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Comment

Partners Dumping Partners: Business Before Ethics in *Bohatch v. Butler & Binion*

Margaret Kline Kirkpatrick*

Colette Bohatch, a partner at the law firm of Butler & Binion, was fired for reporting what she believed in good faith to be overbilling of a client by a fellow partner.¹ Bohatch had joined the Washington, D.C. office of the Houston-based firm as an associate in 1986, after working as Deputy Assistant General Counsel at the Federal Energy Regulatory Commission for several years.² The office was comprised of only two other attorneys: John McDonald, the managing partner of the office, and Richard Powers, a partner.³ Most of the work of the three attorneys revolved around one client, Pennzoil.⁴ Bohatch became a partner in February 1990 and began receiving internal operating reports containing the number of hours each attorney worked, billed and collected.⁵ While reviewing these reports, Bohatch became concerned that McDonald was misrepresenting how much work he was doing for Pennzoil.⁶ McDonald was charging Pennzoil for eight to twelve hours of work every day, but Bohatch saw him working only three to four hours each day.⁷ She reported what she believed to be

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1. See *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 544-45 (Tex. 1998).

2. See *id.* at 544.

3. See *id.*

4. See *id.*

5. See *id.*

6. See *id.*

7. See *id.* at 558. A recent symposium addressed unethical billing habits in the legal profession. See Symposium, *Unethical Billing Practices*, 50 RUTGERS L. REV. 2151 (1998). One commentator noted that in many law firms, [t]he lawyers are engaged in pervasive deception of clients, pretending to be doing work that they are not doing, pretending to spend

McDonald's ethical misconduct to other members of the firm's management committee and was fired soon afterward.⁸ Bohatch sued Butler & Binion, alleging breach of the partnership agreement and breach of fiduciary duty.⁹ A jury in the 234th District Court, Harris County, Texas, awarded Bohatch \$307,000 in actual damages from the firm and several of its partners and \$4 million in punitive damages from partners Louis B. Paine, Jr., R. Hayden Burns, and John K. McDonald, individually.¹⁰ All parties appealed to the Court of Appeals of Texas, which reversed the punitive damages award and held that the firm had not violated its fiduciary duty to Bohatch by expelling her.¹¹ The Texas Supreme Court affirmed.¹²

Bohatch v. Butler & Binion raises the issue of whether a law firm should be subject to tort damages for breach of fiduciary duty if it terminates a partner who follows the ethical rules of the legal profession and reports the misconduct of a fellow attorney. The Texas Supreme Court, the first high court to address this issue, grappled with the clash between attorneys' ethical duties, which require them to report the misconduct of other attorneys,¹³ and the common law doctrine of employment-

more time than they are spending, pretending that work needs to be done which in fact does not need to be done. The delivery of legal services is conceptualized principally as a billing opportunity to be manipulated and expanded.

Lisa G. Lerman, *Scenes from a Law Firm*, 50 *RUTGERS L. REV.* 2153, 2175-76 (1998).

8. See *Bohatch*, 977 S.W.2d at 544-45.

9. Bohatch's contract claim was based on the firm denying her a year-end distribution for 1990 and for reducing her tentative distribution for 1991 to zero without requisite notice as required by the partnership agreement. See *Bohatch v. Butler & Binion*, 905 S.W.2d 597, 604 (Tex. App. 1995). She also argued that the firm breached the partnership agreement in refusing to provide her with her monthly draw. See *id.* Finally, she contended that those acts of the firm constituted a constructive eviction from the firm in violation of the partnership agreement. See *id.* at 604-05.

10. See *id.* at 599. The punitive damages against the three partners were reduced to \$237,141 in the final judgment. See *id.*

11. See *id.* at 608. The Court of Appeals did, however, hold that the firm was liable for damages for breach of the partnership agreement in failing to provide Bohatch with her monthly draw before firing her and by not providing notice of its decision to cut off her distribution for the following year. See *id.* at 606. However, the court concluded that she was not entitled to compensation for the year in which she received her distribution in accordance with the partnership agreement. See *id.* The court awarded Bohatch \$225,000 in attorney's fees. See *id.* at 608.

12. See *Bohatch*, 977 S.W.2d at 550.

13. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1983) [here-

at-will, under which an employer can fire an employee for any reason.¹⁴ The case raises the question whether courts should protect whistleblowing partners by creating a public policy exception to the at-will nature of partnerships. In determining whether a whistleblowing partner should be protected by the courts, it is also important to consider whether an attorney need be correct in his or her accusations of misconduct before that attorney will be protected. It is also necessary to determine what effect partners' fiduciary duties have on the right of a partnership to fire a partner who reports ethical misconduct by another attorney.

While focusing on partners, this Comment argues that courts should allow tort damages for all attorneys in law firms who are expelled or otherwise sanctioned for reporting the misconduct of other attorneys, as long as the reporting attorney in good faith believes that misconduct has occurred. Part I describes the attorney's duty to report, the employment-at-will rule and its application to law firms, and the fiduciary nature of partnerships and the duty of good faith. Part II analyzes the *Bohatch v. Butler & Binion* opinion and discusses the court's decision that a firm may expel a whistleblowing partner. It also looks both at the dissent's assertion that the firm violated its fiduciary duties by expelling a partner who reported overbilling by another partner and the attempt by the concurrence to find a middle road. The Comment concludes that courts should protect both partners and associates who report professional misconduct by allowing such attorneys to recover tort damages when expelled or otherwise disciplined for following their ethics codes.

I. THE DUTIES OF LAWYERS AND LAW FIRMS

Under the common law doctrine of employment-at-will, if employment is for an indefinite term, an employer may terminate an employee at any time for any reason, or no reason.¹⁵ At the same time, the legal profession demands that lawyers com-

inafter MODEL RULES]. Rule 8.3(a) states that "[a] lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

14. See, e.g., *Payne v. Western & Atl. R.R. Co.*, 81 Tenn. 507, 519-20 (1884) (defining employment at-will).

15. See *infra* Part I.B.

ply with specified ethical standards, which include reporting misconduct by a fellow attorney.¹⁶ Often, attorneys are caught in a no-win situation, because they are not protected from losing their jobs if they obey their professional duty to report unethical conduct.¹⁷

A. THE ATTORNEY'S DUTY TO REPORT

Disclosure of unethical conduct by a fellow attorney has long been considered important to the legal profession in order to maintain its integrity, to police itself, and to guard against harm to society.¹⁸ Nevertheless, until the early part of the twentieth century, statements of legal ethics carried no binding effect.¹⁹ The Canons of Professional Conduct were first set forth by the American Bar Association in 1908 and encouraged reporting of attorney misconduct without making it mandatory.²⁰ In 1969, state bar associations began to adopt the Model Code of Professional Responsibility, and the reporting of attorney misconduct finally became an obligation.²¹ Under the Model Code, all lawyers have an absolute duty to report attorney misconduct, an obligation which has been criticized for contributing to mutual distrust among attorneys who have to report even small infractions.²² Most states, including Texas, have abandoned the Model Code in favor of the newer Model Rules of Professional Conduct, adopted in 1983, which reject

16. See *supra* note 13 and accompanying text.

17. See Anthony J. Blackwell, *Wieder's Paradox: Reporting Legal Misconduct in Law Firms*, 1992/1993 ANN. SURV. AM. L. 9, 11 (1993).

18. See Blackwell, *supra* note 17, at 9 (citing *Winters v. Houston Chron. Pub. Co.*, 795 S.W.2d 723, 729-31 (Tex. 1990) (Doggett, J., concurring)).

19. See Ronald D. Rotunda, *The Lawyer's Duty To Report Another Lawyer's Unethical Violations in the Wake of Himmel*, 1988 U. ILL. L. REV. 977, 978.

20. See Blackwell, *supra* note 17, at 22 (citing Canons of Professional Ethics (1908)). Canon 28 stated that a "duty to the public and to the profession devolves upon every member of the Bar having knowledge of [improper solicitation] to immediately inform thereof, to the end that the offender may be disbarred," while Canon 29 encouraged intra-professional reporting of misconduct to the appropriate tribunal. See *id.* at 22-23.

21. See *id.* at 23.

22. See *id.* at 24 (citing GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 555-56 (Supp. 1989)). Another criticism of the duty to report revolved around the theory that it would not be obeyed, which would lead to cynicism about attorney misconduct. See *id.*

the general reporting rule for breeding cynicism and for being too difficult to enforce.²³

Under Rule 8.3 of the Model Rules, an attorney who has knowledge of another attorney's misconduct that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."²⁴ The most significant difference between the Model Code and the Model Rules is that the latter permit an attorney to decide whether the behavior of a fellow attorney raises a "substantial question" as to his or her fitness as an attorney.²⁵ The Model Rules focus more on the severity of the violation, rather than on the knowledge requirement, the analysis of which is more flexible and may be based on inferences from the circumstances.²⁶ The reporting requirement has generated confusion because Model Rule 8.3 fails to define exactly what constitutes a substantial offense or what level of knowledge of misconduct is required before an attorney must report such misconduct.²⁷ What is clear is that

23. See *id.* at 25. Texas has adopted virtually the same language as Model Rule 8.3 in Texas Disciplinary Rules of Professional Conduct Rule 8.03(a). In all, at least 47 states have adopted Model Rule 8.3. See Richard L. Neumeier, *Time for Massachusetts Lawyers To Do What Other Professionals and Other Lawyers Already Must Do—Report Serious Misconduct*, 42 BOSTON B.J. 15, 15 (1998).

24. MODEL RULES, *supra* note 13, Rule 8.3(a).

25. See Michael J. Burwick, *You Dirty Rat!! Model Rule 8.3 and Mandatory Reporting of Attorney Misconduct*, 8 GEO. J. LEGAL ETHICS 137, 141 (1994). According to Burwick, the purpose of the change in wording was to "make the provision more clear to attorneys, more workable in practice and more easy to enforce." See *id.* Critics of the change have noted that the rule is too subjective and may not in fact be so easy to enforce. See Cynthia L. Gendry, Comment, *Ethics—An Attorney's Duty To Report the Professional Misconduct of Co-Workers*, 18 S. ILL. U. L.J. 603, 605 (1994) (citing Gerard E. Lynch, *The Lawyer As Informer*, 1986 DUKE L.J. 491; James E. Mitchem, *The Lawyer's Duty To Report Ethical Violations*, 18 COLO. LAW. 1915 (1989)).

26. See Burwick, *supra* note 25, at 142. According to one commentator, the word "knowledge" in the Model Rules suggests an awareness that can be "inferred from the circumstances about which the lawyer knows." Thomas M. Carpenter, *A Question of Duty and Honor: The Requirement To Report Lawyers Who Violate the Code*, 29 ARK. LAW. 16, 16 (1995).

