1992

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THE REVISED UNIFORM PARTNERSHIP ACT: SOME COMMENTS ON THE LATEST DRAFT OF RUPA

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I. INTRODUCTION

On June 7, 1991, the Drafting Committee to Revise the Uniform Partnership Act, appointed by the National Conference of Commissioners on Uniform State Laws (NCCUSL), promulgated its latest draft (the Draft) of the proposed Revised Uniform Partnership Act (RUPA).1 The first part of the Draft was given a second and final2 reading at the 1991 conference of NCCUSL.3 The plans of the Committee apparently are to complete the second reading of the Draft at the 1992 annual conference of NCCUSL,4 which, followed by a vote of approval, would conclude the work of NCCUSL and make the

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1. Uniform Partnership Act (Draft for Partial Approval June 7, 1991) [hereinafter Draft]. The draft is typewritten and is available by writing NCCUSL at 676 North St. Clair St., Suite 1700, Chicago, IL 60611, or by calling (312) 915-0195. Payment of $7.90 is required. The draft is entitled DRAFT FOR PARTIAL APPROVAL and indicates on its cover page that it was prepared for the 100th meeting of NCCUSL, which was held on August 2-9, 1991. It contains renumbered sections but has no table coordinating the renumbered sections with the section numbers under the Uniform Partnership Act. (An earlier draft dated 1/19/91 did produce a table that related the section numbers of prior drafts, which corresponded to the section numbers of the Uniform Partnership Act, to the renumbered sections of RUPA.) The source of a section in UPA will be identified whenever it will be helpful to do so. Because the Draft is not widely available, citations to it will include quotation of the material being cited.

2. The NCCUSL gives its proposed uniform acts two readings. An act is promulgated as a uniform act after a second reading is completed and a vote of approval taken by the Conference acting as a committee of the whole. See NCCUSL Const. art. 8, § 8.1, reprinted in Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in Its Ninety-Fifth Year 469-70 (1990).

3. The second reading was completed through § 303 of the Draft. Telephone Interview with Dean Donald Weidner, Reporter, Drafting Committee to Revise Uniform Partnership Act (August 12, 1991) (Weidner is Dean of the Florida State University College of Law).

4. The plans initially were to finalize RUPA in the summer of 1991. Donald J. Weidner, The Revised Uniform Partnership Act Midstream: Major Policy Decisions, 21 U. Tol. L. Rev. 825, 826 (1990) [hereinafter Midstream]. That goal was not reached, but in August of 1989 a draft of RUPA was presented to the Conference, and the first of the two required readings was begun. The first reading was completed at the annual meeting in 1990. Donald J. Weidner, Three Policy Decisions Animate Revision of Uniform Partnership Act, 46 Bus. Law. 427 (1991) [hereinafter Revision].
revised Act available as a uniform Act to the fifty states for legislative adoption.\(^5\)

The Uniform Partnership Act (UPA), promulgated by NCCUSL in 1914, has been adopted in forty-nine states.\(^6\) Very few amendments have been made to it by the adopting states, and most of the amendments are minor.\(^7\) UPA is highly conceptual, tightly drafted, and concise.\(^8\) Litigation over three-quarters of a century has given lawyers a sense of security in at least some areas of the Act, an overall impression of how courts approach this form of doing business, and a sense of the type of problems likely to arise. Thus, this seventy-five-year-old Act has worked remarkably well. It has stood the test of time.

This does not mean that UPA is perfect. As a report of a subcommittee of the Committee on Partnerships and Unincorporated Business Organizations of the American Bar Association noted, constructive revisions can be made.\(^9\) But final steps to change it should be taken only after full opportunity is given for evaluation of the changes by members at large of the profession, thus increasing the possibilities that RUPA will be widely accepted and that the law of partnership will remain truly uniform.\(^10\)

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5. Changes doubtless will be made in the Draft before formal adoption by NCCUSL as a uniform act. But the June 7 draft is the latest draft available to the author and thus is the focus of this Article.

6. Louisiana is the only state that has not adopted the Uniform Partnership Act. See Uniform Partnership Act, 6 U.L.A. 1-2 (Master ed. 1985 & Supp. 1991) (Table), listing the adopting states [hereinafter UPA].

7. The one exception to this is the state of Georgia, which adopted UPA in 1984 with extensive amendments.

8. UPA was redrafted numerous times over a period of twelve years before approval by NCCUSL. William D. Lewis, The Uniform Partnership Act, 24 Yale L.J. 617, 620 (1915). This extraordinary amount of deliberation and care doubtless contributed to the high quality of the Act.

9. See UPA Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations of the American Bar Association, Should the Uniform Partnership Act Be Revised?, 43 Bus. Law. 121 (1987) [hereinafter ABA Report], where a long list of suggested changes to UPA is published. Although the report was not submitted to the ABA for approval, it was submitted to NCCUSL and apparently served as the inspiration to NCCUSL to undertake in August 1986 a complete revision of UPA. Id. at 121, editor's note.

10. Most legislation proposed today by NCCUSL more appropriately can be characterized as model rather than uniform in nature, even though described as uniform by NCCUSL, due to the modern tendency of states to tinker with whatever is proposed to them. A dramatic recent illustration of this is the Revised Uniform Limited Partnership Act (1976) and its 1985 Amendments, which have been extensively altered in a large number of adopting states. See Revised Uniform Limited Partnership Act (1976) with 1985 Amendments, 6 U.L.A. 244-70 and extensive notes on Action in Adopting Jurisdictions after every section of the Act (Master ed. Supp. 1991). This may in part be the result of uniform legislation being prepared and proposed without provision in a structured way for public exposure and comment. To await public exposure and comment until after approval by the conference, with debate taking place only before state bar
This Article urges the Reporter and his Committee to publish an exposure draft of the proposed revised Act, then wait for a reasonable period of time before seeking final approval by the conference of NCCUSL. Time should be made available for articles on the Act to be written and published and themselves criticized. Perhaps weaknesses currently unthought of would be identified, and solutions to areas admittedly causing difficulty may be proposed.

The drafting committee for UPA went through eight drafts over a period of twelve years before presentation of the Act to the Conference of Commissioners for adoption in 1914. The committee to revise UPA has been in existence for only four years, and its first association committees and legislatures, defeats the goal of uniformity. Of course, uniform acts will vary in that regard, but the law of partnership has a long and successful history of uniformity, which encourages widespread comment before promulgation as a uniform act.

11. There is precedent for publication of an exposure draft in a journal of wide circulation. See, e.g., Exposure Draft, Third-Party Opinion Report of the Section of Business Law, American Bar Association, 46 Bus. Law. No. S1, 1-38 (Dec. 31, 1990). The Exposure Draft stated on its cover sheet that it was “being circulated to provide interested persons the opportunity to review and comment upon the current work product.” Id. at I. A similar process for RUPA would be highly desirable. Although the Draft was published in the 1991 supplement of Alan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Partnership (1988) [hereinafter Bromberg & Ribstein], this is not the equivalent of the publication of an exposure draft inviting comment on the current work product.

12. Perhaps the June 7, 1991, Draft would suffice as an exposure draft. It contains the new section numbers and a number of changes from the prior drafts. There apparently was substantial discussion of the first several sections of the Draft at the 1991 annual Conference of NCCUSL, however, and at least one more redraft is contemplated before the 1992 Conference.

13. See Gerald V. Niesar, Subcommittee Comments on Draft Partnership Act Revision, 11 BUS. LAW. UPDATE 5 (July/August 1991), stating that the Committee on Partnerships of the ABA has established a subcommittee to comment on drafts of RUPA, and inviting comments from interested members “concerning particular problems that lawyers have found operating under the UPA. Suggested solutions would also be appreciated.” This invitation was included in a newsletter dated July/August 1991. Unless things are unseasonably rushed, it could take several years for comments to be received, solutions evaluated, and revisions made and discussed.

14. Several articles already have been published, including three thoughtful, straightforward, and informative articles by the Reporter. See Donald J. Weidner, A Perspective to Reconsider Partnership Law, 16 FLA. ST. U. L. REV. 1 (1988) [hereinafter A Perspective]; Weidner, Midstream, supra note 4; Weidner, Revision, supra note 4; see also Norwood P. Beveridge, Jr., Duty of Care: The Partnership Cases, 15 OKLA. CITY U. L. REV. 753 (1990) (commenting on § 21 of an earlier draft of RUPA, now § 404 in the Draft); Larry E. Ribstein, A Mid-Term Assessment of the Proposed Partnership Act, 46 Bus. Law. 111 (1990). Another article of importance in understanding RUPA is the ABA Report, supra note 9.

15. One area of obvious controversy among the parties drafting the revised Act is whether the word “dissolution” should continue to be used in the revision. The Reporter strongly feels that it should not be, yet his position was for the first time rejected in the preparation of the 1/19/91 draft. See Weidner, Midstream, supra note 4, at 859 (“My greatest disappointment is that the word dissolution was put in RUPA’s breakup rules at our most recent meeting. The term dissolution is an unnecessary one that was not included in RUPA until the new breakup rules were close to final form.”).
drafts were promulgated only several years ago. This is only a frac-
tion of the time devoted to the original Act. In the absence of a com-
pelling need for haste, the Committee is urged to cast a glance
backward and draw inspiration with regard to timing from those who
did the original work on UPA.

This Article discusses three policy positions taken in the Draft. First,
involving creditors' rights, the position taken by the Draft is challenged
on substantive grounds. Second, involving the standards for expulsion
of partners, an amendment to the Draft is suggested, urging that the
drafting committee take the opportunity to write into statutory law the
relatively unambiguous and sensible standards developed by courts un-
der UPA when dealing with this situation. Third, some questions are
raised about the implications of the approach taken in the Draft to the
important issue of fiduciary responsibilities among partners.

Others may disagree with the substantive views advanced herein,
with the importance of the topics chosen, or with both. The point of
major concern is not that the particular views espoused here prevail,
but that others in the profession at large have a full opportunity to
express views about an exposure draft of RUPA before final consid-
eration by the conference of NCCUSL.

II. THE RESPONSIBILITY OF INDIVIDUAL PARTNERS FOR DEBTS OF THE
PARTNERSHIP—A CHALLENGE TO THE REALLOCATION OF PRIORITIES IN
THE DRAFT

The Draft states that partners are individually liable for the obliga-
tions of the partnership despite the shift in RUPA from the aggre-
gate theory to the entity theory of partnership. The liability of each partner is characterized in the Draft as joint and several in nature, wisely rejecting the overly fine line drawn in UPA between liability of partners for contractual obligations of the partnership (joint in nature) and liability for tortious claims against the firm (joint and several). Section 307(c) of the Draft states, however, that creditors of a partnership who seek payment of the amounts due and owing to them must first exhaust all partnership assets before asserting rights to the individual assets of partners. This converts partners to a status merely of guarantors of collection in the ordinary case. This is curi-

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

23. The aggregate theory conceptualizes a partnership as an aggregate of the persons who are its partners doing business in joint ownership form. The partnership itself has no separate existence. Thus, if A, B, and C are the partners in the ABC partnership and A leaves or D joins the partnership, the aggregate changes and the original partnership dissolves. A different partnership carries on the business.

24. The entity theory conceptualizes a partnership as an entity separate from its partners. Thus, the partnership does not necessarily dissolve upon a change in its members.

25. See supra note 22.


27. See Draft, supra note 1, § 307(c), stating:

Except as provided in subsection (d), a judgment creditor of a partner may not levy execution against the assets of the partner to collect a judgment based on a claim that could have been successfully asserted against the partnership unless:

(1) a judgment based on the same claim has been obtained against the partnership; and

(2) a writ of execution against the partnership on the judgment against it has been returned unsatisfied in whole or in part.

Subsection (d) of § 307 reads as follows:

(d) A claimant may proceed directly against the assets of a partner without first obtaining a judgment against the partnership if:

(1) 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;

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

(3) the court grants permission to the claimant to proceed against the assets of a partner based on a finding that the 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

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

Draft, supra note 1, at § 307.

28. Subsection (d) of § 307, supra note 27, qualifies the prohibition against proceeding directly against a partner's assets under certain circumstances and thus takes into account the extraordinary case. The qualifications are either quite narrow, however, addressing bankruptcy or separate agreement between partner and creditor, or are vague, involving standards like "clearly insufficient" or "excessively burdensome" or "an appropriate exercise of the court's inherent
ous, because the language of joint and several liability suggests a primary liability.\textsuperscript{29}

This is an area of the law in which clarification is needed. UPA contains no language on it. State courts are divided on how to deal with this matter. One line of authority allows creditors to have, at their option, immediate access to the assets of individual partners.\textsuperscript{30} A conflicting line of authority denies this and requires creditors to first exhaust claims against partnership assets.\textsuperscript{31} It is not easy to identify a majority rule.\textsuperscript{32}

Several cases distinguish between claims creating joint liability, where some courts require exhaustion of partnership assets,\textsuperscript{33} and

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equitable powers.” The Comments to § 307 do not discuss these standards, nor are any examples provided of the standards in operation. Draft, \textit{supra} note 1, at 43-48.

29. \textit{See} Horn’s Crane Serv. v. Prior, 152 N.W.2d 421, 425 (Neb. 1967) (Smith, J., dissenting) (noting in related circumstances that, “[t]he provision for joint liability of members to partnership creditors strongly suggests a primary liability”). This suggestion of primary liability is even stronger in the case of joint and several liability, certainly in the eyes of the courts which draw the distinction addressed in the text accompanying note 34, \textit{infra}.

30. \textit{See} Catalina Mortgage Co. v. Monier, 800 P.2d 574, 578 (Ariz. 1990) (“[A] partner may be sued severally and his assets reached even though the partnership or other partners are not sued and their assets not applied to the debt.”); Head v. Henry Tyler Const. Corp., 539 So. 2d 196, 199 (Ala. 1988) (“[I]f a creditor chooses to bring an action against one of the partners, that partner is liable for all of the partnership debts, regardless of whether the creditor first attempted to recover the debt from the partnership or prove that the partnership had no assets.”); Smith v. Wohl, 702 S.W.2d 905, 910-11 (Mo. Ct. App. 1985) (“A plaintiff has the option to sue any individual partner; and . . . may hold that partner liable for the entire debt of the partnership. Further, a partner who has paid more than his share . . . has the right to seek reimbursement from his co-partners.”); In re Kelsey, 6 B.R. 114, 118 (S.D. Tex. 1980) (The court found that under Texas law “[c]reditors have the right to select any individual of the firm and collect their claims wholly from his individual property.”) (alteration in original).

31. \textit{See}, e.g., Horn’s Crane Serv., 152 N.W.2d at 423, where the majority in a divided opinion stated that, “[i]n an action seeking a personal judgment against the individual members of a partnership . . . the petition does not state a cause of action if it fails to state that there is no partnership property or that it is insufficient to satisfy the debts of the partnership.” \textit{Accord} Matter of Fowler, 407 F. Supp. 799 (W.D. Okla. 1975); Wisnouse v. Telsey, 367 F. Supp. 855 (S.D.N.Y. 1973) (summarizing New York law, which has a series of cases asserting this proposition); Lenkin v. Beckman, 575 A.2d 273 (D.C. 1990); McCune & McCune v. Mountain Bell Tel., 758 P.2d 914, 917 (Utah 1988) (“If a debt is contractual in origin, common law requires that the partnership’s assets be resorted to and exhausted before partnership creditors can reach the partners’ individual assets.”); Commonwealth Capital Inv. Corp. v. McElmurry, 302 N.W.2d 222 (Mich. Ct. App. 1980).

32. The secondary authority is as divided as the cases on this issue. \textit{Alan R. Bromberg & Judson E. Crane, Crane and Bromberg on Partnership} § 58, at 342 (1968) [hereinafter \textit{Crane & Bromberg}], states that, “[t]he 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.” \textit{Accord} \textit{Harold G. Reuschlein & William A. Gregory, The Law of Agency and Partnership} § 207, at 317 (2d ed. 1990). In contrast, Bromberg & Ribstein, \textit{supra} note 11, at 1:28 states that, “[t]he plaintiff often cannot proceed against the partners until exhausting remedies against the partnership.” No authority is cited for this statement.

claims creating joint and several liability, where some courts allow immediate suit against individual partners. A number of the cases that allow immediate suit against individual partners have arisen in states that have amended paragraph fifteen of UPA to declare all liability to be joint and several.

At first glance, the above distinction seems sensible. Joint and several liability by definition anticipates the possibility of just one person being sued singly and held liable for the entire obligation. Joint liability, on the other hand, historically has mandated the dismissal of a suit on a joint obligation if a creditor has not joined all joint obligors or does not have a valid excuse for the absence of those not joined.

This would lead naturally to the assumption that because joint obligors must be joined in a suit, the joint assets of the joint obligors must first be exhausted before personal assets are pursued. If the liability is joint and several, no such steps need be taken. Those decisions that deny immediate access to the assets of individual partners appear to do so, not on the policy that this reflects the usual understanding of creditors, but rather on the assumption that the law of joint obligations so requires. This assumption is false.

The difference between joint liability and joint and several liability is procedural only. No lines are drawn concerning pursuit of assets. If all joint obligors are properly joined and a judgment is rendered, there is no requirement that a creditor must first exhaust whatever joint assets happen to exist. Instead, the creditor can proceed directly

34. See Head, 539 So. 2d at 199:
The major impact of making partners not merely jointly liable but also severally liable is that if a creditor chooses to bring an action against one of the partners, that partner is liable for all of the partnership debts, regardless of whether the creditor first attempted to recover the debt from the partnership or prove that the partnership had no assets.

See generally Catalina Mortgage, 800 P.2d 574; Smith v. Wohl, 702 S.W.2d 905 (Mo. Ct. App. 1985).

35. Several states have amended their statutes to make all partnership liability joint and several. 6 U.L.A. 174 (Master ed. 1969 & Supp. 1991). It is a matter of some irony that the Draft follows this lead and declares all liability joint and several in nature, yet it expressly reverses the rule of immediate suit against partners that exists in many of those states that already have amended their partnership acts to declare all liability joint and several.

36. Fleming James, Jr. & Geoffrey C. Hazard, Jr., Civil Procedure 469 (3d ed. 1985). Contribution or indemnity rights among persons jointly and severally liable for an obligation are a separate issue from that of several liability.

37. Crane & Bromberg, supra note 32, at 335.

38. See James & Hazard, supra note 36.

39. See In re Kelsey, 6 B. R. 114, 118 (1980) (where the court states, "[t]hat the debtor, as the general partner, is jointly and severally liable is not a complete answer because it does not determine whether creditors of the partnership must first exhaust partnership assets before they can collect from the debtor").

40. See 2 Samuel Williston, A Treatise on the Law of Contracts § 327 (Walter H. E.
against whatever joint obligor the creditor wishes, because each joint obligor is fully liable for the underlying obligation.\textsuperscript{41}

As mentioned above, this is an area of the law that needed clarification. The Draft provides clarification in section 307(c), taking the approach suggested in the ABA Report that requires creditors to exhaust partnership assets before proceeding against individual partners.\textsuperscript{42} Section 307(d)(2) acknowledges that creditors and partners can agree otherwise, in language that seems to contemplate a specific agreement between creditor and partner.\textsuperscript{43}

The position taken in the Draft, though clear, is undesirable. It is not an inexorable result of shifting to the entity model because the Draft departed from the entity theory in section 306 when it mandated personal liability of the partners for the obligations of the partnership.\textsuperscript{44} The main policy underlying section 307(c) appears to be that of

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\item Jaeger, ed., 3d ed. 1959); Restatement (Second) of Contracts § 289 (1981). The state of New York appears to be an exception. There it was early established that joint assets had to be first exhausted, apparently in all joint liability situations. See Seligman v. Friedlander, 92 N.E. 1047, 1048-49 (N.Y. 1910) ("The theory of the law was that the joint liabilities should be paid from the joint property if possible, and not until that remedy was exhausted, or resort thereto shown to be useless, could payment from the individual property be exacted."). It is a matter of interest that several of the early New York cases first setting forth this rule involved claims by creditors against the estate of a deceased partner. This is a situation where the sympathies of the court may be engaged in the direction of requiring satisfaction from joint assets ahead of claims against an estate. Indeed, at one time under the common law the death of a partner absolved him, as a joint obligor, of all liability. Crane & Bromberg, supra note 32, at 340, 454. Ultimately equity stepped in to establish creditors' rights against the estate of the deceased partner if the surviving copartners were insolvent. Id. Only a few states have followed New York in its rule that joint assets first have to be exhausted before individual assets can be pursued. Id. at 341, n.93. UPA expressly recognizes the liability of a deceased partner's estate in § 36(4) without, however, addressing the problem of exhaustion of joint assets. § 36(4), 6 U.L.A. 436 (Master ed. 1985 & Supp. 1991).

