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# LONG LIVE *BOHATCH*: WHY A LAW FIRM PARTNER CAN BE EXPELLED FOR FOLLOWING THE RULES OF PROFESSIONAL CONDUCT

David A. Grenardo\*

## I. INTRODUCTION

Every semester in law schools across the country, law students and professors struggle with the situation presented in the Texas Supreme Court case of *Bohatch v. Butler & Binion*.<sup>1</sup> Colette Bohatch suspected another Butler & Binion partner of overbilling.<sup>2</sup> Pursuant to Bohatch's ethical duties, she reported within the firm the suspected overbilling attorney.<sup>3</sup> The law firm then expelled Bohatch from the partnership.<sup>4</sup> The Supreme Court of Texas held that Bohatch needed to follow her ethical duty to report the overbilling, but the law firm could properly expel her for doing so because, among other things, the trust and confidence needed for a partnership trumped any purported policy protecting a law firm whistleblower.<sup>5</sup> And once she reported her fellow partner, Bohatch lost the trust of the partnership.<sup>6</sup>

This Catch-22 situation troubles many: the partner can either follow the rules of professional conduct by reporting the misconduct of a fellow partner, and lose his or her job in the process without being protected or being able to sue for damages; or, the partner can stay quiet about a fellow partner's misconduct to avoid being terminated, and violate his or her ethical duty to report fellow attorneys who are causing a client harm.<sup>7</sup>

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1. *Bohatch v. Butler & Binion*, 977 S.W.2d 543 (Tex. 1998); ROBERT W. HAMILTON, JONATHAN R. MACEY, DOUGLAS K. MOLL, *THE LAW OF BUSINESS ORGANIZATIONS*, 134 (West Academic Publishing 12th ed. 2014) (including the *Bohatch* case in this textbook); CHARLES R. T. O'KELLEY, M. E. KILPATRICK, ROBERT B. THOMPSON, *CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS*, 116 (Aspen Publishers 7th ed. 2014) (same).

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

3. *Id.*

4. *Id.*

5. *Id.* at 547.

6. *Id.*

7. This Catch-22 situation will be referred to as the "*Bohatch* scenario" throughout this Article. The *Bohatch* scenario as used in this Article involves an actual overbilling partner (as opposed to the

Many scholars have analyzed *Bohatch* and argued that attorneys should be protected for following the rules of professional conduct when reporting the misconduct of a fellow partner.<sup>8</sup> If the analysis begins at the point when the partner is trying to decide whether to follow her ethical duties by reporting a fellow partner and face termination or to ignore an ethical duty yet keep one's job, then the analysis always produces a seemingly unfair outcome. This Article presents a new framework to analyze the *Bohatch* scenario. In particular, this Article argues that the point at which the analysis begins should change, and, when it does, the result in *Bohatch* becomes both intellectually and practically palatable, if not satisfying.

The analysis should begin when the associate makes the decision to become a partner in a law firm. The decision culminates in the signing of the partnership agreement. This paradigm shift correlates directly with several concepts. First, the basic structure of partnership law provides that partners may sometimes suffer negative consequences based on the misconduct or deficient behavior of their fellow partners.<sup>9</sup> Second, the concept of due diligence requires care and research before making a critical decision. Third, the people that individuals choose to associate with often reflect how successful those individuals will be. These basic principles, individually and collectively, represent the notion that attorneys must be extremely careful and diligent when making the choice of whether to become a partner with other attorneys because an attorney may suffer the negative consequences of choosing partners whose misconduct can affect the attorney. Finally, a partner's decision to join a firm by signing an at-will partnership agreement (providing for expulsion without cause) further places the risk on the new partner should the other partners decide they no longer trust that new partner.

An attorney is free to choose whomever he or she wants to become a partner with, but if the attorney chooses a partner whose misconduct negatively affects that attorney, then he or she may suffer the consequences of that decision.<sup>10</sup> Therefore, the basic principles and concepts mentioned

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*Bohatch* case where the firm determined the partner did not overbill). The reporting partner has the requisite level of knowledge of the overbilling, which is a high standard of knowledge under the rules of professional conduct (as opposed to the *Bohatch* case where the reporting partner possessed only a good-faith suspicion instead of knowledge). Thus, the reporting partner has the mandatory duty to report the overbilling partner.

8. See e.g., Maggie M. Finkelstein, *Learning to Do Right*, 9 WIDENER J. PUB. L. 99 (1999) (arguing against the *Bohatch* decision); Douglas R. Richmond, *Expelling Law Firm Partners*, 57 CLEV. ST. L. REV. 93 (2009) (same); Donald J. Nettles, *Do We Really Need Expulsion Procedures in Partnership Agreements*, 25 J. LEGAL PROF. 209 (2001) (same); Thomas A. Kuczajda, *Self-Regulation, Socialization, and the Role of Model Rule 5.1*, 12 GEO. J. LEGAL ETHICS 119 (1998) (same).

9. See e.g., REV. UNIF. P'SHIP ACT § 301 (1997) (stating that "[a]n act of a partner . . . for apparently carrying on in the ordinary course the partnership business . . . binds the partnership).

10. *Bohatch*, 977 S.W.2d at 552 (stating that "at the heart of the partnership concept is the principle that partners may choose with whom they wish to be associated"). Even though law firms often choose business forms such as limited liability partnerships (LLPs), as opposed to general partnerships, to provide protection for their personal assets based on the misconduct of fellow partners, partners in LLPs can still suffer negative consequences based on the conduct of their fellow partners, including

above, which are discussed in detail in Section II, dictate that the analysis should begin at the time when the associate chooses to become a partner in a firm.

Once the point of analysis changes in a *Bohatch* scenario, the onus then moves to the associate's decision-making process to become a partner at a certain law firm. Attorneys possess the opportunity to make informed decisions about which firms they choose to become partners and, thus, who their partners are. If an attorney discovers or believes, for whatever reason, that potential partners may not live up to the standards, codes, or ethics required by the profession, that attorney is not obligated to become a partner with anyone. As a result, if attorneys become partners with individuals that they must later report to the state bar for misconduct committed by those individuals, those attorneys must accept the consequences of a partnership with those transgressors. Section II also discusses the limits on this Article's decision-making premise, although based on bounded rationality.

The analysis in a *Bohatch* scenario should begin when an attorney decides to become a partner, and the analysis should end when an attorney turns in a fellow partner to the state bar; thus, potentially removing the trust required for the partnership to excel.<sup>11</sup> The Texas Supreme Court in *Bohatch* relied heavily on the concept of trust in a partnership, which is necessary for a partnership to thrive.<sup>12</sup> If partners do not trust each other, the partnership cannot flourish.<sup>13</sup> When the trust is removed at any point in the relationship, and it becomes clear that trust cannot be rebuilt between the partners, the untrustworthy partner can be removed.<sup>14</sup> So an attorney who chooses the wrong partner should expect to follow the rules of professional conduct by reporting the fellow partner if the situation requires reporting. And the reporting attorney should also expect to be expelled if he destroys the trust of the partnership by reporting a fellow partner.<sup>15</sup>

Section III focuses on the topic of trust, which serves as the backbone of the correctly-decided *Bohatch* case. Law firm partnerships are social constructs that require the key element in any social relationship—trust.<sup>16</sup> Any endeavor where the participants are reliant on each other for success

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reputational harm. See RICHARD D. FREER & DOUGLAS K. MOLL, *PRINCIPLES OF BUSINESS ORGANIZATIONS*, 539 (West Academic Publishing 1st ed. 2013).

11. *Bohatch* never turned in her fellow partner to the bar; she reported her fellow partner to other partners in the firm. *Bohatch*, 977 S.W.2d at 544. This point raises questions regarding whether the court in *Bohatch* took the opinion too far and whether the court misanalyzed the case, which are discussed *infra* Section I.

12. *Id.* at 546.

13. *Id.* at 546-47 (stating that "personal confidence and trust [are] essential to the partner relationship").

14. *Id.* at 547.

15. *Id.*

16. *Id.* at 546-47.

or failure makes trust and belief in the other participants essential.<sup>17</sup> For example, sports teams, Navy SEALs, and spouses in marriage, the ultimate social contract, demand trust amongst the individuals to survive and flourish.<sup>18</sup>

Section IV examines and responds to the arguments against *Bohatch*. For example, one argument against *Bohatch* is that a fiduciary duty should exist to prevent the expulsion of a partner who is expelled for following the rules of professional conduct.<sup>19</sup> This argument fails for several reasons, one of which being that expulsion of a partner is typically based on the partnership agreement.<sup>20</sup> Fiduciary duties are not implicated in partnership expulsions because the issue is of one of contract, not fiduciary duty.<sup>21</sup> Also, the fiduciary duty partners owe one another does not encompass a duty to remain partners.<sup>22</sup>

This Article concludes that the court correctly decided *Bohatch*. In addition, any court that subsequently decides the issue should reach the same conclusion in *Bohatch*. Attorneys must make every effort to choose their partners wisely and endure the positive and negative consequences of that choice. This Article provides some guidance, particularly in Section II, on how to make that choice. Trust remains an important element in a law firm partnership's success. And if a partner destroys that trust by reporting a fellow partner, the reporting partner may properly be terminated from the partnership without any recourse or protection from the courts.<sup>23</sup>

## II. FACT AND PROCEDURAL HISTORY OF *BOHATCH*

### A. *Summary of Bohatch*

Colette Bohatch became a newly minted partner at the firm of Butler & Binion in 1990.<sup>24</sup> She started at Butler & Binion in 1986 as an associate in the firm's Washington office that included only two other attorneys, the

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17. See e.g., News and Media, *Build Team and Trust and You'll Succeed, Duke's 'Coach K' Says in Ubben Lecture*, DEPAUW, Sept. 12, 2012, <http://www.depauw.edu/news-media/latest-news/details/12240/> (noting head basketball coach of Duke University Mike Krzyzewski's understanding that trust is essential to creating a winning team and trust is the most important component of team-building).

18. See e.g., *id.* (stating that "teams that trust one another and communicate are luckier—you create a culture where you just believe you're gonna win").

19. Finkelstein, *supra* note 8, at 131-32 (stating that "The Texas Supreme Court missed the opportunity to reinforce the value of the legal profession's ethics rules when it held that law partners do not breach a fiduciary duty when they expel a fellow partner for reporting suspected overbilling").

20. See Paula J. Dalley, *The Law of Partner Expulsions: Fiduciary Duty and Good Faith*, 21 CARDOZO L. REV. 181, 182-83 (1999) (stating that "expelled partners generally argue that their expulsions constitute a breach of fiduciary duty and of good faith. The expelled partners argue that by expelling a partner in violation of the partnership agreement or for improper reasons, the other partners have violated their fiduciary duty to the expelled partner.").

21. See *id.* at 183 (stating that "a careful consideration of partnership fiduciary duties reveals that they are not implicated in expulsions; expulsions do, however, involve the interpretation of contracts and thus the contractual obligation of good faith").

22. *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 546-47 (Tex. 1998).

23. *Id.*

24. *Id.* at 544.

managing partner of the office John McDonald and another partner, Richard Powers.<sup>25</sup> Before joining Butler & Binion, Bohatch served “for several years as Deputy Assistant General Counsel at the Federal Energy Regulatory Commission.”<sup>26</sup>

Bohatch made partner in February 1990 and started to receive billing and collection reports (i.e., how much money each partner actually brought in from payment by the client) regarding attorneys at the office.<sup>27</sup> Based on her review of the billing records, which showed the total time billed, Bohatch believed that McDonald was overbilling Pennzoil.<sup>28</sup> After she discussed the matter with Powers, they copied and reviewed McDonald’s individual time entries.<sup>29</sup> Reviewing these individual time entries increased Bohatch’s concern that McDonald was overbilling.<sup>30</sup>

In July of 1990, Bohatch discussed her concern over McDonald’s purported overbilling with the managing partner of the entire law firm, Louis Paine.<sup>31</sup> Paine indicated that he would investigate the matter, and Bohatch relayed her conversation with Paine to Powers.<sup>32</sup> The day after her conversation with Paine, Bohatch was notified by McDonald that Pennzoil wanted her work to be supervised because Pennzoil was dissatisfied.<sup>33</sup> Bohatch testified that she had never received such criticism before regarding her work.<sup>34</sup>

The very next day Bohatch reiterated her concerns about McDonald’s overbilling to Paine and two other members of the firm’s management committee, which provides direction and guidance for the entire firm (much like a corporation’s board of directors).<sup>35</sup> Over the next month, the firm investigated the overbilling accusation, which included speaking with Pennzoil’s in-house counsel and the firm’s primary contact with Pennzoil, John Chapman (Chapman).<sup>36</sup> Chapman had a long-standing relationship with McDonald and told the firm that the bills were reasonable.<sup>37</sup>

In August, the firm determined that there was no basis for Bohatch’s accusation of McDonald’s overbilling.<sup>38</sup> The firm told Bohatch to start looking for another job, but they continued to provide her with her monthly draw (money distributed from the firm’s capital assets), insurance, office, and secretary.<sup>39</sup> She received no further work from the firm.<sup>40</sup> In

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25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

January 1991, the firm also denied her the year-end partnership distribution and reduced her tentative distribution share to zero for the 1991 year.<sup>41</sup> She received her last monthly draw in June 1991. The firm told her to vacate her office by November.<sup>42</sup> Bohatch found a new job by September, though, and sued Butler & Binion in October 1991.<sup>43</sup> Three days after she filed her complaint, the firm voted to expel her.<sup>44</sup>

Bohatch's complaint included claims of wrongful discharge, breach of fiduciary duty, breach of the duty of good faith and fair dealing, and breach of contract.<sup>45</sup> The parties tried the breach of fiduciary duty and breach of contract claims before a jury, which found for Bohatch on both claims. It awarded Bohatch \$57,000 for past lost wages, \$250,000 for past mental anguish, and \$4,000,000 in punitive damages (the punitive damages were eventually reduced through remittitur to \$237,000).<sup>46</sup>

On appeal to the intermediate appellate court, the court of appeals held that the firm did not breach any fiduciary duty.<sup>47</sup> The court reasoned that acting in bad faith in partner expulsions occurs only when the expulsion of the law firm partner was done for self-gain, and here there was no evidence that the expulsion was done for self-gain.<sup>48</sup> The court affirmed the breach of contract award, holding that the firm breached the partnership agreement when it failed to pay her the monthly draw her last three months at the firm and reduced her distribution share to zero for 1991.<sup>49</sup> It determined her damages included lost earnings for 1991 in the amount of \$35,000 and awarded her \$225,000 in attorney's fees.<sup>50</sup> Bohatch received nothing for mental anguish damages or lost wages for 1990.<sup>51</sup>

The Supreme Court of Texas recognized that under common law, "[t]he relationship between partners is fiduciary in character, and imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise."<sup>52</sup> It concluded that "partners have no obligation to remain partners," and "at the heart of the partnership concept is the principle that partners may choose with whom they wish to be associated."<sup>53</sup>

The court then proceeded to decide an issue of first impression: "whether the fiduciary relationship between and among partners . . . gives

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41. *Id.*

42. *Id.* at 544-45.

