authority, discussed in supra subsection II(A)(4). Under RUPA §303(d), the statement of dissolution would withdraw a supplement to partner authority contained in a statement of partnership authority. Under id. §303(e) the statement of dissolution would limit partner authority to convey real property.

\footnote{158} See UPA §§35(1)(b)(II), 35(3)(c)(II).

\footnote{159} Id. §35(3)(b).

\footnote{160} Id. §35(3)(a).

\footnote{161} Id. §35(2).

\footnote{162} This distinction may be justified by the fact that winding up presumably has a limited duration while post-dissociation liability could continue indefinitely. However, as discussed in subsection VII (C), the partners could effectively continue the firm by "winding up" and selling it as a going concern. This potential functional similarity between winding up and continuation casts doubt on the wisdom of sharply distinguishing the two situations for purposes of cutting off partner authority.
confused by the §802 "limbo" period during which it may be unclear whether the firm is dissolving or continuing.\textsuperscript{163}

When considered in conjunction with the effect of the §806 statement of dissolution, however, RUPA may actually shrink partnerships' exposure to post-dissolution liability. As already noted, §806 lets the partnership terminate post-dissolution liability as to all creditors after ninety days by filing a statement of dissolution. Since repeat trade creditors hardly can be expected to continually check the public record, this reduces the partnership's exposure to a sort of entity liability in which the creditor collects from whichever partners happen to be in the firm at the time of collection.\textsuperscript{164} Given the expanded notice burden under §805, most partnerships undoubtedly will opt to provide constructive notice by filing a statement of dissolution. The net result is that creditors of RUPA partnerships will have to be continually on the alert for new partnership filings. This may translate into higher credit costs for partnerships. Moreover, even if diminished exposure is a net benefit for partnerships, it obviously helps only formal partnerships that make §806 filings. Informal partnerships, for which RUPA should be designed, are plainly worse off than under the UPA.

\textbf{E. Settlement of accounts among partners}

UPA §40(b) provides that assets are distributed first to outside creditors, then to satisfy obligations to partners on account of loans, capital and profits, in that order. Section 40 provides for a sort of "entity" theory in the sense that all liabilities are satisfied out of partnership property, expanded by partner contributions sufficient to satisfy the liabilities.\textsuperscript{165} Informal partnerships operating without agreements or formal records necessarily raise questions concerning the amounts in each of these categories. However, no statute can deal fully with the many different situations that are likely to arise regarding distribution of assets. UPA §40 probably is consistent with the expectations of most partners, and in any event its operation has been clarified by many cases. In short, §40 did not need to be fixed.

RUPA §808 nevertheless makes several changes from UPA §40: it eliminates the priority of outside creditors over partner creditors; it provides that profits and losses are charged to partners' "accounts;" it gives partners a right to receive distributions in the amount of their "positive balance;" and it obligates partners to pay to the partnership both their "negative balance" and to contribute to partnership "losses" an amount necessary to satisfy partnership

\textsuperscript{163} See supra Subpart VII (B).

\textsuperscript{164} A similar point applies to RUPA §704 (the statement of dissociation). See supra Subpart VII (D).

\textsuperscript{165} See UPA §40(a), (c) and (d).
"obligations." This language replaces UPA §40's reference to "assets" and "liabilities."

These changes pose many questions. First, what are partner "accounts?" In particular, how does §808 relate to an informal partnership that has not kept books? RUPA apparently at least requires a court to reconstruct partnership accounts rather than simply determining assets and liabilities and dividing them.

Second, how is the partners' additional contribution obligation computed under §808? Specifically, how does the obligation under §808(c) relate to the negative account balance under §808(b)? Also, do "obligations to partners" that must be taken into account in determining the partners' contribution liability include the partners' obligation to return capital? This was clearly the rule under the UPA, 166 has been applied in many cases, 167 and is probably consistent with the expectations of capital contributors.168

These questions concerning §808 are sure to provide grist for litigation for many years to come. Accordingly, in the absence of any clear demonstration of the benefits of the new provisions in solving problems under UPA §40, RUPA should carry over the latter provision.