\item The opinion in Cunard Line Ltd. v. Abney, 540 F. Supp. 657, 659 (S.D.N.Y. 1982), well summarizes the law on this topic:

The joint nature of the obligation does not imply that the joint obligor is immune from being sued individually (citation omitted). It only gives the joint obligor the right to insist that the plaintiff join other such obligors if joinder be possible (citation omitted). And, upon following a prescribed procedure, . . . a plaintiff may hold a joint obligor personally liable on a joint obligation.

Contribution or indemnity rights among the joint obligors are a separate issue from that of joint liability.

\item See ABA Report, supra note 9, at 143.

\item See Draft, supra note 1, at § 307(d)(2), stating that a claimant may proceed directly against the assets of a partner without first obtaining a judgment against the partnership if "the claimant and the partner have agreed that the claimant need not exhaust partnership assets."

\item Indeed, it would be quixotic to point to the entity theory for justification of the decision to convert partners to the status of guarantors for collection, once the decision to hold partners personally liable for obligations of the partnership has been made. The Reporter himself states in a different context that:

I enthusiastically support RUPA's move closer to an entity theory, but do not believe
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reflecting modern expectations; i.e., it is assumed that today most creditors expect to recover against the assets of the partnership and not against the individual partners unless the assets are insufficient.45 Surprisingly, there is little discussion in court opinions46 or the aca-

the theory should shortcircuit policy analysis. There is no reason why the logic of the entity theory should be any more ineluctably applied in the partnership area than in the corporate area, and the entity theory of corporations is often set aside to reach the right result.

Weidner, Midstream, supra note 4, at 832.

However, adoption of the entity theory is given as an explanation in the ABA report for its assertion that partners should be in the position of guarantors of collection only. ABA Report, supra note 9, at 143 ("This rule would respect the concept of the partnership as an entity."). The ABA Report appears to have strongly influenced the drafters of RUPA. The explanation contained in the Comment to § 307 is couched in part in entity terms, quoting from the ABA Report. Draft, supra note 1, at 43-48. Nevertheless, the entity theory does not seem to be the primary moving factor behind the position taken in RUPA, which instead appears to rest on the assumption that most creditors intend to proceed only against partnership assets unless insufficient assets are available to pay the debt. See infra text accompanying note 45. This is consistent with the Reporter's position that the entity theory alone should not control policy decisions.

45. This assumption was stated in the ABA Report. See ABA Report, supra note 9, at 143, stating, "We believe that this result would be most consistent with general business expectations today." The language from the ABA Report is quoted in the Comments to § 307(c). The Comments note that "Sections (c) and (d) represent an attempt to implement in detail the general suggestion in the ABA Report at 143 [quoting from the Report]." The language from the Report which is quoted in the Comments to § 307(c) reads in full as follows:

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.

46. One court opinion that does address the policy question, Ryan v. Brophy, 755 F. Supp. 595, 598 (S.D.N.Y. 1991), does so in the following terms: "The policy underlying this distinction seems to be that in ordinary contract disputes, partners should be protected from individual liability and the resultant need to seek contribution from each other if the partnership has sufficient assets to satisfy the judgment." This explanation does not explain why partners should be so protected, however. Although Ryan does not suggest a reason, perhaps the difference is that creditors with contract claims willingly came into contact with the partnership, whereas tort victims do not. See Note, Liability for Partnership Debts in Louisiana: Is There a More Equitable Solution?, 35 Loy. L. Rev. 467 (1989), suggesting this difference. Yet partners also are willing parties to the contractual relationship, which neutralizes this reasoning.

Another case that discusses policy is Seligman v. Friedlander, 92 N.E. 1047, 1050 (N.Y. 1910), where the court states,

When a partnership debt is incurred, it presumptively creates partnership assets and should in reason be paid therefrom, and not until they are exhausted should individual property be proceeded against. No reason is apparent for leaving all the assets in the possession of the survivors upon the death of one of the partners and yet making the representatives of the latter liable in the first instance without touching the partnership assets.

The second sentence in this quotation is the key to understanding it. The context of the Seligman case is that of a claim being first made against the estate of a deceased partner. This is not an
demise literature\textsuperscript{47} on the merits of denying creditors immediate access to the assets of partners.

No surveys or studies are cited in either the ABA Report or the Draft in support of the assumption that making partners guarantors of collection only is "consistent with general business expectations today."\textsuperscript{48} There is authority asserting the contrary.\textsuperscript{49} Also, the assumption contradicts common sense because it treats all partnerships the same.\textsuperscript{50} Of course, they differ vastly. Creditors making loans to an established partnership of 150 partners with ten offices scattered throughout the world doubtless would contemplate proceeding first against partnership assets and probably would consider unthinkable any effort to track down and sue individual partners in such a large enterprise. On the other hand, creditors of a new, small business probably consider the solvency of the partners first and foremost when making a loan. Such creditors would be relying on the personal creditworthiness of partners and would want the option to proceed against them without the delay and expense involved in having first to prove the partnership insolvent.\textsuperscript{51} This would be true in at least some appealing situation, particularly when the surviving partners are continuing the business. See supra note 40. The first sentence of the quotation is appealing in the equitable sense that the assets that are generated by incurring a liability should be subject to payment of the liability, but it seems too mechanical in application. Often it will be impossible to trace the particular assets generated by a debt, and sometimes debt is incurred in order to pay off other debts. It does not seem appropriate to require creditors to try to trace assets generated by their loans in every case simply because in a few cases that can be done.

\textbf{47. But see} Donald Campbell, \textit{Partnership Obligations and Their Enforcement}, 32 CHI.-KENT L. REV. 127, 129 (1953), stating the following:

[I]t is difficult to perceive why the Uniform Partnership Act did not declare all partnership obligations to be joint and several in conformity with statutory provisions dealing with joint rights and obligations such as exist in most jurisdictions, provisions intended to remedy the contrary harsh theory of the common law, with its attendant procedural difficulties. One of the risks which any partner undertakes is that of being personally called upon to pay all partnership obligations. If he does so, he has his own recourse against his fellows. Why, then, should not this ultimate risk be made immediate, and arise at the time of the original undertaking? Why place the burden of seeking out and pursuing hidden or absent partners upon those who deal with partnerships? Why not suit and judgment against any convenient partner, leaving it to him to settle with his fellows?

\textbf{48. See supra note 45.}

\textbf{49. See} Horn's Crane Service v. Prior, 152 N.W.2d 421, 425 (Neb. 1967) (Smith, J. dissenting): "Does the businessman intend primarily to extend credit to the firm? [Williston and Lewis] gave negative answers in 1915 [citations omitted]. An affirmative answer is not obvious even in 1967."

\textbf{50. Of course, any default rule is going to lump together disparate situations. One could make the same assertion about the default rule proposed by the author. The real issue being addressed is upon whom should the burden be placed of contracting out of the default rule. This will be developed later in the text. See infra text accompanying note 54.}

\textbf{51. It is true that § 307(d), supra note 27, contains exceptions to the duty of a creditor to}
situations, perhaps in most situations. Although creditors can contract with each individual partner at the time of extending credit for a waiver of guarantor of collection only status, why should creditors be the ones to bear this burden?\textsuperscript{52}

The role of RUPA is to establish the most appropriate default rule—the rule that would apply if the parties do not address a particular matter in their contract. A default rule should approximate what partners and creditors would fairly expect under the circumstances involved.\textsuperscript{53} This is not always easy to determine. Nevertheless, it seems reasonable to conclude that most people would expect that the burden of clarification of guarantor of collection versus primary obligor status should be placed on the partners themselves. The partners are the owners of the business and are personally liable for its obligations.\textsuperscript{54} Also, partners have indemnification and exoneration rights against the partnership for payments made or liabilities incurred with respect to partnership obligations.\textsuperscript{55} If the partnership is unable to indemnify, partners have contribution rights against fellow partners for

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\textsuperscript{52} See infra text accompanying note 54, developing this point.

\textsuperscript{53} This leaves one with the question of perspective. Does one define a default rule from the perspective of a large and sophisticated business, as the ABA Report, supra note 9, seems to do? Or is the small, informal business the proper perspective? It is a matter of some irony that, although the Draft adopts without hesitation the perspective of the Report on the relationship of creditors to partners, with regard to other matters it states that “[t]he aggregate approach at times seems particularly well suited to the small partnership, and the Drafting Committee has determined that the primary focus of RUPA should be the small partnership, including the inadvertent partnership.” Draft, supra note 1, at 2.

\textsuperscript{54} See Draft, supra note 1, at § 306.