43. *Id.* at 545.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* (citing *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264 (Tex. 1951)).

53. *Id.* (citing *Gelder Med. Group v. Webber*, 41 N.Y.2d 680, 684 (N.Y. App. Div. 1977)).

rise to a duty not to expel a partner who reports suspected overbilling by another partner.”<sup>54</sup>

In holding that the law firm did not breach any fiduciary duty to Bohatch by firing her for accusing another partner of overbilling, the court stated that the “fiduciary duty that partners owe one another does not encompass a duty to remain partners or else answer in tort damages.”<sup>55</sup> The Texas Supreme Court noted that other states have allowed for partner expulsion for a number of reasons, including purely business reasons, to protect relationships both within the firm and with clients, and to resolve a “fundamental schism” between the partners.<sup>56</sup> The court concluded that a law firm is also protected from liability if it expels a partner for “accusing another partner of overbilling.”<sup>57</sup> Once these charges are levied by a partner against a fellow partner, regardless of whether the charges are true, there may be a “profound effect on the personal confidence and trust essential to the partner relationship.”<sup>58</sup> The court continued, “[o]nce such charges are made, partners may find it impossible to continue to work together to their mutual benefit and the benefit of their clients.”<sup>59</sup>

The court also discussed the consequences had it held differently. In particular, the court stated that the “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.”<sup>60</sup> So the court recognized the heightened significance of trust necessary for a law partnership to function. When trust erodes, even based on good faith allegations of wrongdoing by a fellow partner (here, overbilling), the law firm may properly terminate the partner who impaired the trust of the partnership.<sup>61</sup> This avoids the remaining partners from looking over their shoulders, wondering if the reporting attorney will also be investigating them as well. Because partners rely on each other for their success, partners regularly peering over their shoulders would create an untenable working environment.<sup>62</sup>

The court also addressed the argument that an exception to the at-will nature of partnerships should be created for whistleblower partners who report wrongdoers in the firm who are overbilling.<sup>63</sup> Proponents of an exception suggest that “such an extension of a partner’s fiduciary duty is necessary because permitting a law firm to retaliate against a partner who in good faith reports suspected overbilling would discourage compliance with

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54. *Id.*

55. *Id.* at 546.

56. *Id.* (quoting *Waite v. Sylvester*, 560 A.2d 619, 623 (N.H. 1996)).

57. *Id.*

58. *Id.*

59. *Id.* at 547.

60. *Id.*

61. *Id.* at 546-47.

62. *Id.* at 547.

63. *Id.*

rules of professional conduct and thereby hurt clients.”<sup>64</sup> But the Texas Supreme Court responded that such a rule would run afoul of the trust necessary for a partnership.<sup>65</sup> Also, the court stated that lawyers should conform to the rules of professional responsibility even in the face of termination.<sup>66</sup> Indeed, the court specifically noted:

We emphasize that our refusal to create an exception to the at-will nature of partnerships in no way obviates the ethical duties of lawyers. Such duties sometimes necessitate difficult decisions, as when a lawyer suspects overbilling by a colleague. The fact that the ethical duty to report may create an irreparable schism between partners neither excuses failure to report nor transforms expulsion as a means of resolving that schism into a tort.<sup>67</sup>

This proposition—that a partner can and should follow her ethical obligations even if that means that partner may be expelled without any legal recourse—forms the basis of the objections to the *Bohatch* decision, which are illustrated well in the dissent, and discussed below.<sup>68</sup> The court held, however, that the “firm did not owe Bohatch a duty not to expel her for reporting suspected overbilling by another partner.”<sup>69</sup>

Moreover, the partnership agreement at issue allowed for expulsion of a partner and included the procedures to be followed, but it did “not specify or limit the grounds for expulsion.”<sup>70</sup> Thus, the Texas Supreme Court reasoned that “while Bohatch’s claim that she was expelled in an improper way is governed by the partnership agreement, her claim that she was expelled for an improper reason is not.”<sup>71</sup>

The concurring opinion focused on the result of the investigation into overbilling—namely, that there apparently was no overbilling.<sup>72</sup> As a result, “[e]ven if expulsion of a partner for reporting unethical conduct might be a breach of fiduciary duty, expulsion for mistakenly reporting unethical conduct cannot be a breach of fiduciary duty.”<sup>73</sup> The concurring opinion noted that the law firm’s expulsion of Bohatch did not discourage ethical

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64. *Id.* at 546.

65. *Id.*

66. *Id.* at 547.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 550.

71. *Id.* at 546 (emphasis added). The Texas Supreme Court affirmed the intermediate appellate court’s holding that the law firm breached the partnership agreement by failing to pay the monthly draw to Bohatch while she remained at the firm and by reducing her tentative distribution share for 1991 to zero without giving her notice as required under the partnership agreement. *Id.* at 545. Moreover, the Texas Supreme Court affirmed the award of attorney’s fees to Bohatch under a Texas statute that allows for attorney’s fees to the prevailing party in a breach of contract case. *Id.*; see TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (Vernon 2008) (providing for attorneys’ fees to the prevailing party on a breach of contract claim).

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

73. *Id.* at 555.

conduct but errors of judgment—the latter of which should be discouraged.<sup>74</sup>

The concurring opinion objected to the broad rule adopted by the majority, that “a law firm that expels a partner for reporting ethics violations has no liability to the partner under any circumstances.”<sup>75</sup> The concurrence also criticized the dissent by stating that the “dissent would hold that ‘law partners violate their fiduciary duty by retaliating against a fellow partner who ma[kes] a good faith effort to alert her partners to the possible overbilling of a client.’”<sup>76</sup> In fact, “the dissent would adopt the broader proposition that a partner could not be expelled from a law firm for reporting any suspected ethical violation, regardless of how little evidence there might be for the suspicion.”<sup>77</sup> The concurring opinion pointed out that the dissent’s reliance on Texas Rule of Professional Conduct 8.03, which mirrors ABA Model Rule 8.3, was misplaced because those rules require knowledge of an attorney’s improper conduct, not simply a good faith belief, as occurred in *Bohatch*.<sup>78</sup>

The dissent stated that it “would hold that partners violate their fiduciary duty to one another by punishing compliance with the Disciplinary Rules of Professional Conduct.”<sup>79</sup> The dissent reiterated the importance of the rules of professional conduct regarding how attorneys cannot charge a client an unconscionable fee and how attorneys are required to report other attorneys if they know of conduct by another lawyer that raises a substantial question as to that lawyer’s honesty or fitness to practice as a lawyer.<sup>80</sup> The dissent also addressed the rule of professional conduct that partners and supervisory attorneys have a duty to take reasonable remedial action to avoid or mitigate the consequences of known violations of the rules of professional conduct by other lawyers in their firm.<sup>81</sup> The dissent’s contention is that, regardless of the ethical rule being followed by a partner, the law firm should not be able to expel that partner for following the rules of professional conduct.<sup>82</sup>

The dissent, therefore, argued that the fiduciary duty owed between partners “should incorporate the rules of the professional conduct.”<sup>83</sup> As a result, the dissent “would hold that in this case the law partners violated their fiduciary duty by retaliating against a fellow partner who made a good faith effort to alert her partners to the possible overbilling of a client.”<sup>84</sup>

The dissent further argued that “[e]ven if a report turns out to be mistaken or a client ultimately consents to the behavior in question, as in this

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74. *Id.* at 554-55.

75. *Id.* at 556.

76. *Id.*

77. *Id.*

78. *Id.* at 557.

79. *Id.* at 558 (Spector, J., dissenting).

80. *Id.* at 560.

81. *Id.*

82. *Id.*

83. *Id.* at 561.

84. *Id.*

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.”<sup>85</sup> Thus, according to the dissent, termination of a partner may be appropriate, but the law firm should be liable for damages to the attorney acting in good faith based on that termination.<sup>86</sup>

The dissent closed with the notion that the majority believes that following the rules of professional conduct is subordinate to the law firm’s other interests, and it leaves an “attorney who acts ethically and in good faith without recourse.”<sup>87</sup>

### B. *Misanalysis by the Bohatch Court*

The Texas Supreme Court appeared to analyze the *Bohatch* case improperly, but the result remains correct. For example, the court may have created a duty to report good faith suspicions of violations of the rules of professional conduct within one’s firm when no such rule exists. In particular, the court analyzed the situation under two District of Columbia Rules of Professional Conduct (along with Texas law in all other respects); one that prevented “[a] lawyer . . . [from] . . . collect[ing] [ ] . . . clearly excessive fee[s],” and the other “prohibited lawyers from engaging in ‘conduct involving dishonesty, fraud, deceit, or misrepresentation.’”<sup>88</sup> The court stated that Bohatch properly followed her good faith belief in reporting McDonald intra-firm for potential overbilling.<sup>89</sup> But the reporting requirement for attorneys requires a high level of knowledge of another attorney’s improper conduct—not simply a good faith belief as Bohatch possessed.<sup>90</sup> Also, the reporting requirement under Model Rule 8.3 and the Texas equivalent, Rule 8.03, require reporting to the “appropriate disciplinary authority,” which is usually the state bar’s disciplinary agency, not one’s own firm.<sup>91</sup> Indeed, the concurring opinion pointed out that the dissent’s reliance on Texas Rule of Professional Conduct 8.03 was misplaced because that rule requires knowledge.<sup>92</sup>

Thus, the court apparently relied on a perceived (rather than an actual) duty by the attorney to report, as no such duty to report within the firm exists in the rules of professional conduct. The result, which was criticized by the concurrence, is that the majority adopted too broad a rule by stating that “a law firm that expels a partner for reporting ethics violations has no liability to the partner under any circumstances.”<sup>93</sup> Even though the majority viewed the case as allowing a firm to expel a partner who followed

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85. *Id.*

86. *Id.*

87. *Id.* at 561-62.

88. *Id.* at 554 (citing D.C. CODE OF PROF’L. RESP. DR 2-106(A) (1990)), 555 (citing D.C. CODE OF PROF’L. RESP. 1-102(A)(4) (1990)).

89. *Id.* at 548.

90. *Id.* at 556.

91. TEX. DISCIPLINARY R. PROF’L CONDUCT 8.03(a).

92. *Bohatch*, 977 S.W.2d at 557.

93. *Id.* at 556.

the rules of professional conduct, when it does not appear Bohatch had an absolute and mandatory duty to report within the firm her good faith suspicions, the proposition that a firm can expel a partner for following the rules of professional conduct remains proper. The arguments in this Article are premised on the notion that the reporting attorney is following the rules of professional conduct by properly reporting a fellow partner to the state bar because the reporting partner possesses the high level of knowledge necessary to report another attorney.

