Why Does Doing the Right Thing Have to Be So Hard? A Law Firm Partner's Difficult Decision on Whether to Report Suspected Misconduct

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WHY DOES DOING THE RIGHT THING HAVE TO BE SO HARD? A LAW FIRM PARTNER’S DIFFICULT DECISION ON WHETHER TO REPORT SUSPECTED MISCONDUCT

I. INTRODUCTION

A partner at a law firm never expects to be faced with the difficult decision of whether to report potential misconduct on the part of another lawyer. Unfortunately, these situations do occur. Imagine a situation in which a partner comes across another lawyer’s list of billable hours for a particular client. And, imagine that those hours are abnormally high in light of the fact that the lawyer was working on a routine project for the client. What should a partner in this situation do next? Perhaps the partner will pretend that he or she never became privy to such suspicions; or, perhaps the partner, feeling a higher sense of ethical and moral duty, will report the suspected misconduct to another partner. What happens if the reporting partner’s suspicions are ultimately found to be wrong? The once idealistic partner may find himself or herself on the receiving end of an expulsion by the other partners in the firm.

To understand all the issues involved in situations like the one above, one must turn to the applicable case law. One of the first high courts to decide such a case was the Texas Supreme Court in Bohatch v. Butler & Binion.\(^1\) The Bohatch court held that partners do not have a fiduciary duty to remain partners with a partner whom they expelled, when the expelled partner acted in good faith, but incorrectly, when charging another partner with over-billing a client.\(^2\) The majority made this decision even though the Rules of Professional Conduct\(^3\) hold attorneys responsible for failing to take action after receiving knowledge of another attorney’s misconduct.\(^4\) Thus, