ATTORNEYS' RIGHTS IN A LAW PARTNERSHIP
OUTSIDE OF A PARTNERSHIP AGREEMENT

I. INTRODUCTION

Partnership law provides a set of standard rules for attorneys who wish to jointly own and operate a firm. Every state except for Louisiana bases its partnership law on either the Uniform Partnership Act (UPA) or the Revised Uniform Partnership Act (RUPA). The purpose of this article is to examine a lawyer’s rights outside of the terms of a partnership agreement. A partner’s rights under UPA will be compared with the results under RUPA. Because law firms typically function as general partnerships, the rights of an attorney in a partnership will be based on these acts.

The National Conference of Commissioners on Uniform State Laws adopted UPA in 1914 and it has been basically free of change since then. However, today it has largely been replaced by RUPA. While RUPA brought about many changes, the “most sweeping change brought by RUPA is the treatment of partnerships as entities rather than as aggregates of their members.” The aggregate theory treats the partnership as a conglomerate of individuals. By contrast, the entity theory treats the partnership as a separate legal entity, totally distinct from the individual partners. Under the entity theory each partner has separate legal rights, and the partnership assets are owned by the partnership. Uncertainty as to which theory of partnership that the UPA embraces has resulted in some confusion. The UPA seems to contain provisions that embrace both

2. Id.
4. Robert W. Hillman, RUPA and Former Partners: Cutting the Gordian Knot with Continuing Partnership Entities, 58-SPG LAW & CONTEMP. PROBS. 7 (Spring, 1995).
5. Id.
7. See id.
8. See id.
aggregate and entity approaches to partnership law.\textsuperscript{9} However, RUPA clearly embraces the entity theory of partnership law. RUPA section 201 specifically states, "a partnership is an entity distinct from its partners."\textsuperscript{10} The drafters wanted to emphasize the entity theory as the dominant model because of UPA's ambivalence on the nature of partnerships.\textsuperscript{11} Because most states are now adopting RUPA, attorneys in a law partnership should pay particular attention to the provisions in this act.  

II. PARTNERSHIP

A common practice in the legal profession is for a group of attorneys to share office space with no intention of creating a partnership. However, they should be aware that it is possible to create a partnership without intending to do so. If there is any agreement to share revenues, a partnership will be created by default.\textsuperscript{12} As a result, the group of attorneys will be governed by partnership law, which provides for such things as joint and several liability, fiduciary obligations, and partnership dissolution provisions.

Under UPA, a partnership is defined as "an association of two or more persons . . . to carry on as co-owners a business for profit."\textsuperscript{13} A partnership is created when people agree "orally or in writing to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business and to divide the profit and bear the loss . . . ."\textsuperscript{14} Nothing has to be declared or filed to create a partnership. If there is an association of two or more people conducting business and sharing profits, a partnership has been formed whether the entity is called a partnership or not.\textsuperscript{15}

In \textit{Dalton v. Austin}, two individuals entered into a business agreement to operate a restaurant that the defendant had previously operated as a sole proprietorship.\textsuperscript{16} The two entered into some type of agreement,

\textsuperscript{9} See id.
\textsuperscript{10} RUPA § 201 (1994).
\textsuperscript{11} RUPA § 201 cmt.
\textsuperscript{12} RUPA § 202.
\textsuperscript{13} UPA § 6(1) (1914); see also Dalton v. Austin, 432 A.2d 774, 777 (Me. 1981).
\textsuperscript{15} See id. at 227.
\textsuperscript{16} Dalton, 432 A.2d at 775.
although the exact nature of the agreement was in dispute.\textsuperscript{17} The plaintiff testified that they agreed to be equal partners.\textsuperscript{18} She claimed that the defendant agreed to incorporate the business in return for financial contributions to be made by the plaintiff.\textsuperscript{19} Stock in the corporation would then be split between the plaintiff and the defendant.\textsuperscript{20} The defendant also testified that they agreed to become partners, but that the agreement was for the plaintiff to eventually purchase the business from him.\textsuperscript{21} After the agreement, the plaintiff managed the enterprise while the defendant was no longer involved in business operations.\textsuperscript{22} During the time the plaintiff managed the restaurant, she made financial contributions to the business in excess of $18,000.\textsuperscript{23} The business soon began to have financial difficulties and eventually failed.\textsuperscript{24} The plaintiff brought suit for conversion of the financial contributions she had made to the business.\textsuperscript{25}