The *Bohatch* court may have also misanalyzed the case as a fiduciary duty and contracts case, when it was simply a contracts case. The late and incomparable Professor Larry Ribstein noted the following: “[I]n *Bohatch* the court held that where the partnership agreement prescribed procedures for expulsion but not grounds, the plaintiff’s claim that the firm expelled her for an improper reason was governed by the firm’s fiduciary duty rather than the agreement.”<sup>94</sup> Professor Ribstein argued that the court effectively used fiduciary duties “to fill a gap in the agreement,” which was unnecessary.<sup>95</sup> The court should have simply enforced the no-cause for expulsion partnership agreement.<sup>96</sup> Professor Ribstein argued that “the court’s error is mitigated by its refusal to hold in favor of a breach of duty,” as he contended that courts should enforce at-will expulsion provisions, including in the *Bohatch* case.<sup>97</sup>

If the court had reviewed *Bohatch* as simply a contracts case, then enforcement of the at-will, no-cause expulsion partnership agreement would have turned on the competing policies of allowing parties the freedom of contract and ordering their affairs by expelling the reporting partner versus protecting a whistleblower in a law firm from expulsion for following the rules of professional conduct. But the court in *Bohatch* indirectly examined these competing policies in its analysis by discussing the necessity having trust in a partnership (thus, discussing ordering the affairs of the partnership) versus whistleblowing protection for a reporting partner.<sup>98</sup> The court properly favored trust – allowing a partnership to order its affairs – over whistleblowing protection.<sup>99</sup> Placing whistleblower protection over a law firm’s ability to expel a partner would be less beneficial to the firm.<sup>100</sup> Also, either McDonald or Bohatch likely needed to leave the firm

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94. Larry E. Ribstein, *Law Partner Expulsion*, 55 BUS. LAW 845, 876 (2000).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Bohatch*, 977 S.W.2d at 546-47.

99. *Id.* at 547.

100. See Ribstein, *supra* note 94, at 878 (stating that “a whistleblowing exception to the expulsion right would be hard to contain and subject to manipulation, particularly given the wide range of misconduct that lawyers might have a duty to report”). But Professor Jeff Schwarz argues that an expulsion in violation of public policy, purportedly as in *Bohatch*, is always improper under a foregone opportunity analysis. Jeff Schwartz, *Good Faith in Partner Expulsions: Application of A Contract Law Paradigm*, 9 CHAP. L. REV. 1, 21-22 (2005). According to Professor Schwartz, expulsion for following the rules of professional conduct falls outside the reasonable expectations of a partner, which represents a forfeited opportunity. *Id.* This argument fails as the public policies of enforcing contracts (and its expulsion provisions) and allowing parties to order themselves as they want trump. See *infra* Part IV.C (regarding

after one reported the other and the investigation ensued. The pragmatic approach favored the removal of the accuser as it aligned with the at-will, no-cause expulsion partnership agreement and the veritable notion of trust (as well as the finding by the law firm that there was no overbilling).

### C. Lack of Case Law on the Bohatch Scenario

Extensive research has not revealed any other case like *Bohatch*, where a partner has been terminated for following the rules of professional conduct. Even at the time of the *Bohatch* decision, there was a “dearth of authority” on this particular scenario.<sup>101</sup> The dissent in *Bohatch* recognized that “the scarcity of guiding case law only heightens the importance of this Court’s decision.”<sup>102</sup> Years later, there remains a dearth of authority for several reasons. First, perhaps a *Bohatch* scenario has not arisen again. Second, which is more likely, when a *Bohatch* scenario has arisen, the law firm and the expelled partner settled the dispute outside of court to avoid negative publicity that might discourage others from becoming partners at that firm. Third, which is also very likely, when a *Bohatch* scenario has arisen, the partner chose not to report to ensure continued participation in the partnership. In the event that the *Bohatch* scenario does come before a court again, which has yet to happen in nearly twenty years, then that court will likely look to the *Bohatch* decision for guidance.

The *Bohatch* scenario has not been addressed by another court, but several courts have examined the termination of in-house and associate counsel for following the rules of professional conduct. A majority of courts in the in-house counsel context have held that in-house counsel may bring wrongful termination lawsuits against their employers for following the rules of professional conduct so long as confidential information of the client is protected.<sup>103</sup> In *Balla v. Gambro*, however, the court’s analysis and holding mirrored that of the Texas Supreme Court in *Bohatch*, reasoning that the key element for in-house counsel and the client employer is trust, and once an attorney properly follows the rules of professional conduct but violates that trust, then the employer can lawfully terminate the in-house attorney.<sup>104</sup> Most courts also allow associates to sue for wrongful termination or retaliatory discharge when they are fired for following the

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how the argument that the protection of a whistleblower partner in a law firm should be the prevailing public policy fails).

101. *Bohatch*, 977 S.W.2d at 545.

102. *Id.* at 560 (Spector & Phillips, JJ., dissenting).

103. See *General Dynamics v. Superior Court*, 876 P.2d 487 (Cal. 1994); *Crews v. Buckman Labs. Int’l, Inc.*, 78 S.W.3d 852 (Tenn. 2002) (holding that in-house counsel can bring a discharge claim); *GTE Prods. Corp. v. Stewart*, 653 N.E.2d 161 (Mass. 1995) (same); MARGARET RAYMOND & EMILY HUGHES, *THE LAW AND ETHICS OF LAW PRACTICE*, 140 (West Academic Publishing, 2d ed. 2015) (stating that the *Balla* holding is in the minority position as most in-house counsel can sue for retaliatory discharge or wrongful termination when fired for following the rules of professional conduct); *but see Balla v. Gambro, Inc.*, 584 N.E.2d 104, 109 (Ill. 1991) (holding that in-house counsel cannot sue for retaliatory discharge or wrongful termination when fired for following the rules of professional conduct).

104. *Balla*, 584 N.E.2d at 104.

rules of professional conduct.<sup>105</sup> The leading case in this area, *Wieder v. Skala*, was cited by the dissent in *Bohatch*.<sup>106</sup>

The in-house counsel and associate cases, although similar in content, should not be dispositive in a *Bohatch* scenario because of the distinctive relationship of attorneys in a law firm partnership. Both the in-house counsel and law firm associate scenarios involve employer/employee relationships. In a partnership, on the other hand, the partners are co-owners of the business, which creates a different dynamic than in-house counsel or associates (who are merely employees).<sup>107</sup> Also, an employer, a principal, does not owe fiduciary duties to its associates or in-house counsel, agents.<sup>108</sup> But partners do owe fiduciary duties.<sup>109</sup> Other unique rules are also at play in the law firm partnership setting, such as the fact that an attorney's success or failure rests greatly on one's partners, meaning attorneys must choose their partners with extreme care and caution. The distinctive legal and social rules relating to partnership law, discussed in Section II, dictate that law firm expulsion for following the rules of professional conduct should be handled differently in a *Bohatch* scenario with law firm partners than with in-house counsel and law firm associates.

Thus, *Bohatch* will serve as the key authority for other courts that might face the issue of whether a law firm partner can be expelled without recourse for following the rules of professional conduct. This Article provides a new framework for following *Bohatch* by changing the point at which the analysis should begin: when the attorney chooses to become a partner at a law firm. The following section discusses why an attorney must choose her partners carefully and the potential consequences of failing to do so.

### III. ATTORNEYS MUST CHOOSE THEIR PARTNERS CAREFULLY AND SUFFER THE NEGATIVE CONSEQUENCES OF CHOOSING THE WRONG PARTNERS

The basic structure of partnership law, the concept of due diligence, and the notion that the people that individuals choose to associate with often reflect how successful those individuals will be, help shift the starting point of analysis in a *Bohatch* scenario to the point at which an individual chooses to become a partner with others. All of these basic principles and

105. *Wieder v. Skala*, 80 N.Y.2d 628, 631 (N.Y. Sup. Ct. 1992); *Matzkin v. Delaney, Zemetis, Donahue, Durham & Noonan, PC*, 2005 WL 2009277 (Conn. Super. 2005).

106. *Bohatch*, 977 S.W.2d at 560 (Spector & Phillips, JJ., dissenting).

107. See Dalley, *supra* note 20, at 205 (stating "partners are co-owners of the business, and, as such, have a property interest in the business that is completely unlike the interest of an at-will employee in her job") (citing REV. UNIF. P'SHIP ACT § 502, 6 U.L.A. 1 (Supp. 1995); REV. UNIF. P'SHIP ACT §§ 9, 13, 14, 15, 6, 24-26, 6 U.L.A. 400, 444, 454, 456 (Supp. 1995); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 958-62 (1984); Robert W. Hillman, *The Impact of Partnership Law on the Legal Profession*, 67 FORDHAM L. REV. 393, 397 n.31 (1999)).

108. See RESTATEMENT (THIRD) OF AGENCY, § 1.01 cmt. e (stating that the "obligations that a principal owes an agent, specified in §§ 8.13-8.15, are not fiduciary").

109. See *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

concepts, individually and collectively, represent the proposition that attorneys must be extremely careful and diligent when making the choice of whether to become a partner with other attorneys; an attorney may suffer the negative consequences of choosing partners whose misconduct can affect the attorney. Each is discussed below.

*A. The Structure of Partnership Law Provides that Partners May Suffer Negative Consequences Based on the Misconduct or Deficient Behavior of Fellow Partners*

1. General and Limited Partnerships

General and limited partnerships are not the primary entities that attorneys choose to form law firms these days—limited liability partnerships are (and LLPs will be discussed *infra*). But their law provides a good background to the general structure of partnerships. General partnership black-letter law provides that the conduct of a partner can bind the other partners to personal liability.<sup>110</sup> So in general partnerships, if a partner commits a tort on behalf of the partnership, such as committing legal malpractice, the personal assets of the other partners may be reached to satisfy any judgments against the partnership.<sup>111</sup>

Similarly, in limited partnerships, general partners “are jointly and severally liable for the firm’s obligations.”<sup>112</sup> Limited partners can also lose their investment based on the conduct of a fellow partner to pay off a partnership debt or obligation.<sup>113</sup>

In a general or limited partnership setting, when a law firm’s general partner does bind the partnership to liability through improper conduct, the law does not believe it is unjust or unfair to use the other’s partners’

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110. REV. UNIF. P'SHIP ACT § 306 (1997) (“Except as otherwise provided in subsections (b) and (c), all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.”); *P.A. Prop.’s, Inc. v. B.S. Moss’ Criterion Ctr. Corp.*, 2004 WL 2979984, at \*7 (S.D.N.Y. 2004) (“Partners are ‘liable . . . jointly for all . . . debts and obligations of the partnership’” and general agents, such as law firm partners, can “bind their undisclosed principals as to matters within the general scope of the agency.”); *see Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 672 (Tex. 1998) (“Apparent authority arises through acts of participation, knowledge, or acquiescence by the principal that clothe the agent with the indicia of apparent authority.”); *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1211 (Ind. 2000) (“Inherent agency power is a term used . . . to indicate the power of an agent which is derived *not* from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent.”).

111. *Rogers v. Carmichael*, 192 S.E. 39, 43 (Ga. 1937) (holding that partners can be found liable for actions of co-partners done in the scope of the partnership business).

112. TEX. BUS. ORGS. CODE ANN. §152.304(a) (“[A]ll partners are jointly and severally liable for all obligations of the partnership . . . .”); TEX. BUS. ORGS. CODE ANN. §153.152(b) (“Except as provided by this chapter or the other limited partnership provisions, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to a person other than the partnership and the other partners.”).

113. *Raphan v. United States*, 759 F.2d 879, 884 (Fed. Cir. 1985) (“[L]imited partners, ‘share’ that debt in the proportion they share profits, and each partner’s basis reflects his debt share.”).

assets or the partnership's assets to satisfy the debt or judgment resulting from that partner's improper conduct.<sup>114</sup>

Therefore, in a general partnership, if an attorney chooses to become a partner in a law firm that consists of general partners whose conduct proves to be reckless, incompetent, or tortious in some manner, that attorney's personal assets may be seized to satisfy the debt or judgment resulting from the other partners' behavior.<sup>115</sup>

Another general partnership law principle is that partners, unless agreed to otherwise, share profits and losses equally.<sup>116</sup> Thus, if an attorney in a general partnership chooses a partner that fails to make money for the firm, the attorney may lose money.

## 2. Limited Liability Partnerships

Today most lawyers tend to form their law firms as limited liability partnerships (as opposed to general or limited partnerships) to provide protection of their personal assets based on the misconduct of fellow partners.<sup>117</sup> Even though partners' liability is limited to whatever they contribute to the partnership, the partnership's assets can be used to pay off a

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114. REV. UNIF. P'SHIP ACT § 306 (1997); P.A. Prop.'s, Inc., 2004 WL 2979984, at \*7 ("Partners are 'liable . . . jointly for all . . . debts and obligations of the partnership'" and general agents, such as law firm partners, can "bind their undisclosed principals as to matters within the general scope of the agency").

115. *Evans v. Galardi*, 546 P.2d 313, 321 (Cal. 1976) (explaining that it is possible to secure a judgment through other partner's personal assets if unable to secure from defendant).

116. REV. UNIF. P'SHIP ACT § 401 (1997) (stating that "[e]ach partner is entitled to an equal share of the partnership profits and is chargeable with a share of the partnership losses in proportion to the partner's share of the profits"); ALAN BROMBERG & LARRY E. RIBSTEIN, BROMBERG & RIBSTEIN ON PARTNERSHIP § 3.04(c)(1), at 3:57-3:60 (1999) (same).