27. See Burwick, *supra* note 25, at 143. Charles Wolfram stated that [b]oth the 1969 Code . . . and the 1983 Model Rules impose a mandatory reporting obligation on every lawyer Probably no other professional requirement is as widely ignored by lawyers subject to it. Lawyer complaints form a relatively small percentage of complaints by lawyer discipline agencies. And some of these probably are motivated by self-interest or self-protection of the complaining lawyer or of a client.

Rule 8.3 does not require an attorney who reports the ethical lapses of another attorney to be one-hundred percent positive that misconduct has occurred.²⁸

In order to maintain the honesty of the legal profession, the bar seeks to discipline attorneys who have engaged in misconduct and often relies on fellow attorneys to report these misdeeds.²⁹ Although the duty to report a fellow attorney for misconduct is an important part of the self-regulation of the legal profession, many attorneys remain reluctant to report a fellow attorney.³⁰ Some outside of the legal profession have gotten wind of this reluctance and believe that lawyers follow an "unwritten code of silence" to protect each other from being disciplined for unethical conduct.³¹ One reason for the lack of attorney reporting may be that attorneys do not fear punishment for failing to follow Model Rule 8.3 or an equivalent

Id. (citing CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 12.10.1, at 683-84 (1986)).

28. See Carpenter, *supra* note 26, at 16, 18 ("A lawyer should not fail to report another lawyer simply because he lacks evidence to meet the ultimate burden of proof. To rest a reporting requirement upon such a prerequisite renders the rule a nullity.") Another commentator states that "[t]ypically, the reporting rule does not require that the quantum of evidence of which the lawyer is aware be beyond dispute." Rotunda, *supra* note 19, at 985.

29. See Gendry, *supra* note 25, at 605. There are four objectives of the duty to report attorney misconduct: (1) to protect the public; (2) to protect the reputation of the legal profession; (3) to uphold justice; and (4) to prevent further misconduct. See *id.* at 605-06 (citing ABA STANDARDS § 1.1, § 01:807 cmt.)

30. See Gendry, *supra* note 25, at 606. Gendry notes the words of one author who stated, "The message of the reporting requirement is that the integrity of the legal profession must be protected, even at the expense of zealous advocacy, and the lawyer's own interests. Such is the burden of self-regulation." *Id.* (citing David C. Olsson, *Reporting Peer Misconduct: Lip Service to Ethical Standards Is Not Enough*, 31 ARIZ. L. REV. 657, 666 (1989)); see also Rotunda, *supra* note 19, at 979 (stating that an ABA special committee determined that attorneys' and judges' hesitancy to report misconduct is a significant problem with attorney discipline). One commentator cites three reasons for the lack of compliance with the requirement: (1) ambivalence or negative feelings about the duty to report; (2) not knowing about the requirement or how to report; and (3) worries about retaliation. See Margaret Downie, *Duty To Report*, 32 ARIZ. ATT'Y 42, 42 (1996). The author posits that reporting an attorney who is a co-worker may be even less appealing to an attorney because of close relationships that might have developed and the greater likelihood of being discovered for reporting. See *id.* Some attorneys do report however, as evidenced by the fact that in 1995, Arizona attorneys filed 19% of the disciplinary charges investigated by the bar. See *id.*

31. Downie, *supra* note 30, at 42.

rule.³² Judging from the use of the term "snitch rule" by attorneys, it also seems plain that they find reporting unpleasant.³³ In addition, attorneys may fear that clients will not trust them with their confidences if they think their attorneys will disclose their secrets in the process of reporting the misconduct of another attorney.³⁴ In fact, under the Model Rules, attorneys' duties of confidentiality take precedence over their reporting duty, preventing them from revealing any information related to the representation of a client without that client's consent.³⁵ Finally, few states protect attorneys from retaliatory discharge, and therefore there "exists a real danger that disclosure of dishonest lawyers will be stifled, that cynicism toward legal ethics will be propagated, and that the reputation of the profession in the public conscience will be further impugned."³⁶

Despite the reporting rules, few courts have disciplined attorneys for not disclosing other attorneys' misconduct.³⁷ In most cases where attorneys have been disciplined for not reporting, they have also done something else wrong.³⁸ Usually, Model Rule 8.3 serves as a back-up provision when it is uncertain whether there is enough evidence of other, more serious charges.³⁹ The only case in which an attorney was disciplined

32. See Gendry, *supra* note 25, at 607.

33. See Laura Gatland, *The Himmel Effect: 'Snitch Rule' Remains Controversial but Effective, Especially in Illinois*, A.B.A. J., Apr. 1997, at 24, 25.

34. See William L. Hutton, Note, *The Lawyer's Duty To Report Another Lawyer's Misconduct*, 14 S. ILL. U. L.J. 683, 688-89 (1990).

35. See MODEL RULES, *supra* note 13, Rule 1.6 (stating that an attorney is not to reveal "information relating to representation of a client unless the client consents after consultation"). Thus, the mandatory reporting rule exempts confidential information otherwise protected by Rule 1.6. The comment to Model Rule 8.3 notes that although "[a] report about misconduct is not required where it would involve violation of Rule 1.6," attorneys should "encourage [their] client[s] to consent to disclosure where prosecution would not substantially prejudice the client's interests."

36. Blackwell, *supra* note 17, at 12; see also *id.* at 44-48 for further explanation.

37. See Rotunda, *supra* note 19, at 982.

38. See Burwick, *supra* note 25, at 148. In one case, two attorneys were suspended from the practice of law for five years because they engaged in kickback schemes and because they failed to tell the disciplinary committee of the illegal conduct of another attorney. See *In re Dowd*, 559 N.Y.S.2d 365, 366-67 (App. Div. 1990) (per curiam).

39. See Burwick, *supra* note 25, at 150. In another case, an associate who had knowledge of and participated in a partner's insurance fraud and other misdeeds was reprimanded for both reasons. See Beverly Storm, *Mandatory Reporting of Lawyer Misconduct: Can the Bench & Bar of the Commonwealth Discipline Itself Without It?*, 20 N. KY. L. REV. 809, 811-12 (1993) (citing At-

solely for failing to report another attorney's misconduct was the Illinois Supreme Court's decision in *In re Himmel*.⁴⁰ In that case, Attorney James H. Himmel was suspended for one year for not informing a disciplinary commission about his client's prior lawyer's misconduct.⁴¹ The case imposed "an enforceable duty on lawyers to report other lawyers' misconduct."⁴² The fear of punishment has helped encourage reporting,⁴³ but the fear of a retaliatory discharge may also discourage some attorneys from living up to their ethical responsibilities.⁴⁴

B. THE EMPLOYMENT AT-WILL RULE IN LAW FIRMS

1. The At-Will Rule

The employment-at-will doctrine, which grew out of the laissez-faire climate in the United States in the late nineteenth century, allows an employer or employee to terminate their work relationship at any time for a good reason, a bad reason,

torney Grievance Comm'n v. Kahn, 431 A.2d 1336 (Md. 1981)).

40. 533 N.E.2d 790 (Ill. 1988). In an unpublished Arizona decision, the State Bar brought a case against an attorney who failed to report the misconduct of another attorney. See Downie, *supra* note 30, at 42. The facts were similar to those in *Himmel*, but the punishment was only a public censure, rather than something more severe like suspension. One possible rationale for the lighter sanction is that the Arizona case was decided prior to *Himmel*, and therefore the court did not have *Himmel* as guidance. See *id.*

41. See *Himmel*, 533 N.E.2d at 796. The case involved a suburban Chicago attorney who failed to report the embezzlement of \$35,000 by his client's former lawyer. See *id.* at 791. When the injured client came to Himmel for representation, Himmel did not report the conversion to the Illinois bar. See *id.* The attorney believed that his client did not want him to report the misconduct and also believed that his client had already filed a grievance report. See *id.* Himmel had practiced law for eleven years and had never been the subject of ethical complaints. See Carpenter, *supra* note 26, at 18.

42. Hutton, *supra* note 34, at 684.

43. See Gatland, *supra* note 33, at 24. One year after the *Himmel* decision, the Illinois Attorney Registration and Disciplinary Commission received 922 reports from attorneys of other attorneys' misconduct. See *id.*

44. See WOLFRAM, *supra* note 27, § 12.10.1, at 684:

Filing a disciplinary complaint can incur substantial personal risk for a lawyer if the subject of the complaint is a lawyer in a position of power in the . . . legal system. Particularly in small communities or when the lawyers . . . have close practice relationships, friendships and future clientele and fees might be seriously at risk.

See also Blackwell, *supra* note 17, at 11 (stating that it is not surprising that when faced with a choice between preserving their ethics and saving their jobs, attorneys often choose to ignore misconduct by fellow attorneys); Seymour Moskowitz, *Employment-At-Will & Codes of Ethics: The Professional's Dilemma*, 23 VAL. U. L. REV. 33, 56 (1988).

or for no reason.⁴⁵ This doctrine differs from the English common law rule that an employee could be discharged only after a notice period, which was determined by the custom of the trade, or if there was no custom, a reasonable time.⁴⁶ Although employment at-will remains the presumptive employment relationship today in the United States, many courts and legislatures in recent years have reassessed and limited the doctrine because of fears that it too often results in unjust dismissals of employees.⁴⁷ Congress has passed several statutes limiting an employer's right to discharge an employee.⁴⁸ In addition, states have passed legislation to protect whistleblowers against wrongful discharge. These statutes vary in their protections, with some states like New York offering only limited protection in cases where public health and safety are at stake, while

45. See generally Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976). In one decision, the Tennessee Supreme Court took this approach in stating that "[a]ll may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong." *Payne v. Western & Atl. R.R. Co.*, 81 Tenn. 507, 519-20 (1884), *overruled on other grounds by Hutton v. Watters*, 179 S.W. 134, 138 (Tenn. 1915). The United States Supreme Court once explained that

the right of the employ   to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employ  . . . . In all such particulars the employer and the employ   have equality of right, and any legislation that disturbs equality is an arbitrary interference with the liberty of contract"

Adair v. United States, 208 U.S. 161, 174-75 (1908), *overruled by Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941).

46. See Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719, 721 (1991).

47. See Blackwell, *supra* note 17, at 27-28 (suggesting that one reason courts are more likely to limit the at-will employment rule is that they recognize that workers these days are often hired by big companies rather than small businesses, which has reduced employees' bargaining power). In addition, the decline in unions has meant that employees have less job security. See *id.* According to one court, "[i]t is beyond question that the employment-at-will rule allows employers to effectively pressure employees to commit wrongful or illegal acts through the threat of dismissal." *Salter v. Alfa Ins. Co.*, 561 So.2d 1050, 1055 (Ala. 1990) (Hornsby, C.J., concurring).