VIII CONVERSIONS AND MERGERS

RUPA Article 9 adds provisions concerning mergers and conversions for which there are no direct counterparts in the UPA. Sections 901 and 902 provide methods for converting general to limited partnerships and vice versa. In a conversion from a general to a limited partnership, the partners' liability for partnership debts continues in a manner similar to the holdover liability of dissociating partners under §§702 and 703.169 The effect of the conversion,

166 See UPA §40(b), which lists partners' capital contributions as a debt that must be paid by partner contributions.


168 For a discussion of the rationale of the capital-loss-sharing rule, see Bromberg & Ribstein, supra note 3 at 6:16-6:17.

169 See supra Subpart VI(B).
according to §903, is that the converted firm continues to be the "same entity."

Section 904 provides a method of merging partnerships. Section 905 provides that the effect of a merger is that all parties other than the survivor cease to exist, and all property and obligations of the constituents merge in the survivor. With respect to the critical issue of a partner's liability for pre-merger debts of the constituent partnerships, §905 provides that the partners must contribute as under §808 toward pre-merger liabilities of their own partnership not satisfied out of partnership property. Section 906 provides that the surviving partnership may file a statement of merger that has the effect of transferring title to the survivor.

Article 9 is an important addition to partnership law. While partnerships can accomplish the effect of a merger under current law through asset sales, dissociation and admission of members and dissolution, the effect of such transactions, particularly with respect to the personal liability of the partners of the constituent firms, is not always clear.

At the same time, Article 9 adds some questions of its own. First, it is unclear what conversions or mergers will be deemed to comply with RUPA. Sections 901 and 904 provide for procedural requirements without specifying the effect of noncompliance. The most troublesome and unnecessary is the §904 requirement of a "plan of merger" that must contain certain information. Is the transaction valid if the plan omits some of the information? What if the information is contained in a memorandum agreement that is not designated as a "plan of merger." What if it is contained in an oral agreement?

Second, it is not clear what the effect is of conversion-like or merger-like transactions that are not accomplished under RUPA. Section 907 provides, not very helpfully: "This article is not exclusive. Partnerships or limited partnerships may be converted or merged in any other manner provided by law." It is not clear what other "law" can authorize conversions or mergers or whether non-RUPA conversions or mergers, whether or not under such "law," have the same effect as transactions that conform to RUPA, particularly regarding partners' liability.

Third, the difference between a "merger" and a "conversion" is unclear. Under §903(b), as under §905, all property and liabilities of the old firm become that of the new one. Thus, the main difference between the two transactions appears to be the statement in §903 that the converted firm continues to be the same entity. Yet the "entity" is clearly changed in some sense if an agreement provides for cash-out of members or acceleration of loans upon a conversion. Conversely, it is not clear that the non-surviving "entity" ceases to exist in a merger as provided by RUPA §905(a)(1). Indeed, RUPA §905(a)(4) provides that "an action or proceeding pending against a partnership or limited partnership that is a party to the merger may be continued as if the merger had not occurred."
These are examples of the problems of attempting to answer specific questions with the vague concept of "entity."¹⁷⁰

Fourth, RUPA Article IX raises serious questions to the extent that it purports to cover conversions and mergers involving limited partnerships.¹⁷¹ These matters are appropriately covered by limited partnership statutes or by a separate statute dealing with cross-entity transactions. In particular, the general partnership statute is not the place to provide voting requirements for limited partnerships¹⁷² or to provide for the extent of limited partners' liability.¹⁷³

In short, RUPA should answer the questions concerning general partnership mergers, and particularly those relating to partners' liability, in a way that does not pose additional questions. Also, it should recognize that its provisions are designed for informal firms. Accordingly, RUPA should provide simply that (1) any agreement designated as a "merger" between general partnerships and performed pursuant to the partnership agreement has the effects provided for in §905; and (2) that this does not mean that other transactions do not have this effect.