117. REV. UNIF. P'SHIP ACT § 306(c) (1997) (stating that "[a]n obligation of a partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort, or otherwise, is solely the obligation of the partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for such an obligation solely by reason of being or so acting as a partner."). Some law firms these days also form as limited liability companies (LLCs). The analysis under a *Bohatch* scenario with an LLC would be similar to the analysis with an LLP, as both provide for limited liability, both allow for reputational harm based on the misconduct of a member, and both could result in financial adversity for a member if other members are not successful or perform deficiently in a small or mid-sized firm. See Elizabeth S. Miller, *Are There Limits on Limited Liability? Owner Liability Protection and Piercing the Veil of Texas Business Entities*, 43 TEX. J. BUS. L. 405, 416 (2009) (discussing the full liability shield for LLCs created in RULLCA § 304 which states that "[t]he debts, obligations, or other liabilities of a limited liability company, whether arising in contract, tort, or otherwise: are solely the debts, obligations, or other liabilities of the company . . ."); B. Todd Bailey & Rick D. Bailey, *The Idaho Limited Liability Company: In Search of the Perfect Entity*, 31 IDAHO L. REV. 1, 15-16 (1994) (mentioning limited liability protection as an LLC characteristic while referring to Idaho Limited Liability Company Act § 53-619, which states that "[a] person who is a member of a limited liability company is not liable, solely by reason of being a member . . . for a debt, obligation or liability of the limited liability company, whether arising in contract, tort or otherwise"). Also, a hallmark of LLC law is the flexibility of the entity through contracting, which means that the language used in an operating agreement of an LLC might dictate the result in a *Bohatch* scenario, just as it does with LLPs and partnership agreements. See Paul D. Hutcheon, *The New Jersey Limited Liability Company Statute: Background and Concepts*, 18 SETON HALL LEGIS. J. 111, 111-112 (describing an extraordinary characteristic as the flexibility to contract while referring to RULLCA § 110(d) which states "[i]f not manifestly unreasonable, the operating agreement may: restrict or eliminate the duty . . . [to] identify specific types or categories of activities that do not violate the duty of loyalty; alter the duty of care . . . ; alter any other fiduciary duty . . . ; and prescribe the standards by which to measure the performance of

judgment or debt owed by the partnership based on poor business decisions by a fellow partner.<sup>118</sup> For example, if a fellow partner enters into agreements (such as leases for office space) that result in a tremendous loss of money for the firm, the partnership's assets may be used to pay off that debt. "[A] partner of an LLP who is acting within the actual or apparent authority of the partnership can bind the partnership to an agreement with a third party."<sup>119</sup> As a result, attorneys must choose their partners wisely.

Partners in LLPs, or any type of partnership, can also suffer negative consequences based on the conduct of their fellow partners through reputational harm—even if the partner is not personally liable for some malfeasance by a fellow partner.<sup>120</sup> Thus, if partners in a law firm act inappropriately, that can affect the reputation of the entire partnership, as well as the individual partners who are associated with the firm.<sup>121</sup> Even in a large law firm organized as a limited liability partnership, lawyers still want to partner with others who will not besmirch the reputation of the firm, which in turn can diminish the reputation of each partner of that firm.<sup>122</sup> So an attorney has substantial incentives to join a law firm whose partners

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the contractual obligation of good faith and fair dealing . . ."). Some law firms form as professional corporations (PCs) or professional limited liability companies (PLLCs). In these types of professional entities, as in LLCs and LLPs, limited liability exists, but a lawyer must still follow the rules of professional conduct and there exists an ability to order one's affairs through contract. See Martin C. McWilliams, Jr., *Limited Liability Law Practice*, 49 S.C. L. REV. 359, 364-367 (1998) (discussing how the incorporation of the professional responsibility rules resulted from concerns about the state of the attorney-client relationship as stated in *Melby v. O'Melia*, 286 N.W.2d 373, 375 (Wis. Ct. App. 1979), "[a]ttorneys are in a unique position because their profession is governed by specific ethical standards . . ."); The Virginia State Bar Professional Guidelines, 14. *Professional Corporations, Professional Limited Liability Companies and Limited Liability Partnerships (Limited Liabilities Entities)*, VIRGINIA STATE BAR (June 26, 2012), <http://www.vsb.org/pro-guidelines/index.php/bar-govt/ppc-pllc-llp/> (deeming professional responsibility rules as obligatory for lawyers in a limited liability entity). As a result, the analysis used in this Article regarding how to deal with a *Bohatch* scenario does not change for a law firm formed as an LLC, PC, or PLLC as a partner would be required to report an overbilling partner pursuant to her professional responsibility, the parties could agree to an at-will, no-cause expulsion agreement, and the partnership could expel a partner it no longer trusted (i.e., the parties could order their own affairs via agreement).

118. See e.g., TEX. BUS. ORGS. CODE ANN. § 152.801(d) (West 2011) (explaining that a partner can still be liable regardless of any relationship "imposed by law or contract independently of the partner's status as a partner"); REV. UNIF. P'SHIP ACT § 404(c) (1997) (defining a partner's duty of care as "limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law"); *Dow v. Jones*, 311 F. Supp. 2d 461, 468-69 (D. Md. 2004) (acknowledging that a partner in an LLP can bind the partnership to third party agreements so long as they are acting with actual or apparent authority).

119. *Dow v. Jones*, 311 F. Supp. 2d 461, 468 (D. Md. 2004) (citing RESTATEMENT (SECOND) OF AGENCY §§ 7-8, 27, 140, 159).

120. See RICHARD D. FREER & DOUGLAS K. MOLL, *supra* note 10, at 539; Ribstein, *supra* note 94, at 847 (stating that expulsion allows a law firm to help maintain its reputation, and "[r]eputation is an important reason for the existence of law firms").

121. *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 442 (Ind. Ct. App. 1990) ("Thus, 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, as in *Holman*, since the survival of the partnership itself potentially is at stake.").

122. RICHARD D. FREER & DOUGLAS K. MOLL, *supra* note 10, at 539.

are not likely to expose the partnership to negative financial or professional consequences.<sup>123</sup>

Furthermore, if a partner chooses other partners who select unprofitable cases and clients, or fail to succeed in cases despite good faith efforts, the partner's income may likely be diminished. For instance, a firm with ten attorneys agrees the partners will receive a percentage of the profits. When other partners are not winning cases, the amount of profit that each partner will receive will be less than if the other partners are winning cases. It remains critical that attorneys choose their partners wisely or else potentially suffer financial adversity that can negatively affect the attorneys' lives and careers.

### 3. Big Law Firms

Some of the arguments in this section become less effective when applied to larger law firms. Larger firms typically consist of more than 100 attorneys throughout multiple offices and "rank among the top-grossing law firms in the nation, pay top-market salaries, recruit from tier one law schools, [and] hire from their summer programs."<sup>124</sup> As an initial response, not all law students work for larger law firms. According to NALP (the National Association for Law Placement), 42.6% of 2013 law school graduates joined firms that consisted of *two to ten* people, which was the highest percentage of law students based on the firm size.<sup>125</sup> In fact, of the 2013 law school graduates that went to work at law firms, 63.3% worked at law firms of 50 or less attorneys—only 32.1% of law school graduates that went to work for law firms started at larger law firms.<sup>126</sup> Thus, a majority of lawyers are starting out at smaller firms, not larger law firms.<sup>127</sup>

Moreover, it is difficult to attain jobs with larger firms because those jobs typically go to the higher ranked students at tier one law schools. But it is also difficult to make partner at larger law firms. There are relatively very few partners made each year at large law firms given the size of the firms (and the number of offices of each firm).<sup>128</sup> As a result, it is likely that the majority of attorneys becoming partners do so at smaller firms.

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123. *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 552 (Tex. 1998) (noting that "if expulsion of a partner to protect the firm's reputation or preserve its relationship with a client benefits the firm financially, it perforce benefits the members of the firm").

124. See Sally Kane, *BigLaw*, ABOUT.COM, <http://legalcareers.about.com/od/A-E/g/Biglaw.htm>.

125. *New Grads Find More Jobs for Second Year in a Row, But Not Enough More to Offset the Larger Class Size*, NATIONAL ASSOCIATION FOR LAW PLACEMENT, (Aug. 2014), <http://www.nalp.org/0814research>.

126. *Id.*

127. *Id.*

128. See e.g., LATHAM & WATKINS LLP, <http://www.lw.com/news/latham-names-new-partners-counsel?documentid=7995> (last visited Mar. 17, 2015) (announcing the promotion of 19 associates to partnership in 2015 while the global firm has approximately 2,100 lawyers); DLA PIPER, <http://news.dlapiper.com/Press-releases/DLA-Piper-announces-partnership-promotions-for-2014-875.aspx> (last visited Mar. 17, 2015) (promoting 45 to partnership in 2014 out of the firm's global 4,200 lawyers); VINSON & ELKINS, <http://www.velaw.com/resources/VinsonElkinsPromotesEightPartnership.aspx> (last visited Mar. 17, 2015) (elevating 8 to partnership in 2015 out of the firm's approximately 700 lawyers);

Yet partners at larger firms still should attempt to choose firms with partners who are less likely to damage the reputation of the firm.<sup>129</sup> This task may be extremely difficult at a large law firm, but it should still be attempted as discussed in the following section discussing due diligence.

The fact attorneys have the unfettered free will to choose or refuse to become a partner in a law firm (knowing that a fellow partner's improper conduct can result in negative consequences for that partner) provides a strong justification for the *Bohatch* decision. Attorneys must choose their partners wisely or suffer the consequences. And choosing wisely means conducting due diligence.

### *B. Associates Must Perform Due Diligence When Deciding to Join a Partnership*

Black's Law Dictionary defines due diligence as: "Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case."<sup>130</sup> Merriam-Webster's Dictionary provides the following definitions of due diligence: "the care that a reasonable person exercises to avoid harm to other persons or their property;" and "research and analysis of a company or organization done in preparation for a business transaction (as a corporate merger or purchase of securities)."<sup>131</sup>

The concept of due diligence permeates the legal field.<sup>132</sup> For instance, a company that wants to buy another company or merge with another company typically performs (1) due diligence in the form of extensive research of that other organization, (2) analysis of the possible synergies created by a merger, and (3) a study of the effect on the value of the merged companies. The company invests a great deal of time and money in the due diligence process because it needs to know whether a merger is advantageous in the short-term and long-term.<sup>133</sup>

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NORTON ROSE FULBRIGHT, <http://www.nortonrosefulbright.com/news/115582/norton-rose-fulbright-announces-46-global-partner-promotions> (last visited Mar. 17, 2015) (announcing 46 global partner promotions in 2015 out of the firm's 3,800 lawyers); SIDLEY AUSTIN LLP, <http://www.sidley.com/news/sidley-austin-llp-elects-32-lawyers-to-its-partnership-12-10-2014> (last visited Mar. 17, 2015) (promoting 32 lawyers to partnership in 2015 out of the firm's 1,900 lawyers); JONES DAY, <http://www.jonesday.com/jones-day-names-42-new-partners/> (last visited Mar. 17, 2015) (elevating 42 to partnership in 2015 out of the firm's 2,400 lawyers); KING & SPALDING, [http://www.kslaw.com/News-and-Insights/NewsDetail?us\\_nsc\\_id=8371](http://www.kslaw.com/News-and-Insights/NewsDetail?us_nsc_id=8371) (last visited Mar. 17, 2015) (announcing promotions for 17 out of the firm's 800 lawyers in 2015); K&L GATES, <http://www.klgates.com/kl-gates-names-50-new-partners-across-five-continents-02-16-2015/> (last visited Mar. 17, 2015) (naming 50 new partners out of the global firm's 2,000 in 2015).

129. RICHARD D. FREER & DOUGLAS K. MOLL, *supra* note 10, at 539.

130. BLACK'S LAW DICTIONARY 457 (6th ed. 1990).

131. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 385 (11th ed. 2003).

132. *Id.* The concept of due diligence also permeates society and can be found in the business world, real estate, and everyday vernacular.

133. WILLIAM M. CRILLY & ANDREW J. SHERMAN, *THE AMA HANDBOOK OF DUE DILIGENCE*, 3 (2010) (defining due diligence as a "process whereby an individual, or an organization, seeks sufficient

Similarly, if someone wants to become a partner at a law firm, that individual will invest a great deal in that partnership, including her professional reputation, his or her sweat equity (i.e., billable work and time spent on business development), and potentially his or her own capital through capital contributions, which are not uncommon in law firms.<sup>134</sup> If an attorney is placing his or her career in a decision to become partners with other attorneys, that attorney should use incredible care in determining whether it is prudent to become partners within a particular law firm and with those particular partners.

#### 1. Practical Advice for Attorneys Who Want to Become Partners at Small or Medium-Sized Law Firms

With stakes so high, an attorney should perform extensive research and analysis of the law firm and its partners before making the decision to join. In particular, an attorney should attempt to work with as many partners as possible before making the decision, which will allow the attorney to see how a partner reacts in certain situations, including situations that may require difficult ethical decisions. If the partner chooses a questionable ethical path, then the attorney should avoid becoming a partner at that firm.

An attorney should also try to determine if there is any pending or completed litigation against the law firm. Lawsuits against a firm that could drain the firm's assets (although this is less likely because of insurance that firms carry), bring disrepute to the firm, or indicate that the firm's partners fail or might fail to follow the rules of professional conduct or other laws. Such litigation should dissuade an attorney from becoming a partner at that firm. One can discover these types of lawsuits through searching the Internet, Westlaw, and Lexis.

Also, gossip typically runs rampant at law firms, and by simply talking to partners and associates about the firm, an attorney can discover missteps or failures by partners that again may indicate a likelihood of improper conduct by partners in the future. This Author worked at three large law firms and information, positive or negative, was readily available within the firm if one asked the right people. For example, an attorney can speak with a knowledgeable person at the firm and say, "I have not worked much with Partner X. What is she like? What have you heard about her?" The responses may often reinforce your enthusiasm to become a partner at that firm give you pause.