\textsuperscript{55} Indemnification rights against the partnership are established in § 401(c), where it is stated that “[t]he partnership shall indemnify each partner in respect to payments reasonably made and personal 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.” Section 401(c) is based directly on § 18(b) of UPA. For a representative case interpreting § 18(b), see Head v. Henry Tyler Const. Corp., 539 So. 2d 196, 199 (Ala. 1988) (“[E]very partner [is allowed] indemnification from the partnership for personal liabilities incurred, absent any modification agreed upon by the partners themselves.”). The indemnity right includes protecting the partner from having to expend personal funds under circumstances where the firm is solvent. See Bromberg \& Ristien, supra note 11, at 6:24, citing Bass v. Daetwyler, 305 S.W.2d 339 (Mo. App. 1957). This right is not technically identified as exoneration, an equitable remedy designed to protect sureties from unnecessarily advancing their own funds under circumstances where the firm is solvent. See Bromberg \& Ristien, supra note 11, at 6:24, citing Bass v. Daetwyler, 305 S.W.2d 339 (Mo. App. 1957). This right is not technically identified as exoneration, an equitable remedy designed to protect sureties from unnecessarily advancing their own funds under circumstances where the firm is solvent. Instead, it is explained on the ground that indemnification extends not only to payments made but also to liabilities incurred by the partner. The effect, however, is the same as exoneration.
payments made to creditors of the firm.\textsuperscript{56} These remedies substantially reduce the burdens on individual partners but do not altogether eliminate the burdens. The partners, however, are the ones who profit from the business in an ownership capacity, who have control over the business and the allocation of firm assets, and who should assume primary responsibility for discharge of its obligations.\textsuperscript{57}

Also, placing the burden of clarification on the partners is the soundest approach economically. It would reduce the cost of credit to partnerships because the costs of the extension of credit and of collection would be lessened. Creditors would not have to bargain for immediate access to the assets of individual partners each time they extend credit, thus reducing the transaction costs of extending credit.\textsuperscript{58}

\textsuperscript{56} Contribution rights arise through interaction of several sections of the Act. The relevant sections of UPA will first be described, and then the corresponding sections in RUPA identified. As stated in Bromberg \& Rist, \textit{supra} note 11, at 6:23, referring in part to § 18(a) of UPA, "A partner who pays or incurs a personal liability to a third party on behalf of the partnership becomes a creditor of the partnership in the amount of the payment or liability, in effect subrogated to the rights of the creditor." If the partnership does not pay, the obligation falls on the copartners of the partner who paid the obligation. See § 40(b)(II) of UPA, recognizing the status of a partner as creditor, and § 40(d), stating that partners must contribute the amounts necessary to satisfy liabilities under § 40(b), as provided by § 18(a). See Smith v. Wohl, 702 S.W.2d 905, 911 (Mo. Ct. App. 1985) ("Further, a partner who has paid more than his share of a partnership's obligation has the right to seek reimbursement from his co-partners in proportion to their responsibility.").

The sections of RUPA are substantially the same as those of UPA. Section 401(b) of RUPA, which is based on § 18(a), specifies that "the partnership shall . . . charge each partner with a share of the losses, whether capital or operating, of the partnership." Draft, \textit{supra} note 1, at § 401(b). Section 807(d) of RUPA, which is based on § 40(d), states that the partners "shall contribute, as provided by Section 401(b), the amount necessary to satisfy the liabilities . . . ." Draft, \textit{supra} note 1, at § 807(d).

The wording of § 401(b) has been changed from "contribute towards the losses" in § 18(a) to "charge each partner with a share of losses." The Comments to § 401 indicate that this was done to state that losses incurred while a firm is ongoing ordinarily are charged to a partner's capital account and are personally charged to a partner only upon dissolution or liquidation. The Comments state, "The Committee wanted to avoid an obligation to contribute to losses prior to withdrawal or liquidation." Draft, \textit{supra} note 1, at 57. This seems a little strange, and may create difficulties in the future for partners who seek contribution before dissolution, a remedy that both UPA and RUPA appear to contemplate. Although usually an indemnification right is pursued in an accounting action following dissolution, a predissolution accounting is available under § 406 to "protect the rights and interests of the partner." Further, if the claim is isolated, relief may be granted the partner even without an accounting. Bromberg \& Rist, \textit{supra} note 11, at 6:27-6:28.

\textsuperscript{57} This reasoning applies to sole proprietorships and partnerships and not to businesses organized under state legislation exempting owners from personal liability, such as corporations. Dean Weidner is correct when he states that the law in this country has developed a tolerance for exempting owners from liability, but this is true only when a relevant statute so specifies and the organization is properly qualified under the statute. See Weidner, A Perspective, \textit{supra} note 14, at 38.

\textsuperscript{58} This would apply in particular to credit arrangements generated by sales on credit to a
And, if individual access is not separately arranged with each partner, creditors would not have to calculate into the cost of the credit the risk of expense and delay in having to prove that partnership assets are unavailable before having the right to collect on their debts from individual partners.

If inconvenience is caused during the process of obtaining payment of valid debts of the business, that inconvenience should fall upon the partners, absent express agreement otherwise. The creditor should be required to alleviate partners of this burden only if he agrees to it.

Thus, if the individual partners desire the status of guarantors of collection only, they should bear the initiative of contracting for guarantor status with their creditors. Doubtless, few creditors would willingly agree to such a restriction, which underscores the fact that the assumption underlying section 307(c) may be erroneous. Therefore, the burden placed upon a creditor in section 307(d)(2) to obtain an agreement from the partners that the creditor need not first exhaust partnership assets should be reversed.

III. RUPA AND EXPULSION CLAUSES: A SUGGESTION FOR CLARIFICATION OF STANDARDS

Expulsion clauses are addressed in § 601(2) of the Draft, which reads as follows: "A partner dissociates from a partnership upon the partnership, where the structured, deliberative process involved in many bank loans may not be duplicated, thus making obtaining a waiver from every partner less likely as a routine matter.

59. Curiously, the Draft in its Comment to § 306 endorses the characterization of the liability of individual partners as joint and several by referring to its convenience for creditors:

[T]he joint-only feature places the burden on the creditor to find all of the partners. ... 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 . . . .

Draft, supra note 1, at § 306. Yet in § 307 the language of the Comment ignores a partner's right to contribution and appears indifferent to the burdens § 307 places on creditors. Draft, supra note 1, at § 307.

60. On the other hand, it may be appropriate for a court to insist on exhaustion of joint assets when the claim is being made by one partner against other partners, because of the different interests involved. This distinction is drawn in People v. Knapp, 99 N.E. 841, 844 (N.Y. 1912), where the court states:

As between the partners themselves the assets are marshalled in equity so that joint assets are first used in the payment of joint debts and several assets in the payment of several debts. This rule, however, does not bind creditors who may select any partner and collect their claims wholly from the property of that partner.

61. As mentioned earlier, creditors of large, well established businesses may constitute an exception to the statement made above. See supra note 50 and text following.
occurrence of any of the following: . . . (2) The expulsion of the partner in accordance with the partnership agreement."

The language of subsection (2) is similar to the language of UPA section 31(l)(d) except that the phrase "bona fide" is omitted. The portion of the Comment to section 601 that addresses subsection (2) contains two sentences that read: "No change in substance is intended by the deletion of the words 'bona fide.' The mandatory duty of good faith and fair dealing in RUPA Section 404(a) applies to the expulsion situation."

The Comment also quotes the following language from Bromberg and Ribstein, a leading treatise:

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.

The above quotations contain all of the language in the Comment relevant to expulsion. No language in the Comment addresses the apparent inconsistency between the sentence invoking section 404(a) and the Bromberg and Ribstein quote, which exist side by side in the Comment, one asserting that good faith applies to expulsions and the other seeming to deny that the expelling partners are subject to a standard of good faith.

62. Section 31(l)(d) of UPA reads as follows: "Dissolution is caused: (d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners." UNIFORM PARTNERSHIP ACT, § 31(l)(d), 6 U.L.A. 376 (Master ed. 1985 & Supp. 1991).

63. Section 105 of the Draft lists five situations where the standards prescribed by RUPA are mandatory. It reads in part as follows: "Unless the partnership provides otherwise, this [Act] governs the relations among partners. However, the partnership agreement may not: . . . (2) eliminate the duty of good faith and fair dealing under Section 404(a) . . . ."

64. Section 404(a) reads as follows:

(a) A partner has a duty of good faith and fair dealing towards the partnership and the other partners in all matters related to the formation, conduct and liquidation of the partnership. This duty may not be eliminated by agreement, but the parties by agreement may identify specific conduct that does not violate the duty if the conduct is not manifestly unreasonable. . . . (c) A partner does not violate either the duty of good faith and fair dealing or the duty of loyalty merely because the partner's conduct furthers the partner's individual interest.

Draft, supra note 1, at § 404(a). The assumption underlying the decision to delete the phrase "bona fide" in the Draft doubtless was to avoid redundancy because under section 404(a) good faith applies to all partnership matters, not just expulsion as it did in UPA.

65. BROMBERG & RIBSTEIN, supra note 11, at 7:28.

66. Of course, the two propositions also can be read in a way that will harmonize them.
Read one way, there is no difference between UPA and RUPA with regard to expulsion clauses. Both statutes require good faith when a partner is expelled pursuant to an expulsion clause. Yet the Draft can be read in a different way, to invite expansion of the interpretation of "bona fide" beyond that described by Bromberg and Ribstein in the above quotation. The Draft places its mandatory good faith standard in a much wider context than does UPA. This invites a broader reading of good faith; also, the phrase "and fair dealing" is added in the Draft to the language of good faith and applied to the expulsion situation. As explained below, this could lead to more intrusive judicial scrutiny of expulsions under RUPA. It is debatable whether this would be wise policy. At a minimum, efforts should be made to clarify the intended scope of RUPA on this issue. This matter will be approached by reviewing some of the key decisions that have been made under UPA while using a good faith standard.

The expulsion process involves both the decision to expel and the process by which the decision is made and implemented. It also includes an evaluation and payout stage, during which the expelled partner's economic interest in the partnership is defined and terminated. Does the mandatory duty of good faith apply to all aspects of this process, or can it sensibly be argued that it should be more limited in scope?

A. The Decision to Expel a Partner

Exploration of the good faith of an expulsion at this stage involves an inquiry into motive. This is an inquiry that the expelling partners

The Bromberg and Ribstein quote is referring to judicial decisions that interpreted "bona fide" in UPA to require only compliance with the provisions of the partnership agreement governing expulsion and a fair accounting of the expelled partner's economic interest in the firm. The Comment to § 601(2) can be read as expressing approval of this approach. Yet the reader is left with the impression that the drafting committee would not endorse an approach so narrow. See infra text accompanying notes 105-07. In any event the meaning in RUPA of "good faith and fair dealing" in this context should be made clear. See infra text accompanying note 108, suggesting an amendment to § 601(2).

67. See supra note 64. The phrase "and fair dealing" is not defined in the Draft. It is unclear what role it may play in the formulation of standards in this area. Doubtless, however, the addition of the phrase was intended by the Drafting Committee to add something of a substantive nature to the good faith language. It would otherwise be simply redundant.