The court held that "[e]vidence relevant to the existence of a partnership includes evidence of a voluntary contract between two persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business with the understanding that a community of profits will be shared."\textsuperscript{26} Although the two parties differed as to the specifics of their agreement, the court held that there was ample evidence of an agreement to run the business.\textsuperscript{27} The plaintiff contended that a partnership did not exist because there was no evidence of co-ownership or sharing of profits.\textsuperscript{28} However, the court held that there was evidence of co-ownership in that the plaintiff managed the business without the participation of the defendant.\textsuperscript{29} While there was no evidence of shared profits, the court held that the agreement implied that the parties intended

\begin{itemize}
\item \textsuperscript{17} \textit{Id.}
\item \textsuperscript{18} \textit{Id.}
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{21} \textit{Dalton, 432 A.2d at 776.}
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} \textit{Dalton, 432 A.2d at 777.}
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} \textit{Id.}
\end{itemize}
to share profits. In this case, because of the poor financial performance of the business, there were no profits to be shared. Because a partnership existed, the court held that the plaintiff had no action for conversion and that the dispute as to the financial contributions of the plaintiff should be settled by an accounting between the partners.

The definition of a partnership did not change with the drafting of RUPA. The drafters did not intend a substantive change in the law. Section 202 codifies the judicial construction that a partnership is created by the association of persons whose intent is to carry on a business for profit and that a partnership may inadvertently be created despite the parties expressed intention not to do so.

Attorneys who just want to share office space must be careful that they do not form a partnership. In applying the rule from Dalton, they must be sure that there is no evidence of a voluntary contract between the attorneys to combine their money, effects, labor and skill with the understanding that profits will be shared. If there is any agreement to share profits, RUPA section 202 makes it clear that a partnership will be formed by default.

III. FIDUCIARY DUTY

A fiduciary is defined as "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking." The UPA does not contain an explicit statement of partner fiduciary duties. Instead, section 9(1) states that agency law principles, presumably including fiduciary principles, apply to part-

30. Id.
31. Dalton, 432 A.2d at 777.
32. Id. at 776.
33. See RUPA § 202(a).
34. RUPA § 202 cmt. 1.
35. Id.
36. See Dalton, 432 A.2d at 777.
37. RUPA § 202.
nernships. Additionally, courts have held that partners are fiduciaries of one another. Further, section 21(1) "requires that a partner account to the partnership for any benefit, and hold as trustee for the partnership any profit, derived without the other partners' consent from transactions connected with the partnership's formation, conduct, or liquidation or from the partner's use of partnership property." Generally these duties can be separated into (1) a duty of loyalty; (2) a duty of care; (3) a duty of good faith and fair dealing; and (4) a duty to disclose all matters that are material to the partnership and its business.

In Meinhard v. Salmon, the defendant (Salmon) entered into a twenty year lease of a hotel in New York City. He wanted to convert the property from hotel use to retail use but lacked the necessary funds. As a result, Salmon entered into a joint venture with Meinhard. Meinhard was to supply the funds while Salmon would manage the project. Near the end of the lease, Salmon was given an opportunity to renew the lease. Salmon entered into the renewed lease of this property on his own without even informing Meinhard of the opportunity. Meinhard filed suit, claiming that he should be allowed to participate in the lease. The court held that "copol partners owe to one another, while the enterprise continues, the duty of the finest loyalty." Thus, the defendant could not enter into a lease on his own, when he came across the opportunity as a result of his partnership with the plaintiff.