48. Title VII makes it illegal for an employer to fire an employee because of race, color, religion, gender or national origin. See 42 U.S.C. § 2000e-2(a) (1994). The Age Discrimination in Employment Act, 29 U.S.C. § 623(a) (1994), forbids an employer from discharging an employee because of his or her age. In addition, federal whistleblower provisions protecting employees who report illegal conduct are included in some federal statutes, including the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (1994).

other states like Connecticut protect employees who report suspected violations of any law or regulation.⁴⁹

2. Exceptions to the At-Will Rule

Public policy exceptions to the at-will rule have emerged around the country, creating causes of action for wrongful discharge under contract or tort theories against employers who expel employees for reasons contrary to societal interest.⁵⁰ For instance, many jurisdictions refuse to uphold the expulsion of an employee who refuses to break the law at the employer's behest.⁵¹ Application of the public policy exceptions has often been confusing, and courts have defined the term "public policy" in different ways. While a California court postulated that public policy means that "no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good,"⁵² the Illinois Supreme Court has stated that "public policy concerns what is right and just and what affects the citizens of the state collectively."⁵³ Some courts require that a discharged employee show a violation of a statute or constitutional provision, while others allow plaintiffs to demonstrate that public policy derives from other sources, such as ethical codes and judicial decisions.⁵⁴

49. See Cathryn C. Dakin, Note, *Protecting Attorneys Against Wrongful Discharge: Extension of the Public Policy Exception*, 44 CASE W. RES. L. REV. 1043, 1052 (1995) (discussing how some states have passed laws to encourage employees to report violations of law). For example, Illinois protects employees who report misconduct that they reasonably believe poses a danger to public safety, is an abuse of authority, shows mismanagement, or is a waste of funds. See *id.*

50. See Clyde W. Summers, *Labor Law As the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 13-14 (1988) (explaining that not only have courts around the country recognized limitations to the at-will rule of employment, but also that many states have statutes that protect whistleblowers from retaliatory discharge).

51. See, e.g., *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 34 (D.C. 1991) (holding that a truck driver's wrongful discharge claim was actionable because he was fired for refusing to drive a truck that was missing a required inspection sticker); see also Blackwell, *supra* note 17, at 30-31 (explaining that in most jurisdictions, an employer cannot fire an employee for refusing to break the law).

52. *Safeway Stores, Inc. v. Retail Clerks Int'l Ass'n*, 261 P.2d 721, 726 (Cal. 1953).

53. *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981).

54. See Dakin, *supra* note 49, at 1055.

3. Exception to the At-Will Rule for Lawyers

Many courts have been unwilling to deviate from the at-will rule when the employee is an attorney.⁵⁵ Attorneys, with the exception of partners in law firms, are at-will employees. While in the nineteenth century many attorneys were solo practitioners, their numbers have decreased in recent years, and the number of attorneys employed in law firms has increased.⁵⁶ There are several reasons for courts' caution about adopting a legal ethics exception to the employment at-will doctrine. First, courts believe that the ethical code that binds attorneys protects the public interest, such that extension of the public policy exception is unnecessary.⁵⁷ Second, they assume that allowing such suits would harm the attorney-client relationship, which is founded on confidence and trust.⁵⁸ Finally, courts have been reluctant to protect attorneys who report the misconduct of fellow attorneys, because a duty to the public is not implicated in the same way it would be if the health or safety of the public were on the line.⁵⁹ Only three

55. In New York, the Court of Appeals has repeatedly stated that the legislature, rather than the courts, should determine whether exceptions should be made to the at-will employment rule. In one case, the court declared that "significant alteration of employment relationships . . . is best left to the Legislature because stability and predictability in contractual affairs is a highly desirable jurisprudential value." *Sabetay v. Sterling Drug, Inc.*, 506 N.E.2d 919, 923 (N.Y. 1987) (citation omitted). In another case, the court remarked that

[t]he Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the view of the various segments of the community that would be directly affected . . . and to investigate and anticipate the impact of imposition of [changes to the employment at-will doctrine].

Murphy v. American Home Prods. Corp., 448 N.E.2d 86, 89-90 (N.Y. 1983).

56. See Dakin, *supra* note 49, at 1050-51 (1995). While today only approximately 52% of attorneys practice by themselves or with one other partner, in 1930 most attorneys were either solo practitioners or worked with just one other partner. See *id.* at 1050 n.39.

57. See *id.* at 1045.

58. See *id.*

59. See Blackwell, *supra* note 17, at 38. There are many reasons why it might be advantageous to report suspected professional misconduct first to one's firm and then to the state disciplinary committee: (1) the firm has the opportunity to respond and clarify any possible misunderstanding; (2) the attorney avoids public embarrassment to his/her colleagues and firm if the suspicion was wrong; (3) the firm may make a more formal and less partisan report to the committee; (4) reporting demonstrates the attorney's loyalty to the firm and the profession by not making an unsubstantiated charge public; (5) by reporting, attorneys help to protect the public against unethical attorneys;

states, including Texas, have indicated that a professional code of conduct can serve as a significant source of public policy that leads to an exception to the at-will doctrine.⁶⁰

Some courts have wanted to protect attorneys from wrongful discharge while at the same time avoiding an extension of the public policy exception and, therefore, have permitted attorneys to bring wrongful discharge suits on the basis of breach of contract. In *Wieder v. Skala*, an associate who had been terminated because of his insistence that the firm report the misconduct of another associate to the appropriate disciplinary committee brought suit against his former employer.⁶¹ The court found that the plaintiff stated a claim for breach of contract based on an implied-in-law obligation, but it declined to recognize the tort of abusive discharge, stating that alterations in the employment relationship are best left to the legislature.⁶²

Nevertheless, the *Wieder* court did recognize that there exists an implied-in-law understanding in the hiring of an associate to practice law that both the associate and the firm will comply with the profession's standard of ethics.⁶³

Associates are, to be sure, employees of the firm but they remain independent officers of the court responsible in a broader public sense for their professional obligations. Practically speaking, plaintiff's duties and responsibilities as a lawyer and as an associate of the firm were so closely linked as to be incapable of separation.⁶⁴

The court also made a point of noting that the rule of professional conduct requiring attorneys to report the misconduct of other attorneys is essential to the self-regulation and survival of the legal profession.⁶⁵

One commentator has noted that the court's finding of an implied-in-law duty purely by relying on the firm's hiring of the

(6) if the firm refuses to act on the report, the attorney must still report independently to the disciplinary committee. *See id.* at 40.

60. *See id.* at 42.

61. 609 N.E.2d 105, 106 (N.Y. 1992).

62. *See id.* at 110.

63. *See id.* at 108. In holding that a claim for breach of contract existed against the law firm when an associate was fired for reporting another associate's misconduct, the court stated that "[i]ntrinsic to [the hiring of an attorney to practice law] . . . was the unstated but essential compact that in conducting the firm's legal practice both plaintiff and the firm would do so in compliance with the prevailing rules of conduct and ethical standards of the profession." *Id.* at 109-10.

64. *Id.* at 108.

65. *See id.*

plaintiff supports the far-reaching conclusion that an implied-in-law term exists between all law firms and their associates.⁶⁶ This means that upon entering into an employment relationship, a firm and an attorney, whether they explicitly state so or not, are mutually bound to adhere to the ethical requirements of the profession. Some courts, seemingly embracing this view, have commented that attorneys should not be allowed to contract around the ethical duties of the profession.⁶⁷ At least one commentator has argued that because courts have always wielded almost exclusive control over attorneys, they should not wait for the legislature but should instead adopt a public policy exception to the employment-at-will doctrine based on professional ethics rules.⁶⁸

C. THE FIDUCIARY NATURE OF PARTNERSHIPS AND THE DUTY OF GOOD FAITH

While a law firm associate is more like an ordinary employee, a partner is on equal footing with his or her fellow partners, which may make a difference in terms of a partner's protection from expulsion. The relationship among partners is not a true "employment" relationship and "differs markedly from that between . . . the partnership and its associates."⁶⁹

66. See Dakin, *supra* note 49, at 1071. The *Wieder* court concluded that "in any hiring of an attorney as an associate to practice law with a firm there is implied an understanding so fundamental to the relationship and essential to its purpose as to require no expression." 609 N.E.2d at 108.

67. See, e.g., *Wieder*, 609 N.E.2d at 109-10. The Texas Supreme Court has noted that contracts often involve special relationships that could result in duties enforceable as torts. See *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 n.1 (Tex. 1991). Nevertheless, in *DeLanney*, the court held that a plaintiff's claim against a telephone company for failing to publish an advertisement was based solely in contract and was not a tort. See *id.* at 495. The court distinguished this situation from a case in which it had allowed recovery both in contract and in tort to a homeowner whose water heater had not been properly repaired by defendant. See *id.* at 494 (citing *Montgomery Ward & Co. v. Scharrenbeck*, 204 S.W.2d 508, 510 (Tex. 1947)). In *Scharrenbeck*, the court found that the defendant had a contractual obligation to properly repair the water heater, as well as a common law duty to perform his job with care and skill. See *id.*

68. See Christopher G. Senior, Comment, *Does New York's Code of Professional Responsibility Force Lawyers To Put Their Jobs on the Line? A Critical Look at Wieder v. Skala*, 9 HOFSTRA LAB. L.J. 417, 447 (1992).

69. *Hinshon v. King & Spalding*, 467 U.S. 69, 79 (1984) (Powell, J., concurring). *Hinshon* involved a former associate who sued her former law firm for sex discrimination based on its failure to make her a partner. See *id.* at 72. The Supreme Court found that her complaint stated a valid claim under Title VII, because as long as consideration for partnership was a term of em-

The position of a law firm partner is similar to that of a tenured professor who cannot be expelled except for serious misconduct.⁷⁰ In the same way, an employee who has been hired for a term of years historically has been protected against discharge without cause.⁷¹ An expectation exists among associates that if they work long hours and make many personal sacrifices, they will make partner, which they have reason to believe will confer on them wealth, security and more power in the firm.⁷² In other words, having made partner, attorneys often believe that their position in the firm is secure, only to discover later that they have been expelled.

The Revised Uniform Partnership Act (RUPA),⁷³ adopted by all but one state, represents a fairly uniform and stable statement of partnership law and establishes standards of conduct for partners.⁷⁴ When analyzing an expulsion case under RUPA, which has been adopted in Texas,⁷⁵ several questions need to be answered. First, it is necessary to inquire whether the expulsion violated the duties of loyalty and care owed to one's partners.⁷⁶ Under section 404(b) of RUPA, a breach of the duty of loyalty has occurred if one of the following three com-

ployment, the firm's decision could not be based on anything prohibited by Title VII. *See id.* at 74-75.

70. *See id.* at 80-81 n.4 (Powell, J., concurring).

71. *See* Theodore J. St. Antoine, *Employment-at-Will—Is The Model Act the Answer?*, 23 STETSON L. REV. 179, 179 (1993).