IX APPLICATION AND EFFECT OF RUPA

RUPA Articles 1 and 10 contain several important general provisions in relating to RUPA's application and effect.

A. Effect of partnership agreement

Section 103 summarizes all of RUPA's provisions that may not be waived among the partners by the partnership agreement. While the summary is useful, many of RUPA's limitations on private ordering are questionable, as discussed throughout this Article. The basic problem is that the Act prohibits all agreements in certain general categories, such as agreements waiving fiduciary duties, merely because these agreements may lead to bad results in some circumstances. The better approach would be to trust to the courts' broad powers to deal with the hard cases as bad faith or through judicial dissolution or expulsion, just as they have under the UPA.

¹⁷⁰ See supra subsection I(B)(1).

¹⁷¹ For other questions and problems regarding RUPA's application to limited partnerships, see infra Subpart IX(E).

¹⁷² See RUPA §§901(b), 902(b) and 904(c)(2). These provisions refer to voting by "partners" of limited partnerships without specifying whether this means general or limited partners.

¹⁷³ See RUPA §902(e). Note that id. §905, providing for the effects of a merger, refers ambiguously to "partners," implying that it may govern the liability of limited partners.
Indeed, this is not much different from what is likely to happen under RUPA: the courts probably will enforce agreements, such as limitations on buyout, that operate reasonably, and refuse to enforce only the bad deals. If that is the case, the statute should provide for enforceability of agreements for the sake of clarity as well as policy.

B. Choice of law

Although choice of law seldom has been a problem for partnerships due to their mostly local operation and the uniformity of partnership law, it may cause a problem once RUPA introduces non-uniformity. RUPA §106 provides that "[l]aws of the State in which a partnership has its chief executive office govern the partnership's internal affairs." This seems contrary to the usual "internal affairs" rule for corporations and limited partnerships that applies the law of the jurisdiction in which the partnership is formed. However, the rule should lead to the right result in most cases. For the typical informal partnership, that jurisdiction will be the place of the partnership's chief executive office. Thus, RUPA arguably only clarifies the place of formation for informal firms. Moreover, the parties can agree to apply another law, since this section is not listed as nonwaivable under §103.

There are, however, some problems under the RUPA formulation. First, it may not be clear when a firm has contracted around §106. For example, it is not clear whether a firm that specifies in its agreement that it is a "partnership of the state of X," but does not explicitly provide that X's law applies, would be governed by X law even if the chief executive office is in the state of Y. RUPA should eliminate potential confusion by specifying that the applicable law is that of the state of formation which, in the absence of other evidence, is where the chief executive office is located.

A second question is what constitutes "internal affairs." For example, it is not clear whether a partnership that is clearly based in a UPA state is governed by RUPA if it files a RUPA statement of authority in a RUPA state. Conversely, it not clear whether RUPA exhaustion rules apply to RUPA partnerships operating in UPA states. RUPA should at least provide, as in the Uniform Limited Partnership Act and many limited liability company statutes,

174 See RESTATEMENT (SECOND) OF CONFLICTS, §302(2) (1971) (stating internal affairs rule for corporations); UNIFORM LIMITED PARTNERSHIP ACT §901 (1985) (stating internal affairs rule for limited partnerships).

175 See UNIFORM LIMITED PARTNERSHIP ACT (1985), §901 (laws of organization state govern limited partnership's "organization and internal affairs and the liability of its limited partners").
that the state of formation governs the partners' liability. Beyond that, the formation state's law should be applied whenever the partners and creditors have contracted with reference to that law. Thus, RUPA exhaustion rules should apply to RUPA partnerships, but perhaps RUPA statements of authority should not apply to UPA partnerships unless they are provided for in the UPA state. In any event, these questions need clarification in the statute.

A third problem with choice of law under RUPA is that the "chief executive office" could be ambiguous for many firms, such as large law firms. This may not be a serious problem, however, because the larger firms are most likely to contract explicitly with regard to the applicable law.