Section 404 of RUPA provides for the fiduciary duties that a partner owes to the partnership and to the other partners. Section 404(a) specifically provides that the only fiduciary duties that a partner owes are the duties of loyalty and care. RUPA section 404(b) sets forth three specific rules that make up the duty of loyalty. Subsection (b)(1) provides that

40. UPA § 9(1).
42. Callison, supra note 39, at 113 (discussing UPA § 21(1)).
43. Id. at 114.
44. 164 N.E. 545, 546 (N.Y. 1928).
45. Id.
46. Id.
47. Id.
48. Id.
49. Meinhard, 164 N.E. at 546.
50. Id.
51. Id. at 546.
52. Id. at 547.
53. RUPA § 404(a).
partnership property usurped by a partner must be held in trust for the partnership. 54 Subsection (b)(2) provides that a partner cannot deal with a partnership on behalf of a party having an adverse interest to the partnership. 55 Finally, RUPA section 404(b)(3) provides that a partner cannot compete with a partnership in the conduct of its business. 56

RUPA section 404(c) establishes the duty of care that a partner owes to the partnership and to other partners. 57 Although courts did recognize a common law duty of care, this is a new provision in that UPA did not provide for a duty of care. 58 This section provides that a partner’s duty of care “is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law.” 59

RUPA section 404(d) is another new provision. 60 This section provides that partners have an obligation of good faith and fair dealing in the discharge of their duties, whether these duties arise under RUPA or the partnership agreement. 61 The obligation of good faith and fair dealing also extends to the exercise of any rights by a partner. 62

Under UPA the parties may vary some of these duties by agreement. 63 UPA section 21(1) expressly allows partners to agree to a partner’s retaining partnership benefits and properties. 64 Some courts have held that these duties may be altered, but the fiduciary character of the relationship cannot be eliminated. 65

Section 103 of RUPA provides which fiduciary duties may be modified and which may not. 66 Subsections 103(b)(3) through (b)(5) allow the duty of loyalty, duty of care, and the obligation of good faith and fair dealing to be modified, but these subsections may not be eliminated

54. RUPA § 404 cmt. 2.
55. RUPA § 404(b)(2).
56. RUPA § 404(b)(3).
57. RUPA § 404 cmt. 3.
58. Id.
59. RUPA § 404(c).
60. RUPA § 404 cmt. 4.
61. Id.
62. Id.
64. UPA § 21(1).
65. Pierce, supra note 63, at 40-41.
66. Hynes, supra note 38, at 449.
entirely. An agreement may not eliminate the duty of loyalty, unreasonably reduce the duty of care, or eliminate the obligation of good faith and fair dealing. This ensures the existence of a fundamental core of fiduciary responsibility.

Under RUPA an attorney in a law partnership owes the firm fiduciary duties of loyalty and care. Law firm property appropriated by an attorney must be held in trust for the firm. Moreover, an attorney cannot deal with the firm on behalf of a party having an adverse interest to the partnership. Additionally, an attorney cannot compete with the firm “in the conduct of the partnership business.” An attorney breaches his duty of care to the law partnership by engaging in grossly negligent or reckless conduct or a knowing violation of law. Finally, attorneys in a law partnership will have an obligation of good faith and fair dealing in the discharge of their duties.

IV. RIGHTS OF A PARTNER

A. Partner as Agent

Each attorney that is a partner in a law firm has the right to act as an agent for the partnership. UPA section 9(1) and RUPA section 301(1) define the scope of the partner’s authority to act for the partnership. Under UPA every partner is both a principal and agent of the partnership with respect to any business within the scope of the partnership. Each partner is an agent of the partnership, and one partner’s acts bind all of the partners.