72. *See* Mark S. Kende, *Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Women Partners*, 46 HASTINGS L.J. 17, 74 (1994). Kende argues that if a law firm could fire a female partner for discriminatory reasons, it would be inconsistent with her reasonable expectations. *See id.* Firms encourage associates to believe that making partner is worth their sacrifices. *See id.*

73. UNIF. PARTNERSHIP ACT (amended 1994), 6 U.L.A. 1-124 (1995 & Supp. 1998). The Act's official title does not include the word "revised," but it is commonly referred to as "RUPA" because it is a convenient and easily-pronounced acronym and RUPA is indeed a substantial revision of the Uniform Partnership Act (UPA). *See* J. Dennis Hynes, *The Revised Uniform Partnership Act: Some Comments on the Latest Draft of RUPA*, 19 FLA. ST. U. L. REV. 727, 727 n.1 (1992).

74. RUPA is a revision of the Uniform Partnership Act, which was first approved by the National Conference of Commissioners on Uniform State Laws in 1914. *See* Hynes, *supra* note 73, at 727-28. Every state except Louisiana had adopted the Uniform Partnership Act. *See id.* at 728 n.6. According to one commentator, the UPA has "stood the test of time." *Id.* at 728.

75. *See* Bohatch v. Butler & Binion, 977 S.W.2d 543, 554 (Tex. 1998).

76. *See* J. William Callison, *Blind Men and Elephants: Fiduciary Duties Under the Revised Uniform Partnership Act, Uniform Limited Liability Company Act, and Beyond*, 1 J. SMALL & EMERGING BUS. L. 109, 139 (1997).

ponents of the duty has been breached: (1) a partner must "account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property"; (2) a partner must not deal adversely with the partnership; and (3) a partner must not compete with the partnership.⁷⁷ No breach of the duty of loyalty has occurred if the action by the partners falls outside these three categories.⁷⁸

Second, it is necessary to analyze whether the partners breached their obligation of "good faith and fair dealing," which is based on both the contractual roots of the partnership and its fiduciary nature.⁷⁹ An implied covenant of good faith exists in every contract, according to section 205 of the *Restatement (Second) of Contracts*.⁸⁰ Further strengthening the obligation of good faith is the fiduciary duty that exists among partners. Under RUPA, the duty of good faith is mandatory and cannot be waived.⁸¹ Yet, RUPA does not explicitly define the duty.⁸²

Because "good faith" has not been explicitly defined, courts have developed their own definitions of the term. Determining whether an action taken by a partnership was done in good faith involves an inquiry into motive and is inherently open-ended and subjective.⁸³ Some courts have adopted the view that a breach of the implied covenant of good faith exists if the parties would have proscribed the act had they thought to negotiate with respect to that issue.⁸⁴ As one commentator has

77. See RUPA § 404(b).

78. See Callison, *supra* note 76, at 139.

79. See RUPA § 404(d). It is interesting to note that except for a narrow clause dealing with expulsions, the obligation of good faith and fair dealing was not expressly required in the Uniform Partnership Act, which was the uniform statement of the law of partnership for the first seventy-five years of the century. See Robert M. Phillips, Comment, *Good Faith and Fair Dealing Under the Revised Uniform Partnership Act*, 64 U. COLO. L. REV. 1179, 1181 (1993).

80. See RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

81. See Claire Moore Dickerson, *Is It Appropriate To Appropriate Corporate Concepts: Fiduciary Duties and the Revised Uniform Partnership Act*, 64 U. COLO. L. REV. 111, 143 (1993).

82. Although the drafting committee intentionally left the term undefined, one commentator has argued that it is imperative for the meaning of the obligation to be defined in RUPA. See Phillips, *supra* note 79, at 1183.

83. See Hynes, *supra* note 73, at 741-42.

84. See, e.g., *Katz v. Oak Indus. Inc.*, 508 A.2d 873 (Del. Ch. 1986). The *Katz* court set forth the following test:

noted, "[t]he implied obligation of good faith imposes a limitation on a contracting party's ability to exercise legal rights in a way that deprives the other party of the substance of the *express bargain* that he had reached."⁸⁵ The Uniform Commercial Code (UCC) demonstrates a narrow conception of "good faith," defining it as "honesty in fact in the conduct or transaction concerned."⁸⁶ One court looked at good faith more broadly and focused on the tortious state of mind of the expelling party.⁸⁷ In order to prove a tortious state of mind, a plaintiff must show that the defendant intended to create harm or that the defendant's actions constituted wanton and reckless or willful misconduct.⁸⁸

Several courts have found that an expulsion of a partner breaches the duty of good faith. For example, an Illinois court held that a partner could not be expelled for persistently requesting to exercise his rights to view the firm's books and records under the partnership agreement.⁸⁹ The court agreed with the partner that his expulsion was void because it violated the implicit duty of good faith that exists between part-

[I]s it clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter. If the answer to this question is yes, then . . . a court is justified in concluding that such act constitutes a breach of the implied covenant of good faith.

Id. at 880.

85. Callison, *supra* note 76, at 142.

86. U.C.C. § 1-201(19) (Supp. 1998).

87. *See* Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P., 624 A.2d 1199, 1208 (Del. 1993).

88. *See* Callison, *supra* note 76, at 147. Callison states that only three reported cases employ the term "tortious state of mind." *See id.* at 146 (citing Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P., 624 A.2d 1199 (Del. 1993); Comeau v. Rupp, 810 F. Supp. 1127 (D. Kan. 1992); Rose Acre Farms, Inc. v. Cone, 492 N.E.2d 61 (Ind. Ct. App. 1986)).

89. *See* Winston & Strawn v. Nosal, 664 N.E.2d 239, 246 (Ill. App. Ct. 1996). The expelled partner made repeated requests to look at the firm's financial statements by invoking a provision in the partnership agreement involving "access to the firm's books and records." *Id.* at 243. Shortly after he made a final request to view the books, he received written notice that he was being discharged from the firm because his international trade practice was incompatible with the firm's interests and because his conduct was "disturbing." *Id.* at 244. The partner refused to leave the firm, and the firm expelled him. The court found that the partners had expelled the partner for self-gain and that "regardless of the discretion conferred upon partners under a partnership agreement, this does not abrogate their high duty to exercise good faith and fair dealing in the execution of such discretion." *Id.* at 246.

ners.⁹⁰ The court also acknowledged that a fiduciary relationship exists among partners and that each partner must exercise good faith and honesty in all matters regarding the partnership.⁹¹ In another case, a Florida court held that the partnership breached its fiduciary duty to a partner by expelling him in order to produce greater profits for the remaining partners.⁹² In a case decided by the California Supreme Court, Justice Traynor stated that a partner violated his fiduciary duties by expelling another partner in bad faith.⁹³ Following the California court's reasoning, the Georgia Supreme Court has held that Georgia law prohibits bad faith termination of a partnership.⁹⁴ Some courts have had a narrower understanding of fiduciary duties and have held that partners violate a fiduciary duty in expelling another partner only if they act with dishonest or sinister motives or for self-gain.⁹⁵

On the other hand, many state courts wishing to retain the traditional employment-at-will doctrine have refused altogether to find an implied covenant of good faith that would

90. *See id.* at 244-46.

91. *See id.* at 244-45.

92. *See* Cadwalader, Wickersham & Taft v. Beasley, 1998 WL 904065 (Fla. Dist. Ct. App. Dec. 30, 1998). At a secret meeting of the firm's partners, a list was compiled of the least productive partners, including the plaintiff. *See id.* at *1. All of the plaintiff's fellow partners in the Palm Beach office were included on this list. *See id.* The firm then decided to close the firm's Palm Beach office. *See id.* The District Court of Appeals of Florida held that while the management committee had the power to close an office, they did not have the right to expel a partner if there was not a provision regarding expulsion in the partnership agreement. *See id.* at *3. Although the firm offered to transfer the plaintiff to the New York or Washington offices, the court stated that this was not a good faith offer, since the partner had spent his whole career in Florida and would therefore not be very capable of winning new clients in these northern cities. *See id.*

93. *See* Page v. Page, 359 P.2d 41, 44 (Cal. 1961) ("A partner may not . . . by use of adverse pressure 'freeze out' a co-partner and appropriate the business to his own use.").

94. *See* Wilensky v. Blalock, 414 S.E.2d 1, 4 (Ga. 1992) (holding that although defendant was permitted to terminate a partnership, he was still liable for tortious interference for trying to keep all of its assets and business opportunities).

95. *See, e.g.,* St. Joseph's Reg'l Health Ctr. v. Munos, 934 S.W.2d 192, 197 (Ark. 1996) (finding that because a legitimate business reason existed for a partner's termination of another partner's contract, no fiduciary duty was breached); Leigh v. Crescent Square, Ltd., 608 N.E.2d 1166, 1170 (Ohio 1992) ("We find that a general partner's fiduciary duty applies only to activities where a partner will take advantage of his position in the partnership for his own profit or gain.").

prevent a partnership from firing a partner.⁹⁶ In holding that there was no breach of fiduciary duty when a partnership expelled partners without stating a reason, one court stated that the "guillotine" method seemed desirable: "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."⁹⁷ Similarly, in another case, the court upheld the expulsion of a partner under the no-cause expulsion clause of a partnership agreement because "[the partners'] intent was to provide a simple, practical, and above all, a speedy method of separating a partner from the firm."⁹⁸

II. THE TRIUMPH OF FIRM BUSINESS NEEDS IN *BOHATCH V. BUTLER & BINION*

In *Bohatch v. Butler & Binion*,⁹⁹ the Texas Supreme Court addressed the issue of whether a law firm owed a partner a duty not to expel her for reporting the overbilling of another partner. Although the employment at-will doctrine prevails in Texas, as it does around the country, the court was faced with an argument that it should make an exception for a partner who reports the misconduct of another attorney because of her professional obligations under the Texas Disciplinary Rules of Professional Conduct.¹⁰⁰ The court also had to determine

96. See Kende, *supra* note 72, at 61 n.192.

97. Holman v. Coie, 522 P.2d 515, 524 (Wash. Ct. App. 1974). The court stated that a clean severance is desirable because when a schism develops among partners, "its magnitude may be exaggerated rightfully or wrongfully to the point of destroying a harmonious accord." *Id.*

98. Lawlis v. Kightlinger & Gray, 562 N.E.2d 435, 442 (Ind. Ct. App. 1990). The court went on to say that

[w]here 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.

Id. at 442-43.

99. 977 S.W.2d 543, 544 (Tex. 1998).