68. The Draft refers to it as the expulsion "situation." Draft, supra note 1, at 94. This is ambiguous, but probably the intent was to cover the entire expulsion process. Courts are always free to narrow the scope of the duty, of course. But it would be preferable if the narrowing of scope were done within the statute itself, in the interests of both certainty and uniformity. See infra text accompanying note 108.
would fear most because it is by its nature open-ended. Would the expelling partners under the standard posed by section 601(2) have to prove good cause for expulsion, establishing that their purpose in expelling a partner was proper and justifiable? If so, what would distinguish the status of the expelled partner from that of a person enjoying the privileges of tenure where termination of employment is allowed only upon a showing of good cause? Would this be a proper burden to place on private partnerships without their consent? What role would the language of the expulsion clause play? It is this latter question that will first be addressed.

There are three different types of expulsion clauses. These can substantially affect the application of the general good faith standard set forth in the Draft, as developed below.

1. *Clauses Specifying the Causes of Expulsion ("For Cause" Clauses)*

An illustration of a “for cause” clause would be one providing that a partner can be expelled only for reasons of “inactivity, disability, neglect of business, immorality, professional misconduct, shrinkage of business, breach of the partnership articles, and conflicting outside interests.” With this clause, the partners have limited their own range of choice and have exposed themselves to an inquiry into their motives for an expulsion. This presents the easiest case for application of a broad good faith standard. All a court need do is ask whether the expelling partners have complied in good faith with their own standards. It may be that the words “bona fide” in the UPA were intended to refer to this situation.

2. *Clauses Specifying Only the Process of Expulsion ("Silent" Clauses)*

An illustration of a “silent” clause would be one providing that “any member may be expelled from the Firm by a majority vote of

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69. By choice, school systems and universities make tenure an explicit part of the contracts with their instructors. See Annotation, Construction and Effect of Tenure Provisions of Contract or Statute Governing Employment of College or University Faculty Member, 66 A.L.R.3d 1018 (1975 & Supp. 1990). This is quite different from a statute or judicial decision imposing the burdens of tenure onto private contracting parties, especially persons contracting for a partnership relationship, with its attendant risks and vicarious liabilities.

70. This list is taken from MARL VOLZ & ARTHUR L. BERGER, THE DRAFTING OF PARTNERSHIP AGREEMENTS 95-96 (6th ed. 1976). The “for cause” clause can be drafted either as an exclusive list, like the clause quoted above in the text, or it can specify that its list is nonexclusive. In the latter situation, it is likely that a court would interpret the clause to limit causes to those similar to the ones listed. See E. ALLAN FARNsworth, CONTRACTS 515-16 (2d ed. 1990), describing the rules of construction under such circumstances.

the Executive Committee.\footnote{72} Nothing is said about the reasons for expulsion. Only the means by which expulsion can be accomplished are specified.

As noted above, UPA qualifies its expulsion provision by the words "bona fide." Several cases have arisen under "silent" clauses where expelled partners in jurisdictions that had adopted UPA have urged courts to apply a good faith standard to their expulsion and inquire into the cause of the expulsion despite compliance by the expelling partners with the form of process specified. A representative and well-known case is Holman v. Coie.\footnote{73} Holman involved a twenty-two-person law partnership practicing in Seattle. The expulsion clause is the one quoted above, stating that "any member may be expelled from the Firm by a majority vote of the Executive Committee." The partnership agreement did not specify whether expulsion had to be with or without cause, nor did it list any grounds for expulsion.

The Executive Committee consisted of ten partners. By majority vote it expelled two partners, the Holman brothers, both of whom were members of the Executive Committee. Several weeks before expulsion Francis Holman, a member of the Washington Legislature, had made statements during a legislative debate regarding personal property tax legislation that high ranking officers in the Boeing Company, a client of the firm, found offensive.\footnote{74} A vice president of Boeing complained to the managing partner of the firm. Soon thereafter an informal meeting of all members of the Committee, except the Holman brothers, was held. The issue of expulsion of the Holman brothers was discussed in detail for more than nine hours.

A second meeting was scheduled. The Holman brothers were invited and attended. A proposed resolution was read aloud, expelling them. No reasons were given, despite their request for reasons.\footnote{75} A


\footnote{73} \textit{Id.}

\footnote{74} This was not the first time Francis Holman had irritated Boeing. In the month preceding the speech the president of Boeing had advised the managing partner of the firm that Boeing desired Mr. Holman to do no further legal work on its behalf. Apparently this stemmed at least in part from a local newspaper column that had praised Mr. Holman as a tax reform maverick who was independent from his client, Boeing. \textit{Id.} at 518.

\footnote{75} The negative inference with regard to the cause for expulsion that can be drawn from these facts is compelling. But life outside of Hollywood entertainment is more complex than first appears. The opinion notes that the Holman brothers had been admitted to the firm during the tenure of their father, a well-respected and distinguished senior partner of the firm. Apparently the relations of the other partners with the Holman brothers had never been harmonious. The court stated that, before the admission of the brothers to the Executive Committee,

[The committee's meetings had been pleasant, friendly, and characterized by a spirit}
vote was taken and the resolution was approved 7-2.\textsuperscript{76}

The Holmans sued the partnership for breach of the partnership agreement, breach of trust, and conspiracy. They also commenced an action for an accounting, which later was terminated by voluntary nonsuit. Plaintiffs argued that the partnership agreement was breached by (i) expelling them without cause, (ii) failing to state the reasons for expulsion, and (iii) failing to allow them an opportunity to be heard.\textsuperscript{77}

The court opinion noted that none of the three objections raised by plaintiffs was based on language in the partnership agreement. Plaintiffs argued that such limitations on expulsion were necessarily implied in the agreement. The trial court rejected this argument, finding the agreement to be a complete integration and granting summary judgment. The appellate court concurred, noting, "[A]dditional requirements should not be added to unambiguous expulsion provisions."\textsuperscript{78}

Plaintiffs also argued that the expulsion was not in good faith, pointing to UPA section 31(1)(d) and its use of the phrase "bona fide."\textsuperscript{79} The court defined bona fide as "[i]n or with good faith"\textsuperscript{80} and acknowledged that "the general rule of law is that the partners in their dealings with each other must exercise good faith."\textsuperscript{81} The court applied the standard of good faith as follows:

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of unselfishness and devotion to the best interests of the firm. However, after admission of the Holmans, there appeared to develop a polarization among the committee, with the Holmans on one side and the remainder of the committee on the other. There is also testimony which would indicate that a number of years prior to the expulsion some consideration had been given to requesting the Holmans to leave the firm.\textsuperscript{Id. at 517.}

\textsuperscript{76} It does not take a great leap of imagination to guess the identity of the two dissenting votes.

\textsuperscript{77} Id. at 519. A procedural argument of lack of proper notice also was made and dismissed by the court on the basis of construction of the partnership agreement.

\textsuperscript{78} Id. at 522. See also Smart v. Hernandez, 66 A.2d 643 (N.H. 1959); McPherson v. J.E. Sirrine & Co., 33 S.E.2d 501, 510 (S.C. 1945) ("It is not the province of the court to alter a contract by construction or to make a new contract for the parties . . "). This approach is not the only one that could be taken. See Franklin A. Gevirtz, Preventing Partnership Freezeouts, 40 MERCER L. REV. 535, 579 (1989) (suggesting that "it is just as rational to assume the parties intended an implicit requirement of reasonable grounds for removal—rather than subject their interests completely to the whims of other partners—as it is to assume the parties consciously omitted such protection because of a desire to avoid litigation").


\textsuperscript{80} Holman, 522 P.2d at 523. In doing so the court quoted from the fourth edition of Black’s Law Dictionary. The definition of bona fide reads in full as follows: "In or with good faith; honestly, openly, and sincerely; without deceit or fraud." Id.

\textsuperscript{81} Id.
However, the personal relationships between partners to which the terms "bona fide" and "good faith" relate are those which have a bearing upon the business aspects or property of the partnership and prohibit a partner, to-wit, a fiduciary, from taking any personal advantage touching those subjects. (Citation omitted.) Plaintiffs' claims do not relate to the business aspects or property rights of this partnership. There is no evidence the purpose of the severance was to gain any business or property advantage to the remaining partners. Consequently, in that context, there has been no showing of breach of the duty of good faith toward plaintiffs. 82

The court gives some focus to the meaning of "bona fide" or good faith, narrowing the inquiry to whether the purpose of the expulsion was to gain a business or property advantage against the expelled partner. The partnership agreement involved in Holman provided a method of compensation upon expulsion. The court stated: "We must assume those provisions have been properly complied with in view of plaintiffs' acceptance of the accounting." 83 The plaintiffs' acceptance of the accounting satisfied the court that they had no claim based upon good faith. Thus, the court appears to confine an inquiry into good faith to determining whether the plaintiffs' economic interests in the firm were fairly and accurately evaluated and paid to them.

The court's definition contains some language that is vague, such as whether the plaintiffs' claims relate to the "business aspects" of the partnership, or whether the purpose of the severance is to gain a "property advantage." This could open the decision making process to wide-ranging inquiries into motive, depending on how broadly one defines "business aspects" or "property advantage." One can argue, for example, that the expelling partners gain a business advantage through expulsion because the partnership income is divided into fewer shares. Under that definition, all expulsions would require an inquiry into good faith because reduction in the number of shares is an inevitable consequence of expulsion. Yet the decision of the court on this issue, while somewhat conclusory, 84 can be read to limit the inquiry to a fair evaluation and payout of the expelled partner's economic interest in the firm. This interpretation of good faith puts some parameters around an otherwise vague concept.