C. Amendment or repeal of act

RUPA §107 provides that a partnership governed by the Act is subject to amendment or repeal of the Act. This is a "reserved power" provision that has traditionally been applied only to corporations.177 It is arguably bad policy, since for the first time it permits legislatures to retroactively change existing partnership agreements. Moreover, it may violate the Contract Clause of the U.S. Constitution.178 It is true that the legislature needs some flexibility to adapt the statute to new circumstances and incorporate new ideas. However, there is ordinarily no reason why amendments must apply to existing firms, as distinguished from allowing such firms to opt into statutory changes.

D. Application to pre-RUPA partnerships

RUPA §1006 provides that the Act (1) applies to partnerships formed under the prior act but (2) does not impair the obligations of contract or affect the enforcement of a judgment against the partnership or a partner in an action commenced before the effective date of the act. There is an intractable conflict between these two provisions, since application of the Act to pre-existing partnerships must affect contract obligations. As detailed throughout this Article, RUPA makes many other changes in both the effect or interpretation of existing formal agreements, in the default rules that apply to existing informal partnerships, and even in when a partnership is created. Moreover, if, as this section negatively implies, the Act's exhaustion-of-remedies provisions apply to debts entered into under

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176 For a review and analysis of these statutes, see Larry E. Ribstein & Robert Keatinge, RIBSTEIN & KEATINGE ON LIMITED LIABILITY COMPANIES, §13.03(a) (1992).

177 See, e.g., 8 DEL. CODE §394.

the old act, the Act clearly does affect the obligation of at least some pre-RUPA credit contracts.

Section 1006(b), which was added on the floor at the NCCUSL annual meeting, creates additional problems. It says that §802, which provides for limited continuation of the partnership after partner dissociation, does not apply to preexisting partnerships. As discussed immediately above, no provision of the Act should apply unless the partnership elects coverage. Singling out §802 might support a negative pregnant construction favoring broad application of the rest of RUPA to existing agreements. Moreover, the effect of §1006(b) on existing partnerships is unclear. The dissolved partnership apparently is subject to RUPA in all respects except that it does not necessarily dissolve on partner dissociation. Thus, RUPA Articles 6, 7 and 8 control the events of dissociation and winding up and the partner's buyout rights. Moreover, any reformed partnership emerging from a winding up apparently would be subject to RUPA.

RUPA should be changed to clarify that it applies only to partnerships that were either formed after the effective date or that elect to have RUPA apply, and that third parties must agree to options that change their rights.

E. Application to limited partnerships

RUPA §§101(4) and 202(b) attempt to make clear that "partnership" under RUPA does not include limited partnerships. Nevertheless, RUPA would apply to limited partnerships by virtue of the limited partnership statute.179 Thus, these provisions at most merely eliminate potential conflict between differently formulated partnership and limited partnership provisions on the application of general partnership law to limited partnerships. Moreover, RUPA Article IX explicitly applies to limited partnerships concerning mergers and conversions.

This discussion raises the larger question of whether partnership law -- particularly as changed by RUPA -- should apply to limited partnerships. In contrast with general partnerships, limited partnerships necessarily have centralized management, passive, limited-liability members and some degree of formality. These differences in basic features should result in pervasive differences in default rules, including fiduciary duty and remedy provisions that limited partnership law has borrowed from general partnerships. In any event, if RUPA is to apply to limited partnerships, the RUPA changes must be evaluated in light of their appropriateness for limited as well as for general partnerships. For all these reasons, the

179 See UNIFORM LIMITED PARTNERSHIP ACT (1985), §1105 (providing that partnership law applies "in any case not provided for" under RULPA); Comment to RUPA §202.
adoption of RUPA should be an opportunity for reexamining the linkage between general and limited partnership law.

F. Uniformity

RUPA, like other uniform acts, provides that it "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."180 While this provision seems innocuous (assuming, of course, that uniformity is a worthwhile goal181) it presents interesting questions given the fact that RUPA actually works counter to uniformity by changing current uniform law. If courts want to make uniform "the law with respect to the subject of this [Act]" --- that is, partnership law -- should they construe RUPA so that it is as consistent as possible with existing law under the UPA, or should they simply maximize the uniformity of the cases under RUPA?