100. See *id.* at 546. The Texas Disciplinary Rules of Professional Conduct are modeled after the Model Rules. See *supra* note 13. Rule 8.03 of the Texas Rules reads in part, "a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority."

whether the existence of a fiduciary duty among partners should have prevented the firm from firing Bohatch.¹⁰¹

Bohatch took steps to protect her partnership and its client upon concluding that a fellow partner was engaged in ethical misconduct. Bohatch went to the other partner, Powers, to discuss her concern about McDonald's billing practices, which it turned out he shared.¹⁰² The two of them reviewed McDonald's time record together and made copies of the previous two months' records.¹⁰³ Powers advised Bohatch that she should take some action.¹⁰⁴ In July, she reported her belief that McDonald was overbilling Pennzoil between \$20,000 and \$25,000 per month to Louis Paine, the firm's managing partner in Houston.¹⁰⁵ He said he would investigate.¹⁰⁶ Bohatch then told Powers that she had reported her concerns to Paine.¹⁰⁷ The following day, Powers talked with McDonald privately for an hour, and afterwards McDonald spoke with Bohatch.¹⁰⁸ Bohatch testified that McDonald, with "red-faced anger," informed her that Pennzoil was unhappy with her work, which she testified was the first time that she had ever heard of their dissatisfaction with her.¹⁰⁹ He informed her that henceforth he would be supervising her work and subsequently took away all of her work for Pennzoil.¹¹⁰ Bohatch telephoned Paine and two other members of the firm's management committee, R. Hayden Burns and Marion E. McDaniel, and reiterated her concerns about McDonald's billing practices.¹¹¹ The three man-

101. See *Bohatch*, 977 S.W.2d at 544.

102. See *id.*

103. See *id.* They noticed that many of the records were vague and did not comply with the firm's requirements for time record-keeping. See *id.* at 558 (Spector, J., dissenting). Bohatch believed that McDonald had lied in his records to hide his overbilling. See *id.*

104. See *id.* at 558 (Spector, J., dissenting). Before reporting her concerns to anyone else, Bohatch read the District of Columbia's ethical rules and spoke with an attorney. See *id.*

105. See *id.* Paine informed Bohatch that she had done the right thing in telling him her concerns. See *id.*

106. See *id.* at 544.

107. See *id.*

108. See *id.* at 558 (Spector, J., dissenting).

109. See *id.*

110. See *Bohatch v. Butler & Binion*, 905 S.W.2d 597, 600 (Tex. App. 1995). Her work on a pending case for Pennzoil was assigned to an associate who had only been working at the firm for one month. See *Bohatch*, 977 S.W.2d at 559 (Spector, J., dissenting).

111. See *Bohatch*, 977 S.W.2d at 544.

agement committee members then called McDonald, who reported Pennzoil's dissatisfaction with Bohatch's work.¹¹²

Over the next month, Paine and Burns investigated Pennzoil's bills and concluded that they contained no problems.¹¹³ They also spoke about the bills with Pennzoil's in-house counsel, John Chapman, who had a longstanding relationship with McDonald.¹¹⁴ He stated that the company was satisfied with its bills but was unhappy with Bohatch's work.¹¹⁵ Pennzoil's legal department also reviewed the bills and determined that they were reasonable.¹¹⁶ In August, Paine met with Bohatch and told her that the firm had completed its investigation and had found no basis for her allegations.¹¹⁷ He also mentioned that she should start looking for new employment, but told her that the firm would help her out by giving her a recommendation, providing her with her monthly draw, permitting her to continue to use her office, and continuing her insurance coverage.¹¹⁸ From that day forward, the firm gave Bohatch no further work.¹¹⁹

In January 1991, the firm refused to give Bohatch her year-end distribution for 1990 and reduced her tentative distribution share for 1991 to zero.¹²⁰ The firm paid Bohatch her last monthly draw in June, after notifying her in May of its intent to do so.¹²¹ In August, the firm informed Bohatch that she would have to vacate her office by November, but by September Bohatch had found a new position with the law firm of Duncan & Allen.¹²² A month later she filed suit against Butler & Binion alleging breach of contract, breach of fiduciary duty, breach of the duty of good faith and fair dealing, and wrongful discharge.¹²³ A few days afterward, on October 21, 1991, the firm voted to expel her.¹²⁴

112. *See Bohatch*, 905 S.W.2d at 600.

113. *See id.*

114. *See Bohatch*, 977 S.W.2d at 544.

115. *See Bohatch*, 905 S.W.2d at 600.

116. *See id.*

117. *See Bohatch*, 977 S.W.2d at 544.

118. *See id.*

119. *See id.*

120. *See id.* at 544-45.

121. *See Bohatch*, 905 S.W.2d at 600.

122. *See id.*

123. *See id.*

124. *See Bohatch*, 977 S.W.2d at 545.

The trial court granted summary judgment for the firm on the claims of wrongful discharge and the claims for breach of fiduciary duty and breach of the duty of good faith and fair dealing for any conduct occurring on or after October 21, 1991.¹²⁵ The trial court denied summary judgment, however, for the claims of breach of fiduciary duty and breach of the duty of good faith and fair dealing for acts that occurred prior to that date.¹²⁶ The case was tried before a jury on the breach of contract and breach of fiduciary duty claims.¹²⁷ The jury found that the firm had breached its partnership agreement and its fiduciary duty.¹²⁸ Bohatch received actual damages of \$57,000 for lost earnings in the past and \$250,000 for mental anguish in the past.¹²⁹ The jury awarded her \$4 million in punitive damages because of the breach of fiduciary duty by Paine, Burns and McDonald.¹³⁰ The jury also awarded attorney's fees.¹³¹ The trial court entered judgment for Bohatch in the amounts determined by the jury, but deleted the award of attorney's fees, because the judgment was based in tort.¹³² Bohatch accepted and the trial court entered a second judgment reducing the punitive damages award to \$237,141.¹³³

All parties appealed, and the court of appeals concluded that the firm had violated provisions of the partnership agreement and that the firm had a duty not to expel a partner in bad faith.¹³⁴ The court defined "bad faith" as meaning that partners cannot be expelled for the self-gain of other partners.¹³⁵ Finding no evidence that Bohatch had been expelled for self-gain, the court determined that Bohatch could not recover on the theory of breach of fiduciary duty.¹³⁶ It did, however, hold that the firm had violated certain provisions of the partnership agreement in not providing advance notice of its plans not to provide her with her partnership distribution for 1991 and in terminating her monthly draw a few months before her termi-

125. See *Bohatch*, 905 S.W.2d at 600.

126. See *id.*

127. See *id.*

128. See *id.*

129. See *id.*

130. See *id.*

131. See *id.*

132. See *id.* at 601.

133. See *id.*

134. See *id.* at 604, 606.

135. See *id.* at 603.

136. See *id.* at 604.

nation.¹³⁷ The court concluded that Bohatch was entitled to \$35,000 for lost earnings in 1991 but none for 1990, a year in which she received her distribution.¹³⁸ The court also refused to grant her mental anguish damages, but did render a judgment of \$225,000 in attorney's fees.¹³⁹

A. THE MAJORITY

The primary issues addressed by the Texas Supreme Court in *Bohatch v. Butler & Binion* were whether a partnership should be permitted to oust a partner who reports ethics violations by another partner and whether to create an exception to the at-will rule for attorneys. Because no controlling Texas cases existed, the Texas Supreme Court looked to cases in other jurisdictions that had held that partners may fire a partner for business reasons.¹⁴⁰ The court noted that neither statutes nor contract law principles directly address whether a law firm owes a duty to a partner not to fire him or her.¹⁴¹

The court held that a partner can be expelled without subjecting the partnership to tort damages, focusing on the difficulties a firm would face if it had to retain a partner with whom others felt it impossible to work.¹⁴² The court noted that other courts had held that firms can expel partners in order to maintain solid relationships among partners and with clients.¹⁴³ The court stated that partners do not face an obliga-

137. *See id.* at 605-06.

138. *See id.* at 606.

139. *See id.* at 606, 608.

140. The court noted that the Texas Uniform Partnership Act did not provide much assistance, because it deals with expulsions only in the context of the breakup of a partnership. *See Bohatch*, 977 S.W.2d at 545-46 (citing TEX. REV. CIV. STAT. ANN. art. 6701b). In addition, the new Texas Revised Partnership Act did not apply because it has no retroactive effect. *See id.* *Bohatch & Binion's* partnership agreement failed to shed light on the matter because it did not address the grounds for expulsion, but only described the procedures that must be followed when a partner is fired. *See id.*

141. *See Bohatch*, 977 S.W.2d at 545-46.

142. *See id.* The court stated that a firm should be able to expel a partner "for purely business reasons," citing cases from other jurisdictions to that effect. *Id.* (citing *St. Joseph's Reg'l Health Ctr. v. Munos*, 934 S.W.2d 192, 197 (Ark. 1996); *Leigh v. Crescent Square, Ltd.*, 608 N.E.2d 1166, 1170 (Ohio Ct. App. 1992)).

143. One court held that a law firm could expel a recovering alcoholic partner because "if a partner's propensity toward alcohol has the potential to damage his firm's good will or reputation for astuteness in the practice of law, simple prudence dictates the exercise of corrective action . . . since the survival of the partnership itself potentially is at stake." *Lawlis v. Kightlinger &*

tion to remain partners since "at the heart of the partnership concept is the principle that partners may choose with whom they wish to be associated."¹⁴⁴ The court noted that, in particular, some courts have determined that no breach of fiduciary duty exists where a firm fires a partner in order to remedy a schism in the firm.¹⁴⁵ The court believed that after an accusation of unethical conduct, the trust among the partners would be destroyed, and they would find it difficult to work together to serve their clients.¹⁴⁶

While recognizing an attorney's duty to report the ethical violations of fellow attorneys, the court refused to let this duty override the importance of keeping the firm intact.¹⁴⁷ It noted *Bohatch* and the amici curiae's arguments for recognizing a limited duty to retain partners for the public policy reason of discouraging firms from retaliating against a partner who complies with rules of professional conduct.¹⁴⁸ The court stated that although it refused to recognize a protected status for whistleblowers, its decision "in no way obviates the ethical duties of lawyers."¹⁴⁹ It acknowledged that attorneys can be placed

Gray, 562 N.E.2d 435, 442 (Ind. Ct. App. 1990). Partnerships exist only because of the trust and confidence that the members place in one another, according to *Holman v. Coie*, 524 P.2d 515, 523 (Wash. Ct. App. 1974), which held that when a law firm expels two partners because of their contentious behavior during executive committee meetings, the firm has not breached a fiduciary duty.

144. *Bohatch*, 977 S.W.2d at 545 (citing *Gelder Med. Group v. Webber*, 394 N.Y.S.2d 867, 870-71 (N.Y. App. Div. 1977)).

145. For instance, in *Waite v. Sylvester*, 560 A.2d 619, 622-23 (N.H. 1989), the court held that a managing partner could be discharged because of legitimate business needs. The court indicated that in order to resolve a "fundamental schism" among partners, expulsion of a partner may be the best option. *Id.* at 623. In another case, a court held that a law firm had not breached its fiduciary duty when it expelled a partner whose billable hours were low and who offended some of the firm's clients. See *Heller v. Pillsbury Madison & Sutro*, 58 Cal. Rptr. 2d 336, 348 (Cal. Ct. App. 1996).

146. See *Bohatch*, 977 S.W.2d at 546-47. The concurrence even went so far as to suggest that a lawyer who really cared about the ethics of the legal profession would take matters into his or her own hands and leave a firm that was not willing to report a partner who engaged in unethical conduct. See *id.* at 554 (Hecht, J., concurring).