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information about a business entity to reach an informed judgment as to its value for a specific purpose").

134. See *Liddle, Robinson & Shoemaker v. Shoemaker*, 304 A.D.2d 436, 439 (N.Y. App. Div. 2003) (acknowledging that capital contributions can be required when an attorney becomes a partner in a firm); NANCY B. RAPOPORT & JEFFREY D. VAN NIEL, *LAW FIRM JOB SURVIVAL MANUAL: FROM FIRST INTERVIEW TO PARTNERSHIP*, 162 (Vicki Been et al. eds., Wolters Kluwer Law & Business 2014) (stating that new partners, "[d]epending on the firm and its approach to capital contributions," may be required to make capital contributions ranging from \$50,000 to \$100,000).

Attorneys can and should also talk to other attorneys outside the firm about the reputations and conduct of the potential partners, which can also shed light on behavior or past conduct of potential partners that might suggest they will not be suitable partners. An attorney can invite an outside attorney to lunch and say the following: "I am going to be up for partner at Firm X. Do you know any of the partners at the firm? Have you ever litigated against or worked on a deal with any of the partners at the firm? What were your impressions of the partners that you dealt with at the firm?" The attorney considering becoming partner at the firm might not learn anything new, or the attorney might learn something that would raise red flags about becoming a partner at the firm. The attorney must also take the conversation with a grain of salt, particularly if the outside attorney might want the attorney to come work for the outside firm.

Even if an attorney cannot work with every partner in the office or the firm, then that attorney should make an effort to get to know as many partners as possible through lunches, dinners, or retreats with partners outside of the office. Spending time with potential partners will help an attorney make judgments about whether the attorney believes the potential partners are worthy of being partners. Making judgments about others is sometimes required by attorneys in their practice.

In their everyday jobs, attorneys make judgments about witnesses to determine whether the witness is credible, whether the jury will like the witness, and how the witness will perform under cross-examination. Thus, making judgments about people and discerning how an individual will respond in certain situations encompasses typical aspects of an attorney's duties. An attorney who has worked at a firm for several years should be able to determine his potential partners' character and whether the potential partners will follow the law. In addition, the experienced partner should gage the potential partner's ability to abide by the rules of professional conduct and represent the firm in a professional and respectful manner. This does not mean that every partner must hold the exact same beliefs on every subject as the attorney who may become a partner with them. But the attorney and his or her potential partners must at least agree on the major aspects of how a law firm partner should conduct themselves; such as being candid with the courts, fair with opposing counsel, honest with clients, and steadfast in striving to exceed what is required of the rules of professional conduct rather than to barely meet those requirements or fall short of meeting them.

The attorney should also know the clients of the firm, how long they have been clients, and their viability as clients in the future (i.e., whether they will continue to need legal assistance). The more institutional clients a firm has the more stable that firm will likely be.<sup>135</sup>

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135. An institutional client is typically a large company (although it can be a smaller company) that faces constant legal issues and pays on time, thus providing consistent legal work for a firm (or a number of firms).

Some attorneys may argue that if they work at a firm for seven or eight years and then decline an offer to become a partner, they are unlikely to make partner elsewhere because they invested all of their time and energy into learning about and understanding their particular firm. As an initial matter, no attorney is forced to become partners with anyone. Second, an attorney's only options are not limited to becoming a partner at a firm with partners of questionable ethical character or walking away from the profession. There are plenty of other options for a lawyer – move to a different firm, start one's own firm, work for a company, or work the government. Even though the economy may make it difficult to find another job, an attorney should not join a questionable and unethical partnership, risking her professional reputation and possible financial adversity, simply because it is hard to find another job or start something new.

## 2. Practical Advice for Attorneys Who Want to Become Partners at Large Law Firms

Some of the advice above for attorneys who want to become partners at small or medium-sized firms becomes impracticable for attorneys who want to become partners at large law firms. For example, an attorney cannot take to lunch the hundreds of partners at a large law firm that has offices around the world. Nevertheless, simply because an attorney is considering partnership at a large law firm does not obviate the need to perform due diligence on the firm in which the attorney is investing her career. When a company wants to merge with another company, it does not abandon due diligence if the other company is large or research will take a long time. Even if someone is considering becoming a partner a large law firm that person can and should still perform some due diligence.

In particular, the attorney deciding whether to become a partner should perform due diligence on partners in the office by working on cases with them, spending time with partners at lunch, dinners, or other events, and talking to other lawyers in the community about the firm. In large law firms with a small office, it will be possible to work and interact with the partners at that office. In an office of over 300 attorneys, this task becomes impracticable. In such a large office, the attorney should work and spend time with as many attorneys as possible that are both in her office and also in her practice group. Researching whether the current partners in the office (or just in the practice group if the office is too large) are involved or have ever been involved in any lawsuits or disciplinary proceedings, or whether they have ever been sanctioned by a court, would also be prudent.

If the attorney will be working extensively with a partner(s) in another office, likely because they are doing so or have done so in the past, or because it is a common practice in that firm for attorneys in certain practice areas or representing certain clients to work together, then the attorney should try to gather as much information on that inter-office partner as well. A *Bohatch* scenario arises when a partner develops actual knowledge that a fellow partner is violating the rules of professional conduct. This

most likely happens through working closely with that fellow partner, as opposed to casual contact. As a result, even though it may not be possible to go to dinner or lunch with every partner in another office, the attorney should make a concerted effort to determine the quality and character of attorneys that he or she may be working with in the future. It may be extremely difficult to determine who an attorney might work with in another office, but that should not prevent the attorney from trying to do so and making connections with those partners.<sup>136</sup>

### 3. Bounded Rationality

Rational actors use the information available to make informed decisions. Rational actors are not omniscient, and there is information that is not available or unknown that may affect the actor. In this context, an attorney that chooses to become a partner with other partners does not and cannot have access to all of the relevant information because it is either unknown at the time the decision is made or unlikely to be known. These unknowns also point out the flaws in the premise of focusing on the decision-making of the attorney, and they must be addressed.

For example, suppose a partner performs comprehensive due diligence on the potential partners and the law firm, and he fails to find even one shred of evidence that any partner lacks integrity or superior ethical principles. As a result, he chooses to become a partner at the firm. After he becomes a partner, the law firm by supermajority vote (or whatever the partnership agreement provides), but without the attorney's vote, brings in a partner that the attorney does not approve of as a partner. The new, unwanted partner then overbills or commits other violations that require the attorney that did not want that partner to report that partner to the state bar. This scenario could also happen at a large law firm, where someone in a different office is made partner or laterals in as partner. The attorney who chose to become a partner at the firm did not, and could not, have vetted every single person who might have become a partner in every single office of a large law firm.

Another example includes starting with the same scenario of excellent due diligence by the potential partner without a negative finding, and a once-ethical partner who uncharacteristically begins overbilling (perhaps to make more money to help pay for his wife's recent medical issues or because of some other issue that may arise). The wayward partner exhibited no signs of unethical behavior before the attorney made the decision to join the partnership, but circumstances changed after the attorney became a partner that resulted in the once-ethical partner now being unethical. The new partner learns about the once-ethical partner's overbilling that

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136. NANCY B. RAPOPORT & JEFFREY D. VAN NIEL, *supra* note 134, at 128-29 (stating that an attorney wanting to make partner needs to work with partners from other offices on billable or non-billable work as those partners in other offices may support the attorney during her partnership vote).

requires reporting that partner to the state bar.<sup>137</sup> These scenarios undercut the due diligence premise and the decision-making focus arguments.

But the responses to these arguments remain the same. First, the attorney need not become partners with anyone, and the autonomous choice to become partners with other lawyers exposes the attorney to these possible scenarios, particularly if the attorney signs an at-will, no-cause expulsion partnership agreement.

Second, living with decisions, even if they appear flawless at the time, is a part of life and the risk that anyone faces when deciding to join a social construct or a relationship, which will be discussed below in detail. Also, if the attorney has chosen her partners wisely, and it is discovered that a fellow partner is overbilling, it is possible that the firm will terminate the overbilling partner, not the reporting attorney.

#### 4. Summary of Due Diligence

The concept of due diligence provides that if an attorney makes a bad investment because he failed to perform the requisite work to learn about the potential partners and whether they would be suitable partners the attorney should suffer the consequences of that inadequate decision. The importance of choosing good partners is not limited to law firm partnerships but extends throughout all of life.

##### *C. Success or Failure in Life Depends on One's Associates*

Ralph Waldo Emerson once said, "If you want to be great and successful, choose people who are great and successful and walk side by side with them."<sup>138</sup> Common sense dictates that one's success or failure depends greatly on whom one chooses to associate with in life. If someone spends most of his social time with individuals who make bad decisions or whose conduct is questionable, then it should not be surprising if that person winds up in the "wrong place at the wrong time." Similarly, if an attorney chooses to be partners with individuals who have low ethical standards, a broken moral compass, or a lack of integrity, it is difficult for that attorney to argue that she should be free from the negative consequences when a fellow partner fails to adhere to the rules of professional conduct or violates some other regulation or law. But if an attorney chooses to become partners with other partners whose reputations are impeccable, and their commitment to ethics and integrity is irreproachable, that attorney will likely not face a situation similar to Bohatch.

Attorneys must use care in choosing partners that will help bring them success. But if they do not choose those partners, they must live with their

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137. Associates may also become privy to information as partners that they were not privy to as associates. In Bohatch's case, she began to see the billing reports after she became partner, which alerted her to the potential overbilling by a fellow partner.

138. Ajaero Tony Martins, *Leadership Quotes from Successful Entrepreneur*, MY TOP BUSINESS IDEAS, <http://www.mytopbusinessideas.com/famous-leadership-quotes/> (last visited Feb. 23, 2015).

choice and the negative consequences that may accompany that crucial decision. Regardless of the specific individuals that comprise any partnership, the attorney completes her decision to become a partner by signing a partnership agreement. Depending on the language that he or she negotiates and agrees to in the partnership agreement, a new partner may expose him- or herself to a *Bohatch* scenario.

*D. Like Bohatch, A New Partner Exposes Himself or Herself to  
Expulsion if He or She Agrees to an At-Will, No-Cause  
Expulsion Partnership Agreement*

The decision to become a partner culminates when an attorney signs the partnership agreement. If an attorney signs a partnership agreement that is at-will (i.e., not for a specific time period or for a specific undertaking) and allows for no-cause expulsion, the attorney must bear the risk of expulsion under a *Bohatch* scenario. An attorney may negotiate a provision requiring the partner to abide by the rules of professional conduct or explicitly state that the partner cannot be expelled for following the rules of professional conduct. If an attorney exposes himself or herself to a trustless, partner relationship—absent protective language in the contract—the partnership may, in good faith, expel the attorney.

Similar to an adhesion contract, a law firm may present the partnership agreement as a take-it-or-leave-it contract. The attorney has no choice but to sign the agreement if the attorney wants to become a partner at that firm. But no one is required to become a partner at a law firm. And a potential partner at a law firm will likely not be regarded as an unsophisticated party with no meaningful bargaining power, which is relevant in any type of unconscionability, undue influence, or economic duress analysis.<sup>139</sup> Also, a law firm may agree to add a provision that protects the attorney from a *Bohatch* scenario.

When an attorney makes a decision to sign a partnership agreement that is at-will and provides for no-cause expulsion, the attorney fails to protect himself through the partnership agreement. Just as *Bohatch* experienced a negative application of her partnership agreement, attorneys who agree to an at-will partnership lacking a no-cause expulsion will face a similar legal situation. A lack of trust became the most crucial factor in the court's decision to allow *Bohatch*'s expulsion.<sup>140</sup>

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139. See RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. c (2014) (discussing when a contract is voidable because of duress by threat); *id.* § 177 (considering when a contract is voidable because of undue influence); *id.* § 208 cmt. d (involving unconscionable contracts or terms).

140. See Ribstein, *supra* note 94, at 849-51 (discussing how the potential costs to the expelled partner and the firm are outweighed by the incentives for a firm to use expulsion properly, and arguing against judicial constraints on expulsion by law firms).

#### IV. PARTNERSHIPS ARE A SOCIAL CONSTRUCT THAT REQUIRE TRUST TO SUCCEED

The law is about relationships with clients, the courts, and opposing counsel.<sup>141</sup> Relationships with attorneys who choose to join their sweat equity and capital together constitute a unique legal and professional relationship—a law firm partnership. As a social construct, partnerships require the ultimate characteristic required for a successful relationship, which is trust.

The Texas Supreme Court in *Bohatch* stated that “[a] partnership exists solely because the partners choose to place personal confidence and trust in one another.”<sup>142</sup> Trust in a law firm partnership, the court continued, is “necessary both for the firm’s existence and for representing clients.”<sup>143</sup> Trust, therefore, is essential to a successful law firm partnership. The court explicitly relied on the concept of trust to reach its conclusion in the *Bohatch* case: the law firm could terminate Bohatch for following the rules of professional conduct.

Merriam-Webster defines trust as the following: “assured reliance on the character, ability, strength, or truth of someone or something;” and “one in which confidence is placed.”<sup>144</sup>

Any social construct that involves reaching some goal requires reliance on someone else’s ability and strengths, and each individual must place his confidence in the other. For example, Navy SEALs, one of the elite fighting combat units in the world, preach reliance on one another. It starts in training when potential SEALs are assigned dive buddies. A candidate cannot be too far away from the swim buddy or he is expelled from the training.<sup>145</sup>

Also, each SEAL relies on the others and maintains confidence that the other SEALs will not leave any SEAL behind in combat.<sup>146</sup> SEALs are reassured that even if it means facing a greater harm to recover a dead SEAL’s body, a SEAL will be brought home, dead or alive.<sup>147</sup>

This all comes back to that ironclad SEAL folklore—we never leave a man behind on a battlefield, dead or alive . . . .

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141. Neil Hamilton & Lisa Montpetit Brabbit, *Fostering Professionalism Through Mentoring*, 57 J. LEGAL EDUC. 102, 108 (2007) (discussing the importance of teaching law students that “the law is about relationships” and mentors should model to law students “strong interpersonal skills with clients, colleagues, adversaries, family, the wider profession, and the community”); Neil W. Hamilton, *Empirical Research on the Core Competencies Needed to Practice Law: What Do Clients, New Lawyers, and Legal Employers Tell Us?* (The Bar Examiner & Univ. of St. Thomas Legal Studies, Paper No. 14-34, 2014), <http://ssrn.com/abstract=2502924> (discussing how law firms and clients want attorneys who understand and nurture relationships with the client, within the firm, and within the legal community).

142. *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 546 (Tex. 1998).

143. *Id.* at 547.

144. WEBSTER’S NEW COLLEGIATE DICTIONARY 1246 (Henry B. Woolf, et al. eds., 1980).

145. MARCUS LUTTRELL, *LONE SURVIVOR: THE EYEWITNESS ACCOUNT OF OPERATION REDWING AND THE LOST HEROES OF SEAL TEAM 10*, 81 (2007).

146. *Id.* at 81.

147. *Id.*

Whatever the risk to the living, however deadly the opposing fire, SEALs will fight through the jaws of death to recover the remains of a fallen comrade.<sup>148</sup>

The Navy SEALs constitute a brotherhood that relies heavily on trust to be successful. "That's the way of our brotherhood. It's a strictly American brotherhood, mostly forged in blood. Hard-won, unbreakable. Built on a shared patriotism, shared courage, and *shared trust in one another*."<sup>149</sup>

In sports, trust remains a key element in building a championship team. Mike Krzyzewski, the Duke University basketball coach and current United States Men's Basketball coach, has won five national championships at the collegiate level. Coach Krzyzewski has also led the United States to gold medals in each of the last two Olympics, reminding his teams that trust is the most important factor in creating a winning team.<sup>150</sup> "Krzyzewski believed a team's success was dependent more on *trust* and relationships than X's and O's."<sup>151</sup> Krzyzewski has described trust as the most important component of team-building.<sup>152</sup>

Marriage represents the ultimate social construct. Trust is routinely cited as one of the most important factors in any successful marriage.<sup>153</sup> Without trust and confidence in the other spouse, a marriage breaks down and simply cannot continue in a healthy state.<sup>154</sup>

A law firm partnership is based on relationships between individual lawyers that choose to become partners with each other. Just as sport teams strive to become as successful as possible, so do firm partnerships. When a partner does not trust another partner, the partnership, as with any marriage, can begin to erode. When a partner does not have confidence that another partner will protect and defend each partner within that partnership (this is the type of confidence that is also required for Navy SEALs to function cohesively and efficiently), the partnership can break down. Regardless of the reason why the trust is removed from the relationship, without that trust, the law firm partnership may not be able to thrive fully.

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148. *Id.* The SEALs' tradition of recovering the body of a fallen SEAL and bringing their fallen brother back to the United States (despite whatever insurmountable odds) can be contrasted with Great Britain's tradition of not bringing back home their dead from war. *Id.* at 82. Instead, Great Britain prefers its fallen soldiers remain in that foreign land, making that foreign land "forever England." *Id.*

149. *Id.* at 12 (emphasis added).

150. News and Media, *Build Team and Trust and You'll Succeed, Duke's 'Coach K' Says in Ubben Lecture*, DEPAUW, *supra* note 17.

151. GENE WOJCIECHOWSKI, *THE LAST GREAT GAME: DUKE V. KENTUCKY AND THE 2.1 SECONDS THAT CHANGED BASKETBALL*, 146 (2012).

152. News and Media, *Build Team and Trust and You'll Succeed, Duke's 'Coach K' Says in Ubben Lecture*, DEPAUW, *supra* note 17.

153. John Gottman, *John Gottman on Trust and Betrayal*, GREATER GOOD: THE SCIENCE OF A MEANINGFUL LIFE, (Oct. 29, 2011), [http://http://greatergood.berkeley.edu/article/item/john\\_gottman\\_on\\_trust\\_and\\_betrayal](http://http://greatergood.berkeley.edu/article/item/john_gottman_on_trust_and_betrayal); see Ashley McIlwain, *Trust is a Must: Why Trust is Important in a Relationship*, START MARRIAGE RIGHT (Oct. 14, 2010), <http://www.startmarriageight.com/2010/10/trust-is-a-must/>.

154. Gottman, *supra* note 153; see McIlwain, *supra* note 153.

A lack of trust within a partnership, as in any relationship, can stifle the morale, confidence, and cohesion of a partnership. If partners do not trust each other, then they may feel less allegiance to and pride in the partnership. If the lack of trust creates schisms in the partnership, then that schism can divide the partnership and make it less cohesive. The *Bohatch* decision allowed a firm partnership to terminate a partner when the partner lost the trust of the partnership by reporting a fellow partner. The *Bohatch* court recognized that the partnership could not flourish once trust in the reporting partner was lost.<sup>155</sup> So the analysis in a *Bohatch* scenario should begin when the decision to become partners with others is made. And the analysis should end if the trust is destroyed by a reporting partner.

Despite the legal and practical appeal of the *Bohatch* decision, most legal commentators have argued against the majority in the *Bohatch* opinion.<sup>156</sup> The following section includes the prominent remaining arguments against the *Bohatch* decision and responses to each of those arguments.

## V. RESPONSES TO ARGUMENTS AGAINST A LAW FIRM PARTNERSHIP'S ABILITY TO EXPEL A PARTNER FOR FOLLOWING THE RULES OF PROFESSIONAL CONDUCT

### A. Partnership Duties Should Include Following the Rules of Professional Conduct

The *Bohatch* dissent argued that “partners violate their fiduciary duty to one another by punishing compliance with the Disciplinary Rules of Professional Conduct.”<sup>157</sup> So the duties that partners owe each other should include the duty to avoid punishing or expelling a fellow partner for following the rules of professional conduct.<sup>158</sup> This argument is ineffective for several reasons.

First, the issue of partner expulsion in a law firm is a contract issue, not a fiduciary duty issue.<sup>159</sup> The Uniform Partnership Act (“UPA”) provides that only expulsion provisions in partnership agreements should be given effect.<sup>160</sup> In states adhering to the UPA or a variation thereof, a firm’s right to expel a partner “arises, if at all, from the partnership agreement.”<sup>161</sup> The Revised Uniform Partnership Act (“RUPA”), which has been adopted by most states, “permits the expulsion of a partner via the partnership agreement (as the UPA permits), by a unanimous vote of the other partners in some circumstances, even if the partnership agreement

155. *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 547 (Tex. 1998).

156. See generally Finkelstein, *supra* note 8 (arguing against the *Bohatch* decision); Richmond, *supra* note 8 (same); Nettles, *supra* note 8 (same); Kuczajda, *supra* note 8 (same).

157. *Bohatch*, 977 S.W.2d at 558 (Spector & Phillips, JJ., dissenting).

158. See generally Finkelstein, *supra* note 8 (arguing against the *Bohatch* decision); Richmond, *supra* note 8 (same); Nettles, *supra* note 8 (same); Kuczajda, *supra* note 8 (same).

159. Dalley, *supra* note 20, at 185.

160. See Richmond, *supra* note 8, at 97-98 (citing UNIF. P'SHIP ACT § 31(1)(d) (1914)).

161. See *id.* (citing Allan W. Vestal, *Law Partnership Expulsions*, 55 WASH. & LEE L. REV. 1083, 1111 (1998), accord Jeff Schwartz, *Good Faith in Partner Expulsions: Application of a Contract Law Paradigm*, 9 CHAP. L. REV. 1, 1 (2005)).

does not authorize expulsion, or by a partnership's petition to a court to expel a partner for specified misconduct regardless of whether the partnership agreement provides for expulsion."<sup>162</sup> But the unanimous vote mechanism is difficult to achieve—preventing that method from being effective and pervasively used to expel a partner, and judicial expulsion is generally avoided because it is time-consuming, costly, and creates negative publicity for the firm.<sup>163</sup> Thus, in states that have adopted RUPA, partnerships may neatly expel a partner only if they provide for expulsion in their agreement.<sup>164</sup>

Moreover, most partnership agreements today contain expulsion provisions. So the focus of law firm partner expulsion is a contract issue, not a fiduciary duty issue.<sup>165</sup>

Second, fiduciary duties of a partner are typically limited to the scope of the duties to the partnership's business affairs, as opposed to duties between the partners themselves.<sup>166</sup> RUPA, for example, recognizes the following fiduciary duties between partners and "explicitly limits the scope of the duties to the partnership's business affairs" as opposed to duties to the other partners themselves:

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

(b) A partner's duty of loyalty . . . is limited to the following:

(1) to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct . . . of the partnership business or derived from a use . . . of partnership property . . . ;

(2) to refrain from dealing with the partnership in the conduct . . . of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

(3) to refrain from competing with the partnership in the conduct of the partnership business.<sup>167</sup>

Professor Paula Dalley argues that under RUPA, common law, and UPA, "a breach of fiduciary duty must involve the partnership's business and must, by implication, involve harm to the partnership."<sup>168</sup> Therefore, "[e]xpulsions should not constitute breaches of fiduciary duty because they

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162. REV. UNIF. P'SHIP ACT § 601(4) (1997); see 2 ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP 7:55-7:56 (Wolters Kluwer Law & Business 2012).

163. See Dalley, *supra* note 20, at 202-03.

164. REV. UNIF. P'SHIP ACT § 601(5) (1997).

165. See Dalley, *supra* note 20, at 202-03.

166. *Id.* at 191.

167. REV. UNIF. P'SHIP ACT §404(a)-(b), 6 U.L.A. at 58 (Supp. 1995).

168. Dalley, *supra* note 20, at 191.

relate to dealings of the partners *inter se* as individuals and not to the partnership's business."<sup>169</sup>

Judge Cardozo's timeless and oft-quoted standard of behavior required by partners is set forth in *Meinhard v. Salmon*: "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."<sup>170</sup> Indeed, the court in *Bohatch*

recognized as a matter of common law that "the relationship between . . . partners . . . is fiduciary in character, and imposes upon all the participants the obligation of loyalty to the *joint concern* and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters *pertaining to the enterprise*."<sup>171</sup>

Thus, the punctilio of an honor the most sensitive, along with the obligation of loyalty to the joint concern, mandate that the welfare of the law firm's partnership and trust between the partners outweigh a potential need for creating a fiduciary duty between partners to follow the rules of professional conduct.<sup>172</sup> The court in *Bohatch* reached the same conclusion.<sup>173</sup>

One could argue that an overbilling partner may harm the partnership's business. If a client determined or learned that a partner overbilled a client, the client may not continue to use the firm for its legal work. Less work decreases the revenues generated by the firm, thus harming the partnership's business. If a firm felt that it may lose a client because of a partner overbilling, the firm may elect to expel the overbilling partner. But the issue in a *Bohatch* scenario is whether the firm expels the reporting partner—not the overbilling partner. The expulsion of the reporting partner, which does not involve the partnership's business, but rather relates to trust and the partners *inter se* dealings, does not implicate a breach of fiduciary duty. Indeed, a firm could terminate the overbilling partner for harming the partnership's business, and it could also expel the reporting partner if she lost the trust of the other partners.<sup>174</sup>

No fiduciary duty exists that requires a law firm partnership to refrain from expelling a partner who betrays the trust of a partnership and reports a fellow partner for unethical behavior, nor should such a fiduciary duty be created.

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169. *Id.*

170. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

171. *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998) (citing *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264 (Tex. 1951)) (internal quotations omitted) (emphasis added).

172. *See id.* at 546 (stating that "a partnership exists solely because the partners choose to place personal confidence and trust in one another").

173. *See id.*

174. One could also argue that *Bohatch* had a duty of care to report the alleged overbilling, and if she did not report the overbilling, then she may have been in breach of her duty of care to the firm. *See Richmond, supra* note 8, at 122. Even if this contention is accepted, and assuming she had a duty to report the overbilling anyway as the majority in *Bohatch* contended, this simply further reiterates her duty to report and the firm's ability to expel her, thus restating the *Catch-22* of the *Bohatch* scenario.