82. Id.
83. Id. at 521.
84. As quoted in the text, the court states that, "There is no evidence the purpose of the severance was to gain any business or property advantage to the remaining partners. Consequently, in that context, there has been no showing of breach of the duty of good faith toward plaintiffs." Id. at 523. The court does not develop its explanation further.
Finally, the court discussed plaintiffs' argument that good faith also requires compliance with basic procedural due process standards. The argument apparently was based largely on an article in an English journal where the author argued that: "[T]he rules of natural justice are an essential legal prerequisite in the determination of [an expulsion]. This is so because partners in this circumstance are acting as a 'tribunal...invested with authority to adjudicate upon matters involving civil consequences to individuals." The article concludes that a partner is entitled to notice, a hearing, and reasons before expulsion. This argument was rejected by the court on the reasoning that the actions of the partners were within the contemplation of their agreement. The court elaborated on this as follows:

While this course of action may shock the sensibilities of some, to others it may be that once the initial decision is made, the traumatic reaction to that decision is more quickly overcome and the end result more merciful. However that course of action may appear to the reader, the possibility of exactly such action occurring is clear from reading the agreement. In view of our holding that the executive committee had the right to expel plaintiffs without stating reason or cause pursuant to the partnership agreement, there was no breach of any fiduciary duty.

Another important and recent case on this subject is Lawlis v. Kightlinger & Gray. Lawlis, a senior partner of the defendant law firm, had developed a problem of alcoholism. The firm, upon discovery of the situation, contacted experts in alcoholism and set conditions for his continuing relationship with the firm. These conditions included meeting with specialists for treatment of his condition. His income from the partnership was reduced as he battled his problem.

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85. Id. at 524 (quoting B. Davies, Good Faith Principle and the Expulsion Clause in Partnership Law, 33 CONVEYANCE & PROPERTY LAW. 32 (1969)). The author of the quoted article seems to be confusing state action against individuals and private action pursuant to private agreements.

86. The court stated that the defendants "chose to adopt the guillotine approach, rather than a more diplomatic approach, to the expulsion of partners." Id.

87. Id. One predictable situation that the expelling partners may want to avoid by not giving reasons and opening up discussion of them is exposure to and lack of control over a bitter and personal counterattack by the partners being expelled.


89. Lawlis became a partner in 1971 and a senior partner in 1975. His alcoholism problem developed in 1982. Id. at 437.
After one relapse, Lawlis stopped drinking in March 1984. After being congratulated by several partners on his "100% turn around," Lawlis felt that "a substantial restoration of my previous status was past due." He met with the Finance Committee on October 1, 1986, and proposed a substantial increase in his income. Three weeks later the Finance Committee responded by informing Lawlis that they were going to recommend that his relationship with the firm be severed no later than June 30, 1987. He would be able to retain his status as a senior partner until that time to facilitate his transition to other employment and to keep his insurance coverage intact. He could draw $25,000 from the firm during that time. Two days after this conversation, all firm files were removed from his office.

Lawlis refused to consent to this and retained counsel to represent his interests. He thereafter was expelled by a 7-1 vote of the senior partners. The partnership agreement provided as follows with regard to expulsion: "A two-thirds (2/3) majority of the Senior Partners, at any time, may expel any partner from the partnership upon such terms and conditions as set by said Senior Partners."

Lawlis filed suit for breach of contract contending, among other things, that his expulsion contravened the agreement's implied duty of good faith and fair dealing because he was expelled for the "predatory purpose" of "increasing [the firm's] lawyer to partner ratio."
The appellate court observed that, if true, this argument would prevail, in view of the language defining bona fide in UPA section 31(1)(d). The undisputed facts, however, convinced the court that the inference Lawlis drew was inaccurate. Among these facts were the efforts made by the firm to help Lawlis cope with alcoholism. These efforts included permitting him to draw funds even though he became increasingly unproductive, allowing him to take substantial time off from work to attempt cures at sanatoriums, and giving him a second chance after his relapse despite the lack of obligation to do so.

The court buttressed its conclusion by quoting extensively from the Holman case, in particular the language confining good faith analysis to "the business aspects or property of the partnership," and concluding that, "[s]ubstantially the same consideration present in Holman, i.e., potential damage to partnership business, is present in this case." The court also agreed with Holman on the validity of the "guillotine method" of involuntary severance, that is, no notice or hearing, only a severance vote to terminate need be taken. The intent of the partners "was to provide a simple, practical, and above all, a speedy method of separating a partner from the firm, if that ever became necessary for any reason. We find no fault with that approach to severance.

Where the remaining partners in a firm deem it necessary to expel a partner under a no cause expulsion clause in a partnership agreement freely negotiated and entered into, the expelling partners act in "good faith" regardless of motivation if that act does not cause a wrongful withholding of money or property legally due the expelled partner at the time he is expelled. If we were to hold otherwise, we would be engrafting a "for cause" requirement upon this agreement when such was not the intent of the parties at the time they entered into their agreement.

96. The court noted that "[i]t would be a simple matter to extrapolate [from] the principle that an employer may terminate an at will employee for any cause or no cause without liability" to the relationship involved in the case before it, which also is an at will relationship. "The Indiana Uniform Partnership Act, however, prevents us from so doing." Id. at 440 (citing to § 31(1)(d)).
97. Id. at 442.
98. Id.
99. Id.
100. Id. at 442-43. A literal application of this standard would seem to make unnecessary the portion of the opinion that addresses the efforts by the firm to help Lawlis cope with alcoholism. But some courts seem to find irresistible the temptation to address the reasons for and the merits of the actions of the expelling partners, even when the opinion states that the case does not turn on that. See also infra note 103 (cases dealing with "no cause" clauses).
The case authority on this matter is not substantial, but it appears that the Holman and Lawlis cases reflect the views of most courts when dealing with "silent" clauses in partnership agreements. As the above excerpts from the opinions make clear, the courts are strongly inclined to respect the language of the partnership agreement and not to read additional terms into it.101

3. "No Cause" Clauses

These clauses differ only slightly from those discussed in Part 2. They differ in the sense that they make it expressly clear that the partnership has no contractual obligation to explain the cause of expulsion to the expelled partner. An illustration of this type of clause is contained below:

If the continued membership of a Partner in the Partnership is, for any reason, determined not to be in the best interest of the Partnership as determined by seventy-five percent (75%) in Interest of the Class "A" Partners entitled to vote, said determination is to be made without any regard to cause or fault on the part of the Partner being expelled.102

It would take a bold court to read into such clause a good faith limitation requiring that the expulsion be with cause. It appears that no court has done so. There is judicial authority supporting the enforcement of such a clause in addition to the obvious inferences of support that can be drawn from the Holman and Lawlis cases.103 If a court did choose to override such specific contractual language, it would seem necessary to reach doctrinally outside of the bona fide limitation of section 31(1)(d). The doctrine of unconscionability

103. See Gelder Medical Group v. Webber, 363 N.E.2d 573, 576-77 (N.Y. 1977) (expulsion of partner under medical partnership agreement providing for expulsion without cause; the court concluded that to impose a good faith showing "would nullify the right to expel without cause and frustrate the obvious intention of the agreement to avoid bitter and protracted litigation over the reason for the expulsion. . . . [T]he agreement provision is addressed to avoiding the necessity of showing cause and litigating the issue."). It should be noted, however, that the court appeared to compromise the point made in the above quote by stating in dictum that "[a]ssuming, not without question, that bad faith might limit the otherwise absolute language of the agreement, the record does not reveal bad faith." Id. See also Reid v. Bickel & Brewer, 1990 U.S. Dist. LEXIS 11589, at *14 (S.D.N.Y. 1990) ("[E]ven assuming that Texas would recognize an implied good faith covenant in this partnership agreement, Reid does not present a genuine issue that defendants breached this covenant when they expelled him."). Reid involved a no cause covenant. See supra text accompanying note 102.
would be the most likely vehicle for upsetting such a clause,¹⁰⁴ assuming the facts support an inference of oppression and unfair surprise. The standard common law doctrines of duress and fraud also are available if the facts support an attack on such grounds.

B. Good Faith Under RUPA

What impact would RUPA likely have on the three types of expulsion clauses described above? With regard to "for cause" clauses, the standards proposed in the Draft would make little difference because the partners themselves by contract have invited an inquiry into their motives and have restricted their own freedom of action.

What role, however, would the good faith and fair dealing standard in the Draft be likely to play when a partner is expelled under a "silent" clause? The Draft places special status on good faith through its inclusion in section 404(a)¹⁰⁵ together with the sentence in the Comment to section 601(2) specifically addressing expulsion clauses and stating that the duty of good faith is mandatory. It can be argued that this is broader than the "bona fide" standard in UPA and that it expands the role of the courts in such situations, inviting judicial inquiry into the reasons behind an expulsion under a "silent" clause. Although good faith has been defined in economic terms in the UPA cases of Holman and Lawlis, it could easily be broadened under the Draft by pointing to its use in section 404(a) as well as the Comment to section 601(2). Clearly the meaning of good faith cannot be defined solely in economic terms when viewing it from the broad perspective of section 404(a), which applies to a host of situations beyond expulsion and payout of a partner's share. Also, the added language "and fair dealing" may be influential in buttressing a broader reading. Thus, the precedents established under UPA may not carry the same weight under RUPA.

One can imagine a judge operating under the seemingly broadened standard of RUPA responding to the facts of Holman by saying that the behavior of the majority partners was clearly in bad faith and did not constitute fair dealing toward a fellow partner. To condone such

¹⁰⁴. See Shell Oil Co. v. Marinello, 307 A.2d 598 (N.J. 1973), cert. denied, 415 U.S. 920 (1974) (refusing to enforce a clause in a franchise contract that gave the company the right to terminate the lease underlying the contract on 10 days notice without cause). The court found the bargaining power of the parties "grossly disproportionate" and held that Shell could terminate only if the dealer substantially failed to perform his obligations under the lease and dealer agreement. Thus, Shell could terminate only for good cause, as defined by the court. Id. at 603. See also Ashland Oil, Inc. v. Donahue, 223 S.E.2d 433 (W. Va. 1976).

¹⁰⁵. As noted previously, UPA has no such equivalent clause that speaks to all relations among partners.
behavior is to condone buckling in to the bullying behavior of a powerful, arrogant client and sacrificing a partner who was merely exercising his rights of free speech. The facts of Lawlis also could be characterized as bad faith by emphasizing the insensitivity of the majority partners to Lawlis’ struggle with alcoholism. He had made a recovery and had been sober for several years. As soon as he made a request for an increase in income, he was expelled. There was no good faith cause for expulsion, it could be argued. Also, Lawlis arguably was not fairly dealt with by his fellow senior partners, and RUPA now invites an inquiry into fair dealing, particularly under circumstances where the partnership agreement is silent on standards for expulsion.