XI SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

RUPA will confuse business people and their lawyers for years to come while failing to make the changes in the UPA that were most needed, particularly including eliminating the archaic rules on dissolution at will. All of this results from the drafters' failure to ask the right questions. First, they should have considered what the appropriate role of a statute is in this area as compared with that of private agreements and judicial decisions. Instead of providing, as it should have done, a basic structure for informal firms and leaving the rest for the courts and the parties, the statute often insists on undue detail and formality. Also, the statute often includes provisions, such as dissolution at will and prohibitions on fiduciary duty waivers, that might avoid problems in a few cases. Instead, the statute should adopt default rules that are right for most cases and trust the courts to deal with the occasional hardships.

Second, the drafters should have considered the appropriate role of a new uniform law. Instead, the statute destroys the value of eighty years of case law under the UPA and provides new rules whenever the drafters think they can improve on the UPA's black letter. RUPA therefore threatens the logic, simplicity and uniformity across jurisdictions that have made the general partnership an attractive and widely used business form. Because of this effect, RUPA would make partnership law worse off even if, viewing both on a clean slate, much of were better than the UPA.

The following is a brief summary of some of the more serious problems with RUPA that are analyzed in this article.

180 See RUPA §1001.

181 See Ribstein, Uniform Laws, supra note 5.
1. §201 confusingly characterizes a partnership as an "entity" although the statute includes several "aggregate" characteristics and although the effect of the characterization, if any, is unclear.

2. §204 fails adequately to protect third parties who have relied on record title as to whether partnerships or individual partners own partnership property.

3. §301 provides that the partnership is not bound for partners' acts that are apparently in the usual course of business if the third party has facts indicating, but no knowledge of, the lack of authority. However, the partnership is bound for acts that are not apparently in the usual course of business but are otherwise apparently authorized even if the third party is aware of a restriction on the partner's authority. Also, because of the deletion of the categories of presumptively non-binding acts from the analogous UPA §9 without substituting new categories, it is uncertain whether partnerships will be bound by acts that formerly were in these categories.

4. §302 provides that a grantee of real or other property conveyed by a partnership may not enforce the transfer against the partnership if he had "notice" that the transaction was unauthorized, even if the transfer was apparently in the usual course of business. On the other hand, an immediate grantee of partnership property can enforce a transfer if he did not know of the partnership's interest even if he knew that the transfer was not authorized by all of the title-holders.

5. §303 provides a mechanism for clarifying partners' authority which is particularly necessary in light of the problems under §§301 and 302 noted above. However, the usefulness of §303 is reduced by unnecessary formalities.

6. §307 conditions individual partner liability on the creditors' exhaustion of remedies against the partnership even in tort cases. This is doubtful policy and confuses existing state law.

7. §401 requires the partnership to keep "capital accounts," which may confuse and frustrate the expectations of informal partners.

8. §403 gives access to partnership records only to partners who satisfy the dual "demand" and "just and reasonable" requirements, and accordingly frustrate reasonable partner expectations of disclosure in other circumstances.

9. §404 creates uncertainty about the effect of case law under the UPA by redefining the duty of loyalty and adds an open-ended and inappropriate "obligation" of "good faith and fair dealing."
10. §103 includes unwarranted limitations on the extent to which the duties in §§403 and 404 can be waived in the partnership agreement.

11. §406 fails clearly to eliminate the "exclusivity" requirement, and apparently permits direct actions by individual partners for injuries to the firm which could overburden the firm with litigation.

12. §103(b)(6) provides that the partners cannot contract around the power to withdraw under §601(1). This is not only bad policy, but is unclear concerning the relationship between this prohibition and the partners' rights to contract around the consequences of dissolution under §701.

13. §701 contains confusing new standards for valuing an outgoing partner's interest, questionably eliminates the partner's right to be paid profits or interest on his capital investment between the time of dissociation and the time of payment, unduly limits the partner's right to indemnification, and provides detailed procedures for payment that are inappropriate for informal partnerships.