*B. Partnership Agreements Should Preclude Termination When It Violates the Implied Covenant of Good Faith and Fair Dealing*

Partners typically use partnership agreements, which means that partners are bound to comply with the implied covenant of good faith and fair dealing that attaches to all contracts.<sup>175</sup> The implied covenant of good faith and fair dealing focuses on the enforcement and performance of a contract, and it encourages the parties to refrain from actions that prevent the other party from receiving the fruits of the contract.<sup>176</sup> The implied covenant of good faith and fair dealing can be applied when one party has discretion under the contract to make a decision, such as expelling a partner.<sup>177</sup> Some legal commentators argue that expelling a partner for following the rules of professional conduct violates the implied covenant of good faith and fair dealing.<sup>178</sup> This argument also fails.

In the context partner expulsion, one legal commentator found that “[a]n expulsion right is exercised in good faith when it is done for a purpose within the contemplation of the parties, such as to protect the partners from a partner who has become untrustworthy or to remove a partner who has made the cooperative operation of the business impossible.”<sup>179</sup> If the expulsion of a partner is done “‘in the best interests of the partnership,’ a term often used by the courts in expulsion cases,” then the expulsion is considered a “good faith expulsion.”<sup>180</sup> Thus, a law firm that expels a partner whom it can no longer trust is a good faith expulsion. It is only where the partners expel another partner solely to “enhance their own profit share” or for personal financial gain does the expulsion constitute a lack of good faith.<sup>181</sup> In those cases, the partners are attempting to circumvent the transaction costs of renegotiating their original partnership agreement to obtain a benefit that they could not and did not achieve in the initial instance.<sup>182</sup>

When the good faith and fair covenant requirement is applied to the *Bohatch* scenario, the partners’ expulsion of *Bohatch* clearly complies with

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175. See Dalley, *supra* note 20, at 192 (arguing both under UPA and RUPA that a contractual duty, as opposed to a fiduciary duty, exists to act in accord with the implied covenant of good faith and fair dealing that accompanies every contract); REV. UNIF. P’SHIP ACT § 404(d) (1997).

176. RESTATEMENT (SECOND) OF CONTRACTS § 205 (2014). The contractual covenant of good faith and fair dealing should not be confused with a fiduciary duty of good faith. See Ribstein, *supra* note 94, at 870 (discussing how the covenant of good faith and fair dealing found in every contract “does not require the parties to act unselfishly. Rather, the parties may exercise voting and other rights so as to protect their own interests except to the extent the contract limits exercise of this power. By contrast, because delegating power over one’s property to a fiduciary assumes that the latter will exercise the power in the property owner’s interest, a fiduciary duty of unselfishness may arise from the delegation alone without any other contractual provisions.”).

177. See RESTATEMENT (SECOND) OF CONTRACTS § 205 (2014).

178. See e.g., Michael A. Fisher, *Why Does Doing the Right Thing Have to be so Hard? A Law Firm Partner’s Difficult Decision on Whether to Report Suspected Misconduct*, 87 MARQ. L. REV. 1005 (2004); Margaret Kline Kirkpatrick, Comment, *Partners Dumping Partners: Business Before Ethics in Bohatch v. Butler & Binion*, 83 MINN. L. REV. 1767 (1999).

179. Dalley, *supra* note 20, at 201.

180. *Id.*

181. *Id.*

182. *Id.*

the good faith requirement. In a *Bohatch* scenario, the partners terminate the reporting partner because they have lost trust in that partner for turning in a partner or the firm based on reporting pursuant to the rules of professional conduct.<sup>183</sup> The partners are not attempting to obtain personal financial gain or reap the benefits of a dismissed partner in a manner they did not obtain through the initial partnership agreement with that partner. Instead, the partners are attempting to fortify their partnership by dismissing an individual partner who can no longer be trusted.<sup>184</sup> When a partner reports another partner, then every other remaining partner may wonder whether that reporting partner is focused on promoting and protecting the firm or whether that reporting partner is focused on uncovering behavior or opinions of other partners that do not coincide with the reporting partner's.<sup>185</sup> Expulsion by a partnership in a *Bohatch* scenario, where the firm expels a partner solely because it no longer trusts that partner, falls under a good faith expulsion pursuant to the implied covenant of good faith and fair dealing of a contract as it is done in the best interests of the partnership.<sup>186</sup>

### C. Whistleblowing Attorneys Should be Protected by the Law

Yet another argument against the *Bohatch* decision is that attorneys who blow the whistle on law firms that are violating the rules of professional conduct or other law should be protected from retaliatory discharge by the law firm.<sup>187</sup> This protection would purportedly increase reporting by attorneys, provide more quality legal representation to clients who are adversely affected by overbilling, help to prevent liability to the firm for overbilling, and increase the public's confidence in the legal profession.<sup>188</sup>

In response, Professor Ribstein argued that law firms should be allowed to expel whistleblowers for a number of reasons.<sup>189</sup> First, "ethical restrictions on expulsion would frustrate the firm's strong interest in using expulsion to discipline its partners and are unnecessary in light of firms' ample incentives to catch and punish ethical violators in order to protect their reputations."<sup>190</sup> Second, an exception for whistleblower protection

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183. See e.g., *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 546 (Tex. 1998) (stating that "a partnership exists solely because the partners choose to place personal confidence and trust in one another").

184. *Id.*

185. The partnership may, instead, decide to expel only the overbilling partner, because it no longer trusts that attorney. The partnership might also decide to expel both the overbilling attorney and the reporting attorney. Provided the expulsion is in good faith, then the law firm will be protected from suit.

186. *Bohatch*, 977 S.W.2d at 546.

187. Alex B. Long, *Whistleblowing Attorneys and Ethical Infrastructures*, 58 MD. L. R. 786, 788 (2009).

188. *Id.* at 838.

189. Ribstein, *supra* note 94, at 878.

190. *Id.*

would be difficult to maintain, and it could lead to manipulation by partners.<sup>191</sup> For instance, a partner may create an alleged wrongdoing of a fellow partner to protect himself from being terminated for some other reason.<sup>192</sup> A partner might also spend a considerable amount of time actively looking for potential wrongdoing by a fellow partner, which would make the searching partner less productive, again to protect himself from future expulsion. Third, deterring erroneous whistleblowers might deter reasonable errors and efforts, thus hurting rather than helping clients because it might limit the monitoring done by fellow partners.<sup>193</sup>

Whistleblowing protection would also purportedly increase self-reporting by other attorneys, because an attorney would have incentive to follow the rules of professional conduct by obtaining some protection from retaliatory discharge.<sup>194</sup> Otherwise, the argument presumes, attorneys will not report another attorney for overbilling or some other serious misconduct. This argument reduces the attorney's professional mandatory obligation to a choice. There are many instances where an attorney must follow the rules of professional conduct to her detriment either career-wise or financially.<sup>195</sup>

Moreover, the purpose of self-reporting is to allow the legal profession to regulate itself because attorneys are more aware of potential ethical violations by fellow attorneys and can spot those ethical violations by fellow attorneys by virtue of their first-hand knowledge of what another attorney is doing.<sup>196</sup> Without self-reporting, it would be difficult for most clients and judges to "catch" unethical conduct of attorneys whom the clients and court only have so much contact with, as opposed to attorneys working side-by-side on a case in a firm.<sup>197</sup> Self-reporting protects the public and

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191. *Id.*

192. *Id.*

193. *Id.*

194. See Kuczajda, *supra* note 8, at 142 (arguing that courts should increase reliance on Rule 5.1 to afford greater protection to whistleblowers).

195. See e.g., *Spaulding v. Zimmerman*, 263 Minn. 346 (Minn. 1962) (detailing an ethical dilemma defense lawyers faced when they acquired knowledge that the opposing party, a minor, had a fatal heart condition that plaintiff had not discovered yet that would significantly affect any settlement amount in the personal injury case); *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991) (illustrating a similar ethical dilemma where a lawyer needed to choose between saving his job while innocent people might die or filing a complaint against his employer with the FDA to protect innocent people but risking the loss of his job).

196. MODEL RULES OF PROF'L CONDUCT r. 8.3 cmt. 1-3 (2013).

197. *Id.* Some clients, including sophisticated corporate clients such as Pennzoil in *Bohatch*, in some circumstances may be able to identify and complain successfully if they are overbilled. In-house counsel for large corporations typically worked at large law firms themselves and are familiar with law firm billing procedures and practices. See David A. Grenardo, *Why Should I Become an Associate at a Large Law Firm? And if I Do, Then What Should I Expect and How Do I Succeed?*, 41 *RUTGERS L. REV.* 65, 75 (2014). Corporate counsel discuss law firm billing practices frequently, particularly at conferences and seminars for in-house counsel. See e.g., *ASSOCIATION OF CORPORATE COUNSEL*, <http://www.acc.com> (last visited Jan. 28, 2015) (illustrating a national and annual seminar for in-house counsel where billing is often discussed). This source provides countless articles regarding billing, from the essential guidelines to proper protocol for billing by outside counsel. *Id.* Nevertheless, attorneys working on a case together will typically be able to spot overbilling better than clients because the attorneys working on the case have better first-hand knowledge than the client has regarding how much each

the profession as attorneys are typically in the best position to know when an ethical violation has occurred.<sup>198</sup> And just because it is practically difficult to report another attorney, that does not mean the legal profession or the legislature should provide an incentive to do so. Being an attorney is hard. And ethics cases demonstrate that attorneys will sometimes need to make choices where either their ethical duties conflict with their self-interest or moral duties.<sup>199</sup>

In any event, “[t]he fact that the ethical duty to report may create an irreparable schism between partners neither excuses failure to report nor transforms expulsion as a means of resolving that schism into a tort.”<sup>200</sup> As stated in *Bohatch*, “[A]t the heart of the partnership concept is the principle that partners may choose with whom they wish to be associated.”<sup>201</sup> This principle is as true at the time a partner loses trust in a reporting partner as it is when a potential partner makes the decision to become a partner with other attorneys.<sup>202</sup> The result of providing a mandatory prize for whistleblowers at law firms would create an inherent schism in the partnership, dividing the loyalties and interests of the partners in every partnership. Thus, the whistleblower argument fails as well.

#### D. *Firms Are Now Too Large for Trust Between Partners to be an Issue*

Some legal commentators argue that firms have become so large that they no longer resemble the traditional partnership where trust in another partner remains a key aspect of the partnership.<sup>203</sup> As an initial response, most law students are not going to work at large law firms, and, if they do, many do not make partner at those large law firms.<sup>204</sup>

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attorney is actually working on the case. Associate Dean Reynaldo Valencia, a colleague of the Author, discusses in his Business Associations class whether the in-house counsel, Chapman, really had a choice in the *Bohatch* case. If Chapman admitted to his company, Pennzoil, that his friend was overbilling him (i.e., cheating him) and he did not catch it, then Chapman may have been fired himself. Thus, the option that served Chapman’s self-interests best was to state that the bills were reasonable.

198. MODEL RULES OF PROF’L CONDUCT r. 8.3 cmt. 1-3 (2013).

199. See e.g., *Spaulding v. Zimmerman*, 263 Minn. 346 (Minn. 1962) (detailing an ethical dilemma defense lawyers faced when they acquired knowledge that the opposing party, a minor, had a fatal heart condition that plaintiff had not discovered yet that would significantly affect any settlement amount in the personal injury case); *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991) (illustrating a similar ethical dilemma where a lawyer needed to choose between saving his job while innocent might die or filing a complaint against his employer with the FDA to protect innocent people but risking the loss of his job).

200. *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 547 (Tex. 1998).

201. *Id.* at 552.

202. See e.g., *id.* at 546 (stating that “a partnership exists solely because the partners choose to place personal confidence and trust in one another”).

203. See Geoffrey C. Hazard, *The Underlying Causes of Withdraw and Expulsion of Partners from Law Firms*, 55 WASH. & LEE L. REV. 1073 (1998) (expressing concern about a lawyer’s loyalty with the increase in the average firm size).