67. RUPA § 103 cmt. 4.
68. Hynes, supra note 38, at 450.
69. RUPA § 103 cmt. 4.
70. RUPA § 404.
71. RUPA § 404(b)(1).
72. RUPA § 404(b)(2).
73. RUPA § 404(b)(3).
74. RUPA § 404(c).
75. RUPA § 404(d).
76. O’KELLEY & THOMPSON, supra note 1, at 63.
77. Pierce, supra note 63, at 14.
78. In re Ridenour, 45 B.R. 72, 79 (E.D. Tenn. 1984), overruled on other grounds.
79. Id.
RUPA section 301 retains the basic principals of the UPA. This section provides:

Each partner is an agent of the partnership for the purpose of its business. An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority.

Absent a contrary agreement, a partner is an agent, with both actual and apparent authority in the scope of the partnership’s ordinary business. Actual authority comes from actual communication between the principal and agent. This occurs when the principal gives an agent authority to act in a particular area. Apparent authority does not deal with communication between the principal and agent, but between the principal and the third party. Apparent authority exists when the principal has established a set of circumstances that make it reasonable for the third party to believe that the agent had authority. In a partnership setting, apparent authority arises from some conduct, statement, or circumstance of the principal which reasonably leads a third person to believe the partner has authority to act for the partnership.

RUPA, unlike UPA, clearly provides that a partner has apparent authority to act in business of the kind carried on by the partnership. Thus, under RUPA, a partner has apparent authority to bind a partnership outside the scope of the business of that particular partnership if other similar firms engage in that type of business. For example, assume that A and B form a partnership with an agreement that they sell only baseballs. However, other similar partnerships sell both baseballs and footballs. Under RUPA, partner B would have apparent authority to bind the partnership in a contract to sell footballs because it is business of the kind carried on by the partnership.

80. RUPA § 301 cmt. 2.
81. RUPA § 301(1).
82. RUPA § 301 cmt. 2.
84. RESTATEMENT (SECOND) OF AGENCY § 27 (1978).
86. RUPA § 301 cmt. 2.
Thus, in a law partnership, each attorney will have apparent authority to bind the firm in business of the kind carried on by law firms. As a result, an attorney in a plaintiff’s firm may be able to bind the firm in a contract to provide transactional work for a corporation. It would be reasonable for the corporation to believe that the firm handles that type of work because it is business of the kind carried on by law firms. Thus, the firm could be bound by one of the partners acting as an agent to do work that the other partners do not want and are not qualified to do.

The UPA is somewhat ambiguous. Under UPA, “a partner’s authority to act is limited to transactions within the scope of the partnership business, or within the apparent scope of the partner’s authority.” However, some courts have allowed for the expanded view that a partner can bind the partnership outside of the scope of the partnership business, if other similar firms transact business in the same manner.

B. Right to Share Profits

The rights of a partner to share in the profits of the partnership are drawn substantially from UPA section 18. Under UPA, in the absence of an agreement to the contrary, partners share equally in profits and losses, regardless of their contribution to partnership capital. However, absent an agreement to the contrary, partnership capital will be returned to the partners in proportion to the partner’s contribution upon dissolution.

In Dunn v. Summerville, a partnership had dissolved and Dunn had been found to have taken approximately $40,000 more in partnership draws against profits than Summerville. At trial, Summerville was awarded an amount equal to the excess draws. On appeal, the Texas Supreme Court reduced the judgment. The court held that absent an agreement profits should be shared equally, even if the partners contribut-

87. Id.
90. RUPA § 401 cmt. 1.
91. UPA § 18(a); see also Levine v. Levine, 232 S.E.2d 782, 786 (Va. 1977).
92. UPA § 18(a).
93. 669 S.W.2d 319, 319 (Tex. 1984).
94. Id.
95. Id.
ed unequal amounts of capital. Therefore, because Summerville was only entitled to half of the profits, he was only entitled to half of Dunn’s excess draws.

RUPA section 401(b) continues the rule that profits are shared per capita and not in proportion to capital contributions. Absent an agreement to divide profits in a particular manner, each attorney is entitled to an equal share. Losses are divided in the same proportion as profits. In section 401(a), RUPA establishes a system of accounts for the partnership. Each partner has an account that is “credited with the partner’s contributions and share of the partnership profits and charged with distributions to the partner and the partner’s share of partnership losses.”