Not all judges, of course, would reason that way when faced with interpreting clauses like the ones involved in the Holman and Lawlis cases. But the potentially broadened standard of inquiry under the Draft increases the risk that this could happen. This could make partners wishing to expel a fellow partner afraid to do so and thus vulnerable to a coerced settlement. Alternatively, the partners would be forced to live passively with an unacceptable situation.

With regard to “no cause” clauses, it may be that the mandatory language of good faith and fair dealing in RUPA could be read to qualify even such a clause. One can imagine a court saying that under no circumstances will the language of the partnership contract control the language of a statute in a bad faith expulsion situation.

It is debatable that such an expansive interpretation of the applicable standard for expulsion would lead to an improvement in the law. The essence of the partnership relationship is freedom of association. As mentioned above, entering into a partnership relationship involves risk as well as reward. The risk is intensely personal, on both fiscal and reputational levels. The relationship is a business relationship, entered into for profit. Absent gross overreaching, duress, or fraud, the parties ought to be able to define the limits of their relationship in the terms they wish. They alone must cope with the sometimes difficult

106. It could also be argued that the qualification of the second sentence of § 404(a), supra note 64, is inapplicable because the conduct of expelling a partner under these circumstances is manifestly unreasonable. See infra text accompanying note 125.

107. Of course, each partner has a power of dissolution under § 31 of UPA, but does not always have the right to dissolve the partnership. Thus, exercise of the personal dissolution power is not always a desirable alternative to use of an expulsion clause. The situation is more complex under RUPA. Section 802(1) retains a power of dissolution exercisable at any time by a partner in a partnership at will. Dissolution of a term partnership by a partner in violation of the agreement, however, takes place under § 802(2) only if “any other partner” gives notice within 90 days after dissociation of “that partner’s express will that the partnership business be wound up.” Draft, supra note 1, at § 802(2).
personal situations that can develop in complex, long-term relationships. The parties, therefore, should be the ones who control the boundaries of their relationship, not a court standing outside the situation and second guessing actions that affect only the members of that relationship.

C. A Proposed Amendment

The Draft should be amended to incorporate into section 601(2) the definition of good faith that can be extrapolated from the Holman and Lawlis cases. The Draft should state:

Except as cause for expulsion may be required by the partnership agreement, the expelling partners comply with the obligation of good faith and fair dealing regardless of motive if their act does not cause a wrongful withholding of money or property legally due the expelled partner at the time he is expelled. \(^{108}\)

This protects the interest of the expelled partner who is, after all, free to invest his money in another business, \(^{109}\) while at the same time allowing the other partners to choose with whom they will associate.

Undoubtedly situations will exist where the freedom of association advocated above will be abused by the majority of a partnership. Not all actions of members of a partnership toward each other are fair, not all motives are pure. Arbitrary and petty expulsions can take place pursuant to a silent or no cause expulsion clause. But so long as the economic stake of the expelled partner is fairly accounted for, the interests of predictability and reliability and the benefits of freedom of association outweigh the occasional abuse that the freedom will inevitably entail.

IV. The Definition of Fiduciary Duties: Some Questions About Section 404 of the Draft

Fiduciary duties are defined in section 404 of the Draft. The first paragraph of that section states: "SECTION 404. FIDUCIARY DUTIES OF PARTNER. The only fiduciary duties a partner owes to the

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108. This language is drawn from the Lawlis opinion. Lawlis v. Kightlinger & Gray, 562 N.E.2d 435, 443 (Ind. Ct. App. 1990). This assumes that the partnership agreement does not itself specify a requirement of cause for expulsion.

109. The effect of noncompete clauses should be considered. It can be argued that, except for legitimate protection of trade secrets, noncompete clauses should be less readily enforced under these circumstances.
partnership and the other partners are the duty of good faith and fair dealing, the duty of loyalty, and the duty of care, as set forth in this section."

Some questions will be raised below about this section. In no sense is this brief discussion intended to be conclusive, nor is it intended to be critical of the approach taken by the Committee in attempting to cope with the difficult problems involved in defining terms and standards in this complex area. It is designed only to identify matters that need further discussion.

A. The Mandatory Duty of Good Faith

The Draft states that the duty of good faith and fair dealing is mandatory. This is the only fiduciary duty declared to be mandatory. The parties to a partnership agreement are free to define their relationship as they wish with regard, for example, to standards of loyalty to the partnership and to themselves.

Throughout any piece of basic legislation defining a form of doing business runs a tension between allowing freedom of contract among

110. The rest of § 404 states:
(a) A partner has a duty of good faith and fair dealing towards the partnership and the other partners in all matters related to the formation, conduct, and liquidation of the partnership. The duty may not be eliminated by agreement, but the parties by agreement may identify specific conduct that does not violate the duty if the conduct is not manifestly unreasonable.
(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 informed consent of the other partners, from a transaction connected with the formation, conduct, or liquidation of the partnership or from a use by the partner of partnership property;
(2) to refrain from dealing with the partnership as, or on behalf of, an adverse party without the informed consent of the other partners; and
(3) to refrain from competing with the partnership without the informed consent of the other partners.
(c) A partner does not violate either the duty of good faith and fair dealing or the duty of loyalty merely because the partner's conduct furthers the partner's individual interest. A partner may purchase, for the partner's own account or otherwise, the assets of the partnership in a foreclosure sale or upon liquidation of the partnership.
(d) A partner has a duty to act in the conduct of the business of the partnership in a manner that does not constitute gross negligence or willful misconduct. An error in judgment or a failure to use ordinary skill and care does not constitute gross negligence.
(e) This section applies to a person engaged in the liquidation of the business of the partnership as the personal or legal representative of the last surviving partner as if the person were a partner.
Draft, supra note 1, at § 404.

111. See § 105(2), quoted infra note 115, and § 404(a), quoted supra note 110. This portion of the paper returns briefly to the good faith standard in order to address some of its broader implications.
the owners of the business and exercising paternalistic control over agreements among owners. This tension has been expressly recognized by the Reporter for RUPA.\footnote{112}

The Reporter notes that the Drafting Committee for RUPA has avoided paternalism in most situations, opting instead for freedom of contract.\footnote{113} The assumption apparently is that contracts defining a partnership relationship are almost never contracts of adhesion. They do not involve circumstances of lack of personal choice or of great inequality of bargaining power. Instead, the typical partnership involves people joining together, each contributing something, to start a business with the goal of making money.\footnote{114}

The Draft's approach is to let the partnership agreement control the relations among partners except for five situations specified in section 105.\footnote{115} As mentioned above, one of the situations is that the partnership agreement may not eliminate the general duty of good faith and fair dealing specified in section 404(a).\footnote{116} This seems unexceptional on its face. Who can deny that contracting parties should act fairly and in good faith toward each other? This should especially be true of people who enter into the contractual relationship of partnership, which is complex and interpersonal in nature and potentially of long-term duration. Entering into a partnership relationship involves a great deal of trust. In most cases a partner will not only devote considerable time and energy to the business, but also will be risking his or her reputation and personal assets as a result of the actions of fellow partners that the partner will not be in a position fully to control.

\footnote{112}{Weidner, Midstream, supra note 4, at 828.}
\footnote{113}{Dean Weidner characterizes the choice as one between default rules and mandatory rules. See Weidner, Midstream, supra note 4, at 827. "A default rule is one that applies only in the absence of a provable partnership agreement to the contrary. A mandatory rule, on the other hand, is one that applies even in the face of a partnership agreement to the contrary."}
\footnote{114}{"Mandatory rules governing the relations among partners are essentially parentalistic, and the Committee felt that, with only very limited exception, adults in nonconsumer transactions are old enough and wise enough to be held to their agreements." \textit{Id.} at 828.}
\footnote{115}{Section 105 states:}

\begin{quote}
SECTION 105. EFFECT OF PARTNERSHIP AGREEMENT

Unless the partnership agreement provides otherwise, this [Act] governs relations among the partners. However, the partnership agreement may not:

1. unreasonably restrict a partner's access to books and records under Section 403(b);
2. eliminate the duty of good faith and fair dealing under Section 404(a);
3. vary the power to withdraw as a partner under Section 601(1), except to require the notice to be in writing;
4. vary the right to expulsion of a partner by a court in the events specified in Section 601(3); or
5. vary the requirement to wind up the partnership business in the events specified in Sections 802(5), 802(6), and 802(9).
\end{quote}

Draft, supra note 1, at § 105.

\footnote{116}{\textit{Id.} § 105(2). Section 404(a) is quoted supra note 110.}
Good faith and fair dealing are the minimum one can expect under such circumstances. Yet things are not quite so simple. The concept of "good faith and fair dealing," undefined, is broad and open-ended. Much can be read into it, depending on the inclinations of the reader. Some courts will hold parties to extremely high, even impossible standards, to the extent of disregarding contractual language. Such cases are rare, but the fear of them renders parties vulnerable to coerced and excessive settlements of marginal claims made by persons willing to exploit this uncertainty and the danger of a large and unfair verdict.

Why is the good faith and fair dealing standard, alone of all the standards in section 404, selected to be nonwaivable? The UPA says nothing about good faith, with the exception of expulsion clauses. The Draft is much more aggressive on this matter, both in greatly expanding the scope of good faith and in making it nonwaivable, yet there is no explanation for this change of approach in the Comments to the Draft.

117. See K.M.C. Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985) (good faith limitation imposed by court on lender's clearly expressed contractual power to demand repayment of loan; $7.5 million judgment recovered against lender); State Nat'l Bank v. Farah Mfg. Co., 678 S.W.2d 661, 690 (Tex. Ct. App. 1984) (plaintiff recovered a $12 million judgment against bank on ground of interference with business relations "without just cause or excuse" when bank exercised its contractual rights to call loan with plaintiff if a change in the office of president and chief executive officer was deemed adverse to the interest of the bank. "Although the lenders may have been acting to exercise legitimate legal rights or to protect justifiable business interests, their conduct failed to comport with the standards of fair play.").