204. *New Grads Find More Jobs for Second Year in a Row, But Not Enough More to Offset the Larger Class Size*, NAT’L ASS’N FOR LAW PLACEMENT, (Aug. 2014), <http://www.nalp.org/0814research>; see e.g., LATHAM & WATKINS LLP, <http://www.lw.com/news/latham-names-new-partners-counsel?documentid=7995> (last visited Mar. 17, 2015) (announcing the promotion of 19 associates to partnership in 2015, the global firm has approximately 2,100 lawyers); DLA PIPER, <http://news.dlapiper.com/Press-releases/DLA-Piper-announces-partnership-promotions-for-2014-875.aspx> (last visited Mar. 17, 2015) (promoting 45 to partnership in 2014 out of the firm’s global 4,200 lawyers); VINSON &

Second, the *Bohatch* scenario, which creates the Catch-22 where a partner reports a fellow partner for violating the rules of professional conduct and is terminated for that act, is unlikely to arise through casual contacts across offices. The *Bohatch* situation involves partners working together on a case.<sup>205</sup> This can happen across offices, but it still requires a considerable amount of interaction between the partners to create a situation where one partner has sufficient knowledge to report the other partner for violating the rules of professional conduct.<sup>206</sup> Casual and limited interaction with a partner in another office may be common in large firms via firm retreats, meetings, or small cases, but the *Bohatch* scenario concerns a partner with a high level of knowledge of another partner's overbilling that likely requires extensive exposure to that overbilling partner.<sup>207</sup>

There is, nonetheless, merit in the argument that trust among *all* partners becomes less critical in the successful operation of a firm when the size of the firm and its offices increase. Trust is still important, though, in smaller offices of a large law firm and in smaller practice groups within an office. *Bohatch* herself was in a large law firm, Butler & Binion, in a branch office that consisted of only three attorneys, and the court relied heavily on trust in deciding the *Bohatch* case.<sup>208</sup> There are certainly limitations upon performing due diligence in large law firms, which were discussed in Section II, but that should not prevent an attorney from doing whatever due diligence is practicable.<sup>209</sup>

#### *E. The Duty to Supervise and Monitor Attorney Conduct is Undermined by the Bohatch Decision*

Legal commentators argue that Rule 5.1 of the rules of professional conduct should control in a *Bohatch* scenario, which mandates that lawyers

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ELKINS, <http://www.velaw.com/resources/VinsonElkinsPromotesEightPartnership.aspx> (last visited Mar. 17, 2015) (elevating 8 to partnership in 2015 out of the firm's approximately 700 lawyers); NORTON ROSE FULBRIGHT, <http://www.nortonrosefulbright.com/news/115582/norton-rose-fulbright-announces-46-global-partner-promotions> (last visited Mar. 17, 2015) (announcing 46 global partner promotions in 2015 out of the firm's 3,800 lawyers); SIDLEY AUSTIN LLP, <http://www.sidley.com/news/sidley-austin-llp-elects-32-lawyers-to-its-partnership-12-10-2014> (last visited Mar. 17, 2015) (promoting 32 lawyers to partnership in 2015 out of the firm's 1,900 lawyers); JONES DAY, <http://www.jonesday.com/jones-day-names-42-new-partners/> (last visited Mar. 17, 2015) (elevating 42 to partnership in 2015 out of the firm's 2,400 lawyers); KING & SPALDING, [http://www.kslaw.com/News-and-Insights/NewsDetail?us\\_nsc\\_id=8371](http://www.kslaw.com/News-and-Insights/NewsDetail?us_nsc_id=8371) (last visited Mar. 17, 2015) (announcing promotions for 17 out of the firm's 800 lawyers in 2015); K&L GATES, <http://www.klgates.com/kl-gates-names-50-new-partners-across-five-continent-02-16-2015/> (last visited Mar. 17, 2015) (naming 50 new partners out of the global firm's 2,000 in 2015).

205. *Bohatch*, 977 S.W.2d at 544.

206. *Id.* at 545.

207. *Id.* at 544.

208. Butler & Binion, around the time at issue in the *Bohatch* case (1991), maintained offices in Houston, San Antonio, Dallas, and Washington D.C. See Monica Perin, *Dwindling Butler & Binion bows out*, HOUSTON BUSINESS JOURNAL, (Dec. 5, 1999, 11:00 PM), <http://www.bizjournals.com/houston/stories/1999/12/06/story1.html?page=all>. The Houston office, in 1991, consisted of 145 attorneys.

209. Such research may not have helped *Bohatch*, but she ultimately made the decisions to become a partner with these other attorneys and to sign an at-will partnership that allowed for no-cause expulsion. She must live with the consequences of those decisions.

create an environment where other lawyers at the firm can adhere to the rules of professional conduct, and the supervising lawyer must mitigate or rectify any misconduct by another attorney at the firm once the misconduct is discovered.<sup>210</sup> Thus, Bohatch was required to mitigate the damages done or rectify the situation caused by McDonald's purported overbilling of the client. This argument fails as well.

The purposes of Rule 5.1 regarding supervising and managing attorneys is to make sure that processes, including policies and procedures, are in place to allow lawyers to conform to the rules of professional conduct.<sup>211</sup> Comment 2 to Rule 5.1 tellingly provides some examples of policies and procedures that would apply under this rule: "those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised."<sup>212</sup> Moreover, Comment 3 discusses how the rule can be satisfied, describing in small firms with experienced lawyers that "informal supervision and periodic review of compliance" with the policies and procedures will typically suffice, while in a large firm a procedure that enables junior attorneys to "make confidential referral of ethical problems directly to a designated senior partner or special committee" may be necessary.<sup>213</sup> Furthermore, the example provided in Comment 5, which relates to managerial and supervising attorneys in a remedial situation where their efforts are required to mitigate or rectify the damages caused by the supervised attorney's conduct, refers to the supervised attorney as a subordinate.<sup>214</sup>

Taken together, Rule 5.1 seeks to require managing and supervising attorneys to set up policies and procedures to assist subordinate, junior attorneys, in avoiding ethical missteps.<sup>215</sup> As Comment 3 notes, in a small firm with experienced lawyers informal supervision and periodic reviews of compliance would suffice, but in a large firm with junior attorneys more processes may be needed.<sup>216</sup> Failing to create and follow processes for resolving conflicts, calendaring deadlines, handling client funds and ensuring inexperienced attorneys are supervised fall far afield of the *Bohatch* scenario where one partner is accusing another partner of intentionally overbilling and thereby defrauding the client out of money.

A Rule 5.1 billing scenario might involve a partner reviewing the bills for a client and noticing that the second-year associate recently assigned to the case billed the client for Westlaw or Lexis charges, when that particular

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210. See Kuczajda, *supra* note 8, at 142 (arguing that courts should increase reliance on Rule 5.1 to afford greater protection to attorney whistleblowers).

211. MODEL RULES OF PROF'L CONDUCT r. 5.1 (2013).

212. *Id.* at cmt. 2.

213. *Id.* at cmt. 3.

214. *Id.* at cmt. 5.

215. *Id.*

216. *Id.* at cmt. 3.

client does not pay for those charges, but the client does pay for the attorney's time spent researching on Westlaw or Lexis.<sup>217</sup> The partner may simply have a discussion with the junior associate, explain the procedure again, and send the associate a copy of the procedures and policies for billing on that client's matter. The majority in *Bohatch* did not even discuss Rule 5.1, likely because it is irrelevant in a *Bohatch* scenario where a partner is reporting a fellow partner for a major and intentional violation of the rules of professional conduct—i.e., overbilling, rather than rectifying a situation where a subordinate junior associate fails to follow the procedure or protocols for billing—e.g., the associate bills for travel without prior authorization from the client when the particular client's billing memorandum for that associate's firm prohibits billing for travel when it is not authorized in advance. Thus, Rule 5.1 is inapplicable to the *Bohatch* scenario.

*F. Due Diligence Cannot Always Predict Improper Conduct  
by a Fellow Partner*

One might argue that a person cannot know everything about a potential partner before one decides to become a partner, and one cannot know how a potential partner will react in every situation before one becomes a partner with another. This argument, which is that humans are neither omniscient nor soothsayers, misses the point that there is always some risk in relationships and social constructs.

When someone marries another person, the spouse cannot and does not know with absolute certainty how her spouse will react in every situation. Instead, an individual uses the observations made during the relationship to determine if the potential spouse will behave in a manner that is acceptable to that individual choosing the potential spouse. For example, if a potential spouse reacts with anger when small issues arise, such as traffic, the Time Warner cable signal being lost, or a dishwasher breaking, then perhaps that potential spouse will behave in an unsatisfactory manner when something more substantial occurs in a relationship, such as an unexpected tragedy in the family. Although someone cannot know everything about another person, including how the other will act or react in a given situation, one must use good judgment, instinct and intuition to determine if one wants to marry someone else based on how one assesses the potential spouse will act in the future under certain circumstances.

Similarly, attorneys must determine a witness' credibility and make judgments about how a witness might perform on the witness stand often based only on a half-day meeting with that witness. An attorney that has been working for five to ten years with her potential partners, or has spent considerable time with those potential partners, should be able to assess how she believes potential partners will react or conduct themselves in certain situations. Hopefully the attorney has already witnessed the potential partner in critical situations—e.g., properly preparing a witness to tell the

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217. *Id.*

truth rather than commit perjury to improve the case; properly billing clients or reducing the bills when appropriate; properly producing documents when they are relevant yet extremely damaging to a client's case. Even if an attorney has not seen a potential partner dealing with these situations, then the attorney should still be able to make a reasoned judgment about whether the potential partners are people the attorney wants to trust with her reputation, capital, and career.

The arguments in this section are less powerful for lateral partners who will not have as much time as associates to get to know the potential partners. And the lateral partners will not have the ability to observe his potential partners in situations involving ethical or work dilemmas that could reveal those potential partners' true character. Nonetheless, lateral partners should still conduct as much due diligence as possible, including researching the partners' history regarding sanctions or lawsuits and speaking with other attorneys in the community about the lateral's potential partners.

Similarly, in large law firms, it will be difficult for an associate to spend a great deal of time with a majority of partners at the firm or even in one's office depending on the size of the office. It is also unlikely that associates in a large law firm will be able to witness most of the potential partners in critical situations given the sheer number of potential partners. Regardless of these limitations, attorneys in large law firms should still attempt to perform as much due diligence as is practicable, as discussed in Section II.

It is always a risk to enter into a relationship, but the potential benefits should always outweigh the potential risks based on an honest assessment of the situation. In any event, one must still perform due diligence and live with the consequences, positive or negative.

### G. *The Bohatch Decision Rewards the Wrongdoer*

An argument can be made that following the *Bohatch* decision rewards the bad actor. As stated above, and for the purposes of this article, the *Bohatch* scenario involves an actual overbilling partner (as opposed to the *Bohatch* case where the firm determined the partner did not overbill) and the reporting partner has the requisite knowledge, which is a high standard under the rules of professional conduct, and the mandatory duty to report the overbilling partner. When this scenario plays out, there can be several possible outcomes.

First, the overbilling partner might be sanctioned by the state bar for his misconduct. Second, the overbilling partner could be expelled by the partnership for either failing to adhere to the rules of professional conduct, potentially damaging a relationship with a client, or for losing the trust of the partnership based on his misconduct. Third, the reporting partner could temporarily lose the trust of the partnership, but not be expelled.<sup>218</sup>

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218. The court in *Bohatch* treats trust as a rigid instrument that is either there or not. But as in other social relationships, trust can be lost and regained.

Fourth, the reporting partner could be expelled for losing the trust of the partnership. Fifth, the reporting partner and the overbilling partner could both be expelled. In most of these possible scenarios the overbilling partner does not escape some form of negative consequence.<sup>219</sup> Indeed, if a reporting partner possesses the significant level of knowledge required to report another attorney under the rules of professional conduct, there stands a fair chance that the overbilling attorney will be sanctioned by the state bar's disciplinary agency. The fact that the actual *Bohatch* case fell into the scenario where only the reporting partner was expelled is potentially due to the fact that the investigation concluded that McDonald did not overbill the client. If a *Bohatch* scenario (as defined in this Article) occurs again, then there is a great likelihood that the bad actor suffers a negative consequence, including scorn and a tarnished reputation even if the firm does not expel that partner.

## VI. CONCLUSION

The Catch-22 of the *Bohatch* scenario is solved by moving the starting point of the analysis to when an attorney freely chooses to become partners with other attorneys. Knowing that the success or failure of a partner and the partnership are tied to the actions and inaction of one's fellow partners should lead a reasonable person to believe that her autonomous decision to join a partnership could lead to negative consequences. The decision to become a partner culminates in the signing of the partnership agreement. When an attorney signs an at-will agreement that allows for no-cause expulsion, he or she exposes him- or herself to expulsion that is in the purported best interest of the partnership, as occurred in *Bohatch*.

The analysis in a *Bohatch* scenario should end when a partner reports a fellow partner, if that reporting destroys the trust of the other partners in the reporting partner. Once trust is lost in a partnership, the partnership, a social construct, can no longer thrive.<sup>220</sup> The responsible party for removing the trust can be removed from the partnership. The Texas Supreme Court in *Bohatch* reached the correct result, and any court that faces the same situation should reach the same conclusion using the reasoning and rationale found in the *Bohatch* opinion and this Article.<sup>221</sup>

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219. One might argue that, if one likens this situation to a marriage, then the result in *Bohatch* allows a spouse to abuse another spouse without any consequences for the abusive spouse. The *Bohatch* scenario, however, would be more akin in a marriage to a situation where one spouse cheats on the family's taxes and the non-cheating spouse reports the fellow spouse to the IRS. The primary harm being done is not to the other partner or spouse, but to a third party, that could potentially result in negative consequences either to the partnership for the overbilling—e.g., loss of the client, restitution of overpayments, reputational harm—or to the married couple for filing an inaccurate tax statement—e.g., audit, fines or other penalties. If the cheating spouse decides that he no longer trusts the reporting spouse, then the marriage may not succeed. If the cheating spouse loses trust in the other spouse, but then regains it, then the marriage may still succeed. The same could be said of the partners and partnership in a *Bohatch* scenario.

220. See e.g., *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 546 (Tex. 1998) (stating that "a partnership exists solely because the partners choose to place personal confidence and trust in one another").

221. *Id.* at 561.

An attorney may freely choose to become a partner with others, choose partners of questionable character, fail to perform adequate due diligence, or sign a partnership agreement that leaves no-cause expulsion available to the partnership. Making an attorney responsible for the consequences of these choices is both reasonable and practical. As an American philosopher once said, "Nobody ever did, or ever will, escape the consequences of his choices."<sup>222</sup>

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222. WORLD OF QUOTES: ALFRED A MONTAPERT, <http://www.worldofquotes.com/author/Alfred+A.Montapert/1/index.html> (last visited Jan. 28, 2015).