C. Management Rights

Both the UPA and RUPA provide that partners have the right to participate in the management of the partnership. Under the UPA, “all partners have equal rights in the management and conduct of the partnership business.” However, partners may have an agreement that one or more of them have management control of the enterprise.

In Swiezynski v. Civiello, an employee of a grocery store which operated as a partnership was injured on the job. She received workers’ compensation benefits as a result of the injury. She then brought suit against the individual partners, alleging that the defendants owed her a duty of care as landlords. The court held that, absent a partnership agreement, partners have an equal right to manage the business. Therefore, “each partner has an equal right to control the work performance of a partnership employee.” As a result, the court held

96. Id.
97. Id.
98. RUPA § 401 cmt. 3.
99. RUPA § 401(b).
100. RUPA § 401 cmt. 2.
101. Id.
102. UPA § 18(e).
104. 489 A.2d 634, 636 (N.H. 1985).
105. Id.
106. Id.
107. Id. at 637.
108. Id.
that if a partner does not give up his management rights in a partnership agreement, a partner is an employer to a partnership employee.\textsuperscript{109} Because the partners were considered employers, the plaintiff's only means of recovery was workers' compensation benefits.\textsuperscript{110}

RUPA also provides that partners have an equal right to manage the partnership.\textsuperscript{111} Under RUPA, some decisions require unanimous consent of all partners while others only require a majority decision. Disputes concerning ordinary matters are settled by a majority of the partners.\textsuperscript{112} Differences outside the ordinary course of partnership business and amendments to a partnership agreement require unanimous consent.\textsuperscript{113}

Thus, an attorney's management rights in a law partnership will be governed by partnership law. Under RUPA section 401(f), attorneys have equal rights to manage the firm. Typical day-to-day firm management decisions will be settled by majority rule. However, matters outside the ordinary course of firm business require unanimity.

\textit{D. Rights to Information}

Both UPA and RUPA provide that partners have a right to access books, records, and information related to the partnership.\textsuperscript{114} Under UPA, partnership books are to be kept at the principal place of business.\textsuperscript{115} Every partner has a right to demand "a full, fair, open and honest disclosure of everything affecting the relationship."\textsuperscript{116}

RUPA provides that a partnership must keep its books and records at its chief executive office, and the partnership must provide partners with access to the books and records.\textsuperscript{117} The right to access the partnership's books is not conditioned on motive.\textsuperscript{118} While this right of access may be modified by an agreement, it may not be unreasonably restricted.\textsuperscript{119}

\begin{itemize}
\item \textsuperscript{109} Swiezynski, 489 A.2d at 637.
\item \textsuperscript{110} Id.
\item \textsuperscript{111} RUPA § 401(f).
\item \textsuperscript{112} RUPA § 401(j).
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Pierce, \textit{supra} note 63, at 30.
\item \textsuperscript{115} UPA § 19; see also Pierce, \textit{supra} note 63, at 30.
\item \textsuperscript{116} Hooper v. Yoder, 737 P.2d 852, 859 (Colo. 1987).
\item \textsuperscript{117} RUPA § 403.
\item \textsuperscript{118} RUPA § 403 cmt. 2.
\item \textsuperscript{119} RUPA § 103(b)(2).
\end{itemize}
E. Dissociation and Dissolution

Under both UPA and RUPA, dissolution of a partnership is a two-step process.\footnote{120} The first step is the dissolution which is followed by the winding up of the partnership business.\footnote{121} During the winding up phase, the partners must complete the business of the partnership.\footnote{122} In the case of a law firm, this would mean the completion of the firm’s active cases.\footnote{123}

In section 602(a), RUPA retained the rule of UPA section 31(2) which states that a partner has the power to withdraw from a partnership at any time.\footnote{124} The power to withdraw cannot even be taken away by a partnership agreement.\footnote{125} RUPA has, however, dramatically changed the law regarding dissolution of a partnership.\footnote{126}

The UPA defines dissolution as “the change in the relation of the partners caused by any partner ceasing to be associated in” the partnership.\footnote{127} Absent an agreement, any time a partner voluntarily withdraws, dies, is expelled, or files for bankruptcy, the partnership is dissolved.\footnote{128} Thus, any time a partner leaves a partnership for any reason, the partnership is dissolved. As a result, by simply withdrawing, a partner has the power to dissolve a partnership, even without consent of the other partners.