147. With regard to the briefs of the amici curiae, the concurrence stated, "Their arguments have force, but they do not explain how a relationship of trust necessary for both the existence of the firm and the representation of its clients can survive such serious accusations by one partner against another." *Id.* at 554 (Hecht, J., concurring).

148. See *id.* at 546.

149. See *id.* at 547.

in a difficult position because their duty to report may create a schism among partners, but that this "neither excuses failure to report nor transforms expulsion as a means of resolving that schism into a tort."¹⁵⁰ In refusing to protect reporting attorneys, the court remained focused on the idea that not only might a firm not survive in the wake of accusations of misconduct, but even if the firm stayed intact, "[t]he threat of tort liability for expulsion would tend to force partners to remain in untenable circumstance—suspicious of and angry with each other—to their own detriment and that of their clients whose matters are neglected by lawyers distracted with intra-firm frictions."¹⁵¹

B. THE DISSENT

The dissenting justices, seeing the practice of law less as a business and more as a profession,¹⁵² would have held that the Butler & Binion partners violated their fiduciary duties when they expelled Bohatch for informing them of her belief that a

150. See *id.*

151. See *id.*

152. See *id.* at 559 (Spector, J., dissenting). An ongoing debate persists over whether the practice of law is a business or a profession, with many expressing the fear that there is currently too much emphasis on making money at the expense of the pursuit of justice and service for the public good. See generally MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994). One scholar has noted that Justice Holmes many years ago took the position that law is not a business, because "lawyers, unlike businessmen, pursue money indirectly, putting the interests of their clients in the driver's seat." David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's The Path of the Law*, 72 N.Y.U. L. REV. 1547, 1582 (1997). Yet, the legal profession has changed since Holmes' time. One scholar remarked, "In too many law firms, the computer has become Managing Partner as law firms are ruled by hourly rates, time sheets and electronic devices." Sol M. Linowitz, *Moment of Truth for the Legal Profession*, 1997 WIS. L. REV. 1211, 1213. An ABA commission has tried to revive professionalism through greater policing of the bar and educational programs. See ABA COMM'N ON PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 20-25 (1986). Rather than lamenting the transformation of law from a profession to a business, one scholar suggests a "Middle Range" approach which would involve government regulation and permit non-lawyers to perform legal services, while still allowing admission to the bar. See Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1232-33 (1995).

partner was overbilling a client.¹⁵³ It argued that the interests of the partnership should not trump the rules of professional conduct.¹⁵⁴ This is especially true for partners who are attorneys, because attorneys are officers of the court and have more of a duty to their clients and the public than those in other professions.¹⁵⁵ The dissent stated that the majority sent an "inappropriate signal to lawyers and to the public that the rules of professional responsibility are subordinate to a law firm's other interests."¹⁵⁶ It also suggested that the self-regulated nature of the profession makes it particularly important that attorneys adhere to ethical obligations.¹⁵⁷ In order to drive home the idea that attorneys must not avoid their ethical obligations, it also called attention to the *Himmel* case, in which an attorney was punished for not reporting another lawyer's misconduct.¹⁵⁸ Worrying that the majority opinion failed to encourage adherence to ethical rules and neglected to provide recourse to attorneys who report misconduct, it suggested that partners would be better protected if the ethics rules of the legal profession were incorporated into law partners' fiduciary relationship.¹⁵⁹

C. THE CONCURRENCE

The concurring justices, asserting that neither the majority nor the dissent had a reasonable view of whether a partnership should be liable for expelling a partner who reports what she or he believes to be unethical conduct, tried to find a middle road. It declared that the majority should not have rejected the arguments of the *amici curiae* that a partnership must re-

153. See *Bohatch*, 977 S.W.2d at 558 (Spector, J., dissenting).

154. See *id.* at 559, 561. Dissenting Justice Rose Spector asserted, "The practice of law is a profession first, then a business. Moreover, it is a self-regulated profession subject to the Rules promulgated by this Court." *Id.* at 559. She went on to state that "[u]ltimately, agreements to practice law may not by their terms or effect circumvent the ethical obligations of attorneys established by law." *Id.* at 560.

155. See *id.* at 560.

156. See *id.* at 561.

157. See *id.* at 560.

158. See *id.*; see also *supra* notes 40-42 and accompanying text.

159. See *Bohatch*, 977 S.W.2d at 561 (Spector, J., dissenting):

Even if a report turns out to be mistaken or a client ultimately consents to the behavior in question, as in this case, retaliation against a partner who tries in good faith to correct or report perceived misconduct virtually assures that others will not take these appropriate steps in the future.

tain a whistleblowing partner.¹⁶⁰ At the same time, it asserted that the dissent was impractical in believing that partners can maintain their trust in each other after one partner has accused another of misconduct.¹⁶¹ It contended that whistleblowers like Bohatch, whose reports of unethical conduct are incorrect, should not be protected from expulsion by their firms.¹⁶² "[A] law firm can always expel a partner for bad judgment," according to the concurrence.¹⁶³ As it noted, "Bohatch did not report unethical conduct; she reported what she *believed*, presumably in good faith but nevertheless mistakenly, to be unethical conduct."¹⁶⁴ The fact that "a client as sophisticated as Pennzoil" believed that the firm's bills were reasonable showed that McDonald had not overbilled Pennzoil.¹⁶⁵ The concurrence refused to pay heed to Bohatch's assertion that there were other reasons for Pennzoil's lack of objection to the firm's fees.¹⁶⁶ Instead, it assumed that there had been no overbilling by McDonald and declared that Bohatch had committed a pure error in judgment that warranted expulsion for the health of the firm.¹⁶⁷ It further stated that the Texas Disciplinary Rules of Professional Conduct are not impaired by allowing a firm to fire a partner who makes an erroneous report of misconduct, since the rules require more than suspicion of a violation.¹⁶⁸ It declared, "Butler & Binion's expulsion of Bo-

160. See *id.* at 548 (Hecht, J., concurring).

161. See *id.* The concurrence stated: "In the dissent's view, partners who would expel another for such accusations must simply either get over it or respond in damages. The dissent's view blinks reality." *Id.* The concurrence noted that "[t]here is hardly a schism more fundamental than that caused by one partner's accusing another of unethical conduct." *Id.* at 554. Partners should not be forced to remain partners with someone who has made accusations of unethical conduct against one of them, because "at the heart of the partnership concept is the principle that partners may choose with whom they wish to be associated." *Id.* at 545 (citing *Gelder Med. Group v. Webber*, 41 N.Y.2d 680, 684 (N.Y. App. Div. 1977)).

162. See *Bohatch*, 977 S.W.2d at 548 (Hecht, J., concurring).

163. *Id.*

164. *Id.* at 554.

165. *Id.*

166. See *id.* at 554-55. ("There is nothing to suggest that Pennzoil would have thought clearly excessive legal fees were reasonable simply because it did not like Bohatch.")

167. See *id.* at 555. If Bohatch had disagreed with firm decisions or how to handle a client's affairs, the firm would have been justified in firing her, even if she were acting in good faith. See *id.* "Reporting unethical conduct where none existed is no different." *Id.*

168. See *id.* at 557. Under Rule 8.03(a) of the Texas Disciplinary Rules of

hatch did not discourage ethical conduct; it discouraged errors of judgment, which ought to be discouraged."¹⁶⁹

III. AN UNFAIR CHOICE: YOUR ETHICS OR YOUR JOB

It is important for the Texas Supreme Court and the courts of all of the states to determine whether and to what degree attorneys should be protected from expulsion if they follow their professional codes of ethics and report the misconduct of other attorneys. Noting the lack of precedent on this issue, the dissent in *Bohatch* remarked that "the scarcity of guiding case law only heightens the importance of this Court's decision."¹⁷⁰ Courts should not wait for state legislatures to act.¹⁷¹

Rather than deciding that partners may, without fear of recourse, fire partners who in good faith report unethical conduct by another attorney, the *Bohatch* court should have validated the legal profession's requirement that attorneys report misconduct and held that Butler & Binion's expulsion of Colette Bohatch rendered the firm liable for tort damages for breach of fiduciary duty. While the court was correct in pointing out that disharmony in a law firm is possible after an at-

Professional Conduct, a lawyer's duty is triggered by "knowledge" of a violation of the rules that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness."

169. *Bohatch*, 977 S.W.2d at 555 (Hecht, J., concurring). The concurrence never explicitly stated when it would allow suits by an expelled partner who had reported misconduct. Although an erroneous report of unethical conduct surely deserves expulsion, the concurrence was unwilling to say that expulsion based on an accurate report was enough to warrant recovery on the part of the expelled partner. See *id.* at 555-56. For one thing, even lawyers who are sincere can be fired for having poor judgment. See *id.* It also stated that because courts have permitted the expulsion of partners for "nothing more significant than firm policy and abrasive personal conduct . . . surely a partner can be expelled for accusing another partner of something as serious as unethical conduct." *Id.* at 554. It pointed to the differences between large and small firms, stating that although it had difficulty justifying a large firm expelling a partner who reports unethical conduct, it reasoned that a small firm would not survive such allegations. See *id.* at 548. The concurrence criticized the notion that law firms should face no liability if they fire a partner who reports the misconduct of another attorney; it also suggested, however, that attorneys who have been fired for such reporting ought to be prepared to walk away from their firms only with a sense of righteousness, and not necessarily with money damages in hand. See *id.* at 554-55.

170. *Id.* at 560 (Spector, J., dissenting).

171. See, e.g., *supra* note 68 and accompanying text. As Charles Wolfram has noted, courts have historically been the primary regulators of attorneys and the legal profession. See WOLFRAM, *supra* note 27, at 22-33.

torney reports another attorney's misconduct,¹⁷² the court also should have acknowledged that a firm that takes a stand against ethical lapses may be stronger in the end. In any case, concerns that individual firms might disband if unethical activities are brought to light should not take precedence over the need for attorneys to adhere to the ethical rules of the legal profession. In order to encourage both partners and associates to report and to protect those who do, the court should have created a public policy exception to the at-will rule for all attorneys who in good faith disclose ethical infractions by other attorneys. In addition, the court should have taken an expansive view of RUPA's requirement of good faith among partners and held that Butler & Binion acted for improper purposes and self-gain in firing Bohatch. At the same time, the court should have called for a revision of RUPA so that partners' fiduciary duties would explicitly include the duty to adhere to professional ethics rules. Finally, the court should have held that reporting attorneys need only have a good faith belief that a fellow attorney has behaved unethically.