118. The other standards in § 404 are quoted in full at supra note 110.

119. The Reporter explains the waivability of the rest of § 404 in the following terms: RUPA section 21(b) [now § 404] purports to be an exclusive statement of the duty of loyalty of partners. . . . [It] was motivated by a sense that vague, broad statements of a powerful duty of loyalty causes too much uncertainty. It was said that, even if there were no bad holdings, overly broad judicial language has left practitioners uncertain about whether their negotiated agreements will be voided. It was said that practicing attorneys want to be able to reach a deal, put it down on paper, and know that it will not be undone by the application of fiduciary duties. RUPA sections 4X and 21 [105 and 404] now provide an exclusive checklist of the duties of loyalty and further provide that they can all be drafted away.

Weidner, Midstream, supra note 4, at 856. The above reasoning is persuasive. One is left puzzled, however, why the same reasoning does not apply with equal force to the duty of good faith.

120. UPA § 31(1)(d), which states that dissolution is caused "[b]y the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners." 6 U.L.A. 376 (1969). The words "bona fide" are what creates a good faith standard with regard to this provision.

121. The author has no dispute with the goal of encouraging fairness and good faith among partners. This is a fundamental value, one of long standing in the law. See Meinhard v. Salmon, 64 N.E. 545 (N.Y. 1928). But freedom of contract also is a fundamental value. It is when the two values conflict that troubling questions are raised. No easy solutions exist to this dilemma.
Also, "good faith and fair dealing" is not defined in the Draft. The Comment to section 404 states that "[t]he Committee does not intend to define the duty of good faith and fair dealing." This leaves the reader uncertain about how to deal with this concept.\(^{122}\) Apparently the intention of the Committee is to leave it up to the courts to develop standards over the years via the process of case law. This approach contains both a strength and a weakness. The strength is that of the common law, allowing the law to develop situationally, by trial and error, with the lawmaker being forced to determine a winner and a loser in a specific context involving claims arising from the conflicts of life. The weakness is that this approach invites litigation over disputes where the stakes often are high and the standards are vague.

The Reporter has drawn attention to the broad prescription of good faith in the Uniform Commercial Code, suggesting that a similar prescription is appropriate to RUPA.\(^{123}\) But there is a difference between the two Acts. The UCC narrowly defines good faith.\(^{124}\) No attempt is made to define good faith and fair dealing in RUPA, yet it is statutorily decreed to apply to everything involved in the partnership relationship.

The second sentence of section 404(a) doubtless was designed to address the above concerns. It states that: "[t]he duty [of good faith and fair dealing] may not be eliminated by agreement, but the parties by agreement may identify specific conduct that does not violate the duty if the conduct is not manifestly unreasonable."\(^{125}\) This allows the partners to define good faith for themselves within certain limits. This may strike the necessary balance between freedom of contract and the refusal of the statute to tolerate bad faith among partners. But questions remain. For example, it is unclear to what the word "conduct"

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\(^{122}\) This Article suggested one way to define the concept of good faith when dealing with the discrete topic of expulsion clauses, see supra text accompanying notes 108-09, but the standards proposed there have little relevance to the many other questions that can arise when good faith is applied to partnership dealings that do not involve evaluation and payment of a partner's interest.

\(^{123}\) Weidner, Midstream, supra note 4, at 854.

\(^{124}\) U.C.C. § 1-201(19) (1983), where good faith is defined as "honesty in fact in the conduct or transaction concerned." The standard of honesty in fact seems too narrow for the variety of situations which the definition in § 404(a) would encompass. In the case of a merchant, the code defines good faith as: "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." U.C.C. § 2-103(1)(b) (1983). A similar definition exists in §§ 2A-103(3) and 3-103(4). Perhaps this broader definition is what Dean Weidner had in mind. See supra note 123. But it refers to "commercial standards . . . in the trade," a point of reference that may not provide much guidance in the amorphous matter of relationships and dealings among partners.

\(^{125}\) See supra note 110.
refers. Would it include the conduct specified in the Holman case? Also, the second sentence to section 404(a) qualifies its limitation by a "manifestly unreasonable" standard. What does this mean? Who decides this issue? And when does it apply? Would it apply at the time the clause in Holman was drafted? Or at the time it was invoked to expel the Holman brothers?

The "manifestly unreasonable" standard invites judicial scrutiny of contract terms without the protective barriers that exist in most jurisdictions to insulate contracting parties from overly intrusive judicial interference with contracts. The doctrine of unconscionability, which also invites judicial scrutiny of the fairness of contract terms, ordinarily limits such inquiries to circumstances where it first is proven that the bargaining process was flawed in some way. An illustration is where the complaining party was unfairly surprised by the term being challenged. The same limitation exists for other doctrines, such as duress, undue influence, and fraud, which are used in attacking an unfair contract. Each involves a serious failure in the bargaining process itself. Yet this limitation on judicial review is overcome in RUPA by force of statutory language. Judges are invited to scrutinize terms of the partnership contract without regard to the bargaining process by which those terms were reached. The power this appears to grant to courts to act as "roving commissions" searching out injustice is worrisome. The decision to make good faith a mandatory duty under the terms proposed for RUPA should be carefully debated before it is promulgated in a uniform act.

126. See supra text accompanying note 73.
127. See Arthur Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U. Pa. L. Rev. 485 (1967) (suggesting a distinction between "procedural" and "substantive" unconscionability, with the procedural element involving unfairness in the bargaining process, such as a hidden or deliberately obscure term).
128. See U.C.C. § 2-302 Comment a (1983), stating: "The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power."
130. See Larry E. Ribstein, A Mid-Term Assessment of the Project to Revise the Uniform Partnership Act, 46 Bus. Law. 111, 137-38 (1990) (arguing that the provision for a nonwaivable duty of good faith and fair dealing is "a questionable provision because it introduces new and troubling uncertainty"). Ribstein further states that "the good faith duty is an open invitation to litigate even the most specific agreements." Id. at 138. See also Robert W. Hillman, Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving, 67 Tex. L. Rev. 1, 43 (1988) ("Applying a good faith analysis not only to the dissolving partner's adherence to the rules of dissolution and winding up but also to the decision to dissolve adds unnecessary complications and uncertainties to partnership dissolutions.").
B. The Exclusivity of Section 404

Another question that can be raised about section 404 relates to the language in its first paragraph that the "only" fiduciary duties are the ones specified therein. This appears to preclude the recognition of other interests and other ways to articulate interests that could develop in the law and that may usefully be considered part of a partner's fiduciary duties. Why was this done?

The Reporter suggests the possible source of this odd limitation on the definition of fiduciary duties. Apparently at an early stage of the drafting process the word "fiduciary" was objected to, on the ground that "[i]t is subject to abuse in the hands of judges, academics and others whose flow of satisfactions is derived in far too large a part from imposing their personal values on the more productive members of society." That may be true in rare instances, but the explanation contains a paradox. Abuse of the word "fiduciary" is limited compared to the more widespread abusive use of the phrase "good faith," yet, while limiting the scope of fiduciary duties, the Draft aggressively expands the scope and impact of the duty of good faith.

131. One fiduciary duty that is frequently accorded separate status is the duty of disclosure. See Rosenthal v. Rosenthal, 543 A.2d 348 (Me. 1988); Band v. Livonia Assoc., 439 N.W.2d 285 (Mich. Ct. App. 1989). These cases treat affirmative disclosure as a separate fiduciary duty. RUPA, on the other hand, while identifying the duty to disclose on demand in § 403(c) (which deals with the rights of the partners to obtain information), merely mentions an affirmative duty of disclosure in the Comment to § 404, describing it as a component to the duty of good faith and fair dealing. It may be that the affirmative duty of disclosure is sufficiently important that it should be accorded separate status within the language of § 404, or at least not be foreclosed from such status. This may be of particular importance in those jurisdictions that refuse to print the Comments to uniform acts in their statutes.

132. In raising this question the author wishes to emphasize that the recognition of fiduciary duties and the freedom of contract to tailor or override fiduciary duties are two separate issues. Thus, the argument made above that the duty of good faith should be subject to the same freedom of contract as the duty of loyalty is independent of the argument that courts should be free to define and expand fiduciary duties under the many circumstances that will exist where the parties have not addressed the matter in their partnership agreement.

133. Weidner, Midstream, supra note 4, at 849.

134. But there are instances where courts have stretched to define relations as fiduciary in nature under debatable circumstances. See Anaconda-Ericsson, Inc. v. Hessen, 29 B.R. 139 (E.D.N.Y. 1983); Credit Managers Ass'n v. Superior Ct., 51 Cal. App. 3d 352, 124 Cal. Rptr. 242 (1975) (classifying creditors as fiduciaries).

135. See supra note 117.

136. An additional question about § 404, unrelated to the above discussion, is whether the Draft defines the duty of care among partners too narrowly by limiting violations of it to gross negligence. According to one recent article, by doing so the Draft displaces a system of common law that is operating effectively. See Norwood P. Beveridge, Jr., Duty of Care: The Partnership Cases, 15 OKLA. CITY U. L. REV. 753 (1990) (for a comprehensive treatment of the duty of care issue, arguing against drafting a grossly negligent standard). Despite this, the Draft for the first time includes a standard protecting partners from claims by fellow partners based on ordinary negligence. See § 404(d) of the Draft, supra note 110.
V. CONCLUSION

The latest Draft of RUPA is innovative and comprehensive. It is a welcome addition to the literature of partnership. The Reporter has written three intelligent, straightforward, thoughtful articles explaining what he has done and why. All of this is highly desirable, but the exposure of the Draft to professionals interested in the law of partnership has been quite limited. No urgency exists. The second and final reading of RUPA should not be completed and the vote of the Conference should not be taken until others have had the chance to comment on an exposure draft. RUPA is too important a piece of legislation to be acted upon before that has taken place.

137. The Draft makes a number of constructive and positive changes to UPA. Chief among them is a carefully crafted shift to the entity theory. One laudable consequence of this is that the problems posed by cases like Fairway Development Co. v. Title Insurance Co., 621 F. Supp. 120 (N.D. Ohio 1985), where the automatic dissolution of a partnership creates havoc in an executory contract setting in the hands of a court that is not sensitive to the policies involved, will no longer plague the law of partnership.