14. §801 retains the highly inefficient and outmoded UPA feature of dissolution upon dissociation of any member.

15. RUPA omits any provision like UPA §41 that would soften the effect of dissolution on creditors by providing for automatic assumption of liabilities by a successor partnership.

16. §802, an attempt to reduce the impact of dissolution at will by providing for a delay of dissolution, creates a confusing and unwieldy "limbo" period that may be costly for both creditors and partners.

17. §808 provides confusing new rules for settling partnership accounts that are based on undefined terms and on a duty to keep "accounts" that may cause severe problems in informal partnerships.

18. §106 introduces a new and potentially confusing rule providing that the applicable law is that of the state of the partnership's chief executive office.

19. §107 provides that amendments of the law may retroactively change partnership agreements. This permits state manipulation of partnership agreements that is bad policy and probably unconstitutional.

20. §1006 permits broad retroactive application of RUPA to existing partnerships, and therefore may effectively amend many existing agreements in adopting states. Moreover, its exception of §802 from retroactivity is confusing.
Until these and other problems with RUPA are fixed, states should decline to adopt RUPA as a whole, partnerships should not form under the law of any state that does adopt RUPA, and third parties should exercise extreme caution in dealing with RUPA partnerships. States might consider adopting some of RUPA's more successful and useful provisions, including those permitting filings by the partnerships and mergers and conversions. However, before doing so, the states should consider carefully the problems with those provisions discussed in this article and the availability of alternative variations. Moreover, the states should consider other variations on the UPA that have been passed or are being considered in Georgia, Texas and other states. Since RUPA is unlikely to be adopted as a whole by many states, it is unnecessary to adopt its provisions verbatim in order to preserve uniformity.

But RUPA may cast a long shadow over partnership law even if no state adopts it. First, because RUPA applies even to pre-existing partnerships, all partnerships will be subject to possible retroactive amendment. Second, courts may use RUPA provisions in interpreting existing partnership agreements. Third, even if RUPA itself is never applied to a single partnership, its adoption by NCCUSL's may deter states from improving their partnership statutes.

For these reasons, firms may be well-advised to avoid the partnership form altogether in the post-RUPA era. Unfortunately, the limited partnership is not a suitable escape vehicle because RUPA applies to them as well. However, the limited liability company is becoming an accepted form of business through proliferation of state statutes and increasing recognition of its "partnership" status by the Internal Revenue Service. The uncertainties for both members and creditors in both RUPA partnerships and UPA partnerships that are potentially subject to RUPA, as well as the increased burdens for creditors dealing with a "revised" partnership, eliminate most of the reasons for choosing the partnership form over the LLC form.

There is, however, a solution short of wholly rejecting RUPA. The problem with RUPA may be that it has not had the sort of exposure that is necessary to produce a credible law of this type. Only two previous complete drafts of RUPA have been circulated, in 1990 and 1991. The draft that was finally adopted was significantly changed from any prior draft, including by several floor amendments at the NCCUSL annual meeting. By contrast, numerous drafts of the

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182 See id. §1006, discussed in supra Subpart IX(D).

183 This problem may, however, be minimized for formal partnerships that can agree under RUPA to be governed by the law of a non-RUPA state.

American Law Institute's corporate governance project\textsuperscript{185} circulated throughout the business and legal communities over an eleven-year period. Since the success of RUPA depends on its suitability across a broad range of partnership practice, and since even the best drafters can make mistakes, wide exposure is essential. It is not surprising, therefore, that there is much to criticize in the RUPA draft. Indeed, even one who agreed with only a fraction of my conclusions should have enough pause about the project to favor, as I do, an extended comment and revision period.\textsuperscript{186}

\footnote{\textsuperscript{185} See American Law Institute, \textit{PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS} (Proposed Final Draft, 1992).}

\footnote{\textsuperscript{186} For another article advocating more time for review, see Hynes, supra note 57.}