A. THE NECESSITY OF AN ETHICS EMPHASIS IN THE LEGAL PROFESSION

In emphasizing that an "irreparable schism" among partners could occur if partners were forced to stay partners after one of them reported another's misconduct,¹⁷³ the court in *Bohatch* seemed convinced that maintaining a thriving business is and should be of utmost importance to partners in law firms. Worried that partnerships would disintegrate without the power to get rid of partners who have harmed the firms' business in some way, many courts have granted partnerships a fair amount of leeway in firing partners.¹⁷⁴ These cases have generally involved more typical business concerns, such as issues relating to service to clients or policy disagreements, rather than the reporting of ethics violations.¹⁷⁵ The *Bohatch*

172. See generally *supra* notes 142-46 and accompanying text.

173. *Bohatch*, 977 S.W.2d at 547.

174. See *supra* notes 96-98 and accompanying text.

175. In one case, a court upheld the expulsion of a partner who had battled alcoholism, which according to the court, had the potential to "damage his firm's good will or reputation for astuteness in the practice of law." *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 442 (Ind. Ct. App. 1990). In another case in which the expulsion of two partners from a law firm was upheld, there was evidence that a political speech by one of them had bothered one of the firm's

court, however, maintained that the diminished trust and confidence among the partners at Butler & Binion caused by Bohatch's reporting was an adequate reason to fire her.¹⁷⁶ The court was thus less concerned about the underlying problem of partners breaching their ethical duties than the potential damage to the stability of a firm where misconduct is brought to light.

Yet, the possibility of divisions in firms where such reporting takes place may have been overemphasized by the court in *Bohatch*. Although it is reasonable to assume that ethical misconduct in a firm would cause partners to be upset and concerned about their fellow partner who has done wrong, it is erroneous to conclude that a firm could not survive the reporting of misconduct. Reporting misconduct within a firm might even bring partners together against ethical misconduct rather than against the person who called attention to the misconduct. Having taken a stand against ethical lapses, a firm might in the end be even stronger. Firms that encourage attorneys to report misconduct will likely have an enhanced reputation with the public and experience a decrease in misconduct because attorneys will be less likely to act unethically if they think others are watching and ready to report.¹⁷⁷ Although there is always the possibility that a firm will disband if the unethical activities of its members are brought to light, a firm's attempt to remain viable by discouraging partners from reporting internal misconduct would seriously damage a firm and the individuals who work there, and in addition would violate the rules of the profession.¹⁷⁸ Firms that encourage compliance with the duty to report may create a model work

big clients. See *Holman v. Coie*, 522 P.2d 515, 518 (Wash. Ct. App. 1974); see also *supra* note 143.

176. The *Bohatch* majority stated that charges such as those made by Bohatch, "whether true or not, may have a profound effect on the personal confidence and trust essential to the partner relationship." 977 S.W.2d at 546-47. As David Holman, attorney for Butler & Binion, commented after the court's decision, "When partners no longer wish to be partners they shouldn't be forced to remain partners." Polly Ross Hughes, *High Court Overturns Firing Ruling: Decision May Discourage Whistleblower Reports*, HOUS. CHRON., Jan. 23, 1998, at 27.

177. See Gendry, *supra* note 25, at 614.

178. Because attorneys are subject to higher ethical standards than those in most other occupations, their duty, according to the dissent in *Bohatch*, "affects the special relationship among lawyers who practice law together." 977 S.W.2d at 560. Ethics should therefore be paramount, not just for individual attorneys, but for law firms as well.

environment, because "the ethical atmosphere of a firm can influence the conduct of all its members."¹⁷⁹

The court in *Bohatch* should have paid more heed to the self-regulated nature of the legal profession and the duty of all attorneys, whether partners or associates, to keep the profession in line through the mandatory reporting requirement imposed by the Model Rules.¹⁸⁰ Attorneys have long been known to underreport the ethics violations of their peers.¹⁸¹ Reasons for not complying with the rule include negative feelings about reporting, concerns that reporting could lead to retaliatory firing or less serious but nevertheless unpleasant snubs from other attorneys, lack of knowledge of the reporting requirement, and the sense that they will not be punished for failing to report.¹⁸² In addition, attorneys may be uncertain whether they have the requisite knowledge of misconduct to trigger the reporting requirement.¹⁸³ The court should also have noted the current reluctance of attorneys to report the misconduct of other attorneys and the fact that the court's decision could have a significant bearing on whether attorneys continue to be wary of reporting in the future.¹⁸⁴ Because the court permitted

179. MODEL RULES, *supra* note 13, Rule 5.1 cmt.

180. See *supra* note 13 and accompanying text. *Bohatch*, through observing McDonald's work hours and reading his billing reports, had knowledge of McDonald's ethical missteps that raised a "substantial question" as to his fitness as an attorney. See *Bohatch*, 977 S.W.2d at 544. Believing she was following the District of Columbia Code of Professional Responsibility, she then reported her findings to the appropriate partners within the firm. See *id.* at 548.

181. See, e.g., David R. Ramage-White, *The Lawyer's Duty To Report Professional Misconduct*, 20 ARIZ. L. REV. 509, 512 (1978); Rotunda, *supra* note 19, at 979.

182. See Leonard E. Gross, *Legal Ethics for the Future: Time To Clean up Our Act?*, 77 ILL. B.J. 196, 197-99 (1988); David C. Olsson, *Reporting Peer Misconduct: Lip Service to Ethical Standards Is Not Enough*, 31 ARIZ. L. REV. 657, 662 (1989). Attorneys often find it easier to follow the reporting rules when the attorneys they suspect of misconduct are opposing counsel, rather than other attorneys within their own law firm or other attorney friends. See Michael G. Daigneault, *Ethics & Professionalism: Am I My Brother's Keeper?*, FED. LAW., June 1996, at 9, 12.

183. See Mitchem, *supra* note 25, at 1917 (noting that the reporting requirement for misconduct, which does not require an investigation, is different from the requirements of reasonable inquiry and adequate preparation to which attorneys are accustomed through provisions such as Rule 11 of the Colorado Rules of Civil Procedure).

184. See *supra* notes 30-36 and accompanying text. Attorneys, like everyone else, worry about keeping roofs over their heads and food on their tables, and therefore might not be willing to risk their jobs for the sake of a high-

the retaliatory expulsion of a partner, both partners' and associates' hesitancy to report misdeeds of fellow attorneys has been reinforced. After *Bohatch*, attorneys arguably have greater reason to fear being fired if they report than to fear *Himmel*-type sanctions for not reporting.¹⁸⁵ The Texas Supreme Court's decision not only chills attorney reporting of misconduct but also indicates a lack of interest in changing the public perception that lawyers are a part of an unethical profession.

Because maintaining the ethics of the legal profession is of greater importance than ensuring the livelihood of any given firm, the court should have found that Butler & Binion was liable for expelling Bohatch for adhering to the ethical rules of the legal profession.¹⁸⁶ As the dissent in *Bohatch* noted, "attorneys . . . bear responsibilities to [their] clients and the bar itself that transcend ordinary business relationships."¹⁸⁷ The majority claimed that its holding was not meant to diminish the ethical duties of attorneys,¹⁸⁸ but by placing more emphasis on enabling firms to avoid divisions than on encouraging attorneys to follow their ethical duties and report misconduct, the court discounted the importance of integrity within the legal profession.¹⁸⁹ Attorneys reading the court's decision receive a strong message that the law is now closer to being a business,

minded ideal, even if it is embodied in a professional rule. As long as they have little fear of actually being disciplined for not reporting, attorneys may have an incentive to look the other way in the face of ethical lapses by other attorneys.

185. *In re Himmel*, 533 N.E.2d 790 (Ill. 1990); see also *supra* notes 40-42 and accompanying text (discussing the case). Besides fearing being punished by their law firms if they report internal misconduct by fellow attorneys, some attorneys might also think that if they report the misconduct of an attorney outside the firm, they will be assumed to have done so to intimidate their opponent. See Gatland, *supra* note 33, at 24. According to the chief bar counsel of the State Bar of Arizona, "[y]ou still get a sense that some lawyers use *Himmel* . . . to file against lawyers they don't like." *Id.*

186. One commentator has argued that courts and legislatures should adopt a privilege for attorneys who abide by their professional code of ethics because professions are at their base service-oriented rather than money-oriented: "These three unique characteristics of professional work and authority—collegial, cognitive, and ethical—demonstrate that professionals are not simply purveyors of expert services in the commercial marketplace." Moskowitz, *supra* note 44, at 57.

187. 977 S.W.2d 543, 560 (Tex. 1998).

188. See *id.* at 547.

189. ABA Canon 29 exhorted lawyers to expose the misconduct of fellow attorneys and to "strive at all times to uphold the honor and to maintain the dignity of the profession." ABA CANONS OF PROFESSIONAL ETHICS Canon 29 (1969) (superseded in 1969 by the Model Rules of Professional Responsibility).

with the bottom line being of utmost importance, rather than a profession, with higher societal and ethical goals. The legal profession as a whole might not be so thriving and lucrative in the long run if ethics continue to take a backseat to business needs.

B. THE NEED FOR AN EXCEPTION TO THE AT-WILL RULE FOR ATTORNEYS

Rather than reinforcing the belief that abiding by ethics rules is not as important as maintaining a stable firm, the *Bohatch* court should have created an exception to the employment at-will rule for whistleblowing partners and associates on the basis of the public policy of encouraging ethics in the legal profession. Courts have often found public policy exceptions to the employment at-will rule when the health and safety of the public are involved.¹⁹⁰ Because attorneys play such an important role in public life and a primary part in keeping the legal profession ethical, which is essential not only for the livelihood of the profession but for all citizens, they should be protected from being fired for reporting misconduct.¹⁹¹ The reasons courts in the past have not deviated from the at-will rule with respect to attorneys¹⁹² make less sense when attorneys are fired for abiding by ethical rules of their profession. The argument that the public interest is already protected by ethical codes seems questionable after *Bohatch*,¹⁹³ which will surely result in an even greater unwillingness of the profession to po-

190. See *supra* notes 50-54 and accompanying text. Encouraging ethical conduct by attorneys, who serve the public and wield great power, seems to fit within the variety of definitions given to the term "public policy." For instance, maintaining the highest ethical standards within the legal profession would fit within the Illinois Supreme Court's belief that "public policy concerns what is right and just and what affects the citizens of the state collectively." *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981).

191. One commentator, who believes that professional legal ethics codes should not serve as public policy limits on the at-will rule, notes how broad and vague these codes can be. See Dakin, *supra* note 49, at 1062-63. Employers often have difficulty understanding their duties under them, and subjective interpretations abound. See *id.* Nevertheless, the rule that attorneys must report misconduct that "raises a substantial question as to [a] lawyer's honesty, trustworthiness or fitness" seems fairly unambiguous and not overly difficult for attorneys or a court to understand. MODEL RULES, *supra* note 13, Rule 8.3.