In Clapp v. LeBoeuf, a former law partner brought suit against a partnership that dissolved itself, then reformed without her.\footnote{129} The plaintiff claimed that she was entitled to injunctive and monetary relief because she was deprived of her due process and liberty interest in the continuation of the partnership because there was no notice or hearing before her interest was terminated.\footnote{130} The court noted that the plaintiff’s
interest in the partnership derived from statutory and contractual sources.\textsuperscript{131} In this case the plaintiff signed a partnership agreement that provided for an indefinite partnership term.\textsuperscript{132} The court held that “a partnership agreement of an indefinite term is an at-will partnership which may be terminated by any partner at any time.”\textsuperscript{133} Thus, the court held that the dissolution of the partnership, with or without due process, could not be a violation of the plaintiff’s constitutional rights because she had no right in the continuation of the partnership, under either the contract or relevant state law.\textsuperscript{134}

RUPA introduced the concept of dissociation.\textsuperscript{135} Section 601 establishes the events that will result in the dissociation of a partner from a partnership.\textsuperscript{136} Under RUPA, the dissociation of a partner does not automatically result in a dissolution and winding up of the partnership.\textsuperscript{137} The entity theory of partnership embraced by RUPA provides a conceptual framework for the continuation of the firm despite the withdrawal of a partner.\textsuperscript{138} RUPA section 801 identifies which dissociation events will result in dissolution.\textsuperscript{139} Of the dissociation events established in section 601, only voluntary withdrawal of a partner from an at-will partnership (a partnership not for a particular term or undertaking) will result in dissolution and winding up of partnership business.\textsuperscript{140} Therefore, RUPA still enables an attorney to dissolve a partnership without approval of the other partners by simply withdrawing voluntarily. In dissociation events not resulting in dissolution under section 801, there is a buyout of the dissociating partner’s interest under section 701.\textsuperscript{141}

\textsuperscript{131} Id.
\textsuperscript{132} Id. at 1053.
\textsuperscript{133} Clapp, 862 F. Supp. at 1057-1058.
\textsuperscript{134} Id. at 1058.
\textsuperscript{135} RUPA § 601 cmt. 1.
\textsuperscript{136} RUPA § 601.
\textsuperscript{137} RUPA § 601 cmt. 1.
\textsuperscript{138} Id.
\textsuperscript{139} RUPA § 601 cmt. 1.
\textsuperscript{140} RUPA § 801(1).
\textsuperscript{141} RUPA § 601 cmt. 1.
V. CONCLUSION

Since 1914, partnership law in the United States has been based on the Uniform Partnership Act. This act has been largely replaced by the Revised Uniform Partnership Act. The rights of an attorney in a law partnership will be governed by these acts. Both UPA and RUPA provide a set of default rules that give a partner rights in a partnership absent a partnership agreement. First, a partner has the right to act as an agent for the partnership. Under UPA, an attorney acting within the scope of the partnership business has the authority to bind the partnership. Agency power under RUPA is broader in that an attorney has the authority to bind the firm in business of the kind carried on by the partnership. A partner also has the right to share in the profits of the enterprise. In addition, an attorney has the right to participate in the management of the partnership. Both UPA and RUPA provide that partners have the right to access information concerning the partnership. Finally, an attorney has the ability to withdraw from a partnership and this right cannot be taken away by agreement. Under UPA, any time a partner withdraws for any reason, the result will be dissolution. RUPA introduced the concept of dissociation. The dissociation of a partner does not automatically result in dissolution. Only voluntary withdrawal from an at-will partnership will terminate the partnership.

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