192. See *supra* notes 57-60 and accompanying text.

193. See *supra* note 57 and accompanying text.

lice itself. Second, the notion that creating a public policy exception to the at-will rule will harm the attorney-client relationship may be inaccurate. As long as attorneys inform their clients that their duty not to reveal information related to the representation of their clients takes precedence over their duty to report misconduct by another attorney, clients' fears of disclosure of their secrets should be assuaged.¹⁹⁴ Also, many clients would recognize the importance of encouraging ethical behavior by their attorneys and the long-run benefits of being served by a profession with high standards of integrity.¹⁹⁵ Finally, as noted above, the argument that the public good is not implicated here is far from true when one considers the degree to which citizens rely upon attorneys as their advocates and representatives.¹⁹⁶ Because the expulsion of attorneys who are attempting to live up to the high duties associated with a profession in the law is contrary to societal interest, a public policy exception to the at-will rule of employment is necessary.

194. See *supra* notes 34-35 and accompanying text.

195. Because attorneys are not permitted to disclose information protected by the attorney-client privilege, clients should not fear that their attorneys will divulge such information while reporting the misconduct of another attorney. See *supra* note 35 and accompanying text. Nevertheless, information that is not protected by the attorney-client privilege can be disclosed in an attorney's report of misconduct, subject to Rule 1.6. See *id.* Some clients might fire an attorney who insists on reporting the misconduct of another attorney, but there are other clients who "may respond positively to this attempt by the legal profession to regulate itself." Hutton, *supra* note 34, at 688. The public's confidence in attorneys is undermined by attorney misconduct. See Jennifer Staley, Comment, *Professional Responsibility—The "Snitch Rule," DR 1-103-(A), Meets the Employment-At-Will Doctrine: Weider [sic] v. Skala*, 19 J. CORP. L. 353, 372 (1994). An ABA poll conducted in 1993 found that only twenty-two percent of those surveyed would term attorneys "honest and ethical," and that forty-eight percent of those surveyed believed that "as many as three in 10 lawyers lack the ethical standards necessary to serve the public." Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, ABA J., Sept. 1993, at 60, 62. Although in *Bohatch* Pennzoil claimed that McDonald's bills were not too high and that it did not doubt McDonald's ethics, it seems that most clients in this bottom-line day and age would demand both accountability in terms of their attorney's bills and overall ethical behavior.

196. See *supra* note 59 and accompanying text (noting that reporting helps protect the public from unethical attorneys). Courts are more likely to find public policy exceptions to the employment at-will rule because of a professional code of ethics if there is a fairly substantial public interest served by that ethical code. See Staley, *supra* note 195, at 363.

C. A BROADER VIEW OF FIDUCIARY DUTIES OWED TO PARTNERS

The court should also have broadened the meaning of fiduciary duties and incorporated the rules of professional conduct into the fiduciary duties owed between partners. Even if the court were unwilling to expand the definition of fiduciary duties in this case, it should have held that, under RUPA, the firm violated at least one of its fiduciary duties. Although Butler & Binion does not appear to have violated the duties of loyalty and care, under section 404(b) of RUPA,¹⁹⁷ the partners could fairly have been subjected to liability for violating the duty of good faith and fair dealing.

"Good faith" is not explicitly defined in RUPA,¹⁹⁸ but Butler & Binion's motives in expelling Bohatch for reporting what she in good faith believed to be unethical conduct do not accord with any definition of this duty. Some courts wanting to retain the at-will rule of employment at all costs have refused to acknowledge that, at times, the duty of good faith should prevent a partner from firing a partner.¹⁹⁹ Yet, in situations in which a partner is called upon either to live up to ethics rules and be fired or violate ethics rules and be retained, additional protections are needed and can be achieved through an expansive view of "good faith." Just as in one case in which an Illinois appeals court determined that a firm acted for self-gain and violated its duty of good faith in expelling a partner who made requests to see the firm's financial statements,²⁰⁰ Butler &

197. See *supra* note 77 and accompanying text. Under RUPA § 404(b), the partnership did not violate the duty of loyalty for the following reasons: (1) the expulsion action taken by the partners did not involve a failure to account to the partnership or hold as trustee for it any profit made by the partners; (2) the partners were not dealing adversely with the partnership; and (3) the partners were not competing with the partnership.

198. See *supra* note 81-82 and accompanying text.

199. See *supra* notes 96-98 and accompanying text. Butler & Binion may not only have not acted in good faith in firing Bohatch, but may also have acted in bad faith and for self-gain, which some courts have held is a violation of lawyers' fiduciary duty. See, e.g., *Winston & Strawn v. Nosal*, 664 N.E.2d 239, 246 (Ill. App. Ct. 1996); *Wilensky v. Blalock*, 414 S.E.2d 1, 4 (Ga. 1992); see also *supra* notes 89-95 and accompanying text. While the expulsion decision was not directly economically driven, Butler & Binion emphasized maintaining the stability of the firm at the expense of an individual attorney who had tried to do the right thing. While the "guillotine method" of quickly getting rid of a partner who reports ethical violations committed by other attorneys may seem more kind than dragging out an expulsion, see *supra* note 97 and accompanying text, the fact that the partner was fired at all is the real concern, rather than the mode of firing.

200. See *Winston & Strawn*, 664 N.E.2d at 243-46; see also *supra* notes 89-

Binion acted for business reasons in order to preserve the firm at the expense of its ethical duty to support compliance with the professional rules of conduct. Under a broad understanding of "good faith," which would include the duty to be faithful to the rules of one's profession, it seems clear that Butler & Binion violated its fiduciary duty to Bohatch. The court should have held that any termination of a partner for good-faith reporting of misconduct is not done in good faith.

Beyond acknowledging that the duty of good faith had been breached in this case, the court should have called for a revision to RUPA that would incorporate adherence to professional rules of conduct as a fiduciary duty that is owed among partners. Because "good faith" is subjective and can be interpreted in various ways, many partners, such as Bohatch, who try to live up to their professional duties are not protected from expulsion. A more substantive protection would exist if partners' fiduciary duties included the duty to comport with professional ethics rules. Although partners would still have the option of firing partners for other reasons, partners would not be allowed to fire a partner who reported the misconduct of another attorney.²⁰¹

D. A GOOD-FAITH-ONLY REQUIREMENT FOR REPORTING

A good faith belief that misconduct has been committed should be the only reporting requirement for attorneys. Attorneys should not be required to be accurate in order for them to be protected from expulsion. Model Rule 8.3 fails to define exactly what level of knowledge is necessary before one reports ethical lapses,²⁰² and it seems likely that the rule was meant to encourage attorneys to report misconduct that they believe in good faith occurred, but for which they may not have indisputable evidence.²⁰³ Having viewed McDonald's billing records

91 and accompanying text.

201. Dissenting Justice Spector would have permitted partners to expel a partner in this situation, stating: "Although I agree with the majority that partners have a right not to continue a partnership with someone against their will, they may still be liable for damages directly resulting from terminating that relationship." *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 561 (Tex. 1998) (Spector, J., dissenting).

202. See *supra* notes 26-28 and accompanying text. Bohatch followed the reporting rule by reporting what she believed to be the misconduct of a fellow attorney. She did not have a duty to investigate the situation before making such a report. See *Mitchem*, *supra* note 25, at 1917.

203. See *Carpenter*, *supra* note 26, at 16-18 (asserting that, under the

and observed his work habits, Bohatch had "knowledge" of an ethical violation sufficient to trigger her duty to report.²⁰⁴ Although the concurrence in *Bohatch* asserted that if a partner were mistaken in his or her assessment of misconduct, the partner should not have any recourse against the firm that fired him or her,²⁰⁵ a rule requiring attorneys to prove the misconduct of a fellow attorney would probably lead to less reporting.²⁰⁶ Even if the attorney who reports turns out to be wrong or the client consents to the behavior at issue, "retaliation against a partner who tries in good faith to correct or report perceived misconduct virtually assures that others will not take these appropriate steps in the future."²⁰⁷ Just because a reporting attorney turns out to be wrong does not necessarily mean that he or she exercised poor judgment in reporting.²⁰⁸ It is not poor judgment to attempt to be ethical. In addition, courts should be wary about relying upon clients' opinions about whether they have been overbilled or in some way harmed by the firm representing them. An attorney has the duty to report overbilling even if a client approves of a bill for reasons having nothing to do with ethics. Although Pennzoil defended McDonald,²⁰⁹ its support may have had less to do with an honest belief that McDonald was recording the accurate amount of time he spent on Pennzoil's file than its desire to maintain a longstanding and positive relationship.²¹⁰ An at-

Model Rules, an attorney should report a fellow attorney's misconduct, even if he or she is not certain that ethical lapses have occurred).

204. See *supra* notes 5-7, 26-28 and accompanying text (noting that the Model Rules suggest that "knowledge" can be inferred from surrounding circumstances and does not require the reporting attorney to be one-hundred percent positive).

205. See *supra* notes 162-64 and accompanying text.

206. See *supra* note 28 and accompanying text. Even without such a stringent requirement for reporting, attorneys are predisposed to being cautious before leveling charges against other parties. See *Mitchem, supra* note 25, at 1917. For instance, under Rule 11 of the Federal Rules of Civil Procedure, any papers filed with a court must be certified by the attorney as having been "formed after an inquiry reasonable under the circumstances."

207. *Bohatch*, 977 S.W.2d at 561.

208. Because an attorney is not required to be certain before reporting ethical misconduct, it seems unfair to punish an attorney who reports what he or she believes to be misconduct, which turns out not to be misconduct. According to one commentator, if certainty were required, "the reporting requirement would be severely limited to only the most obvious and egregious cases." Carpenter, *supra* note 26, at 16.

209. See *supra* notes 114-16 and accompanying text.

210. That Pennzoil had never complained about Bohatch's work until it

torney who has the courage to make a good faith report of what he or she believes to be ethical missteps of another attorney deserves protection by the courts, even if other sources claim the report to be mistaken.

CONCLUSION

The court in *Bohatch v. Butler & Binion* was faced with the choice of either protecting an attorney who followed the ethics rules of the legal profession or permitting a law firm to subordinate ethics and fire a partner for the sake of maintaining a stable firm. In choosing to permit Butler & Binion to oust a partner who in good faith reported what she believed to be ethical missteps by a fellow partner, without subjecting the firm to tort damages, the court made it more difficult for attorneys to feel comfortable about reporting misconduct.

The court would have been wiser to declare that the interests of the partnership should not come before the ethics rules of the legal profession. The court needed to create a public policy exception to the at-will employment rule in order to prevent the expulsion of attorneys who in good faith follow their ethical duties and report misconduct. In addition, the court should have held that Butler & Binion violated its fiduciary duty of good faith in firing Bohatch and called for a revision to RUPA that would incorporate into partners' fiduciary duties the duty to follow the rules of professional conduct. Had the court championed the reporting requirement over law firms' business interests, attorneys around the country would have received the much-needed message that if they report misconduct, they are protected against retaliatory firing. They would thus have no excuse but to live up to their duties to the profession.

learned of her accusations of McDonald's overbilling may be an additional reason for believing that Pennzoil might not have been forthright about the real reason for its lack of concern that McDonald might have overbilled it. See *supra* note 109 and accompanying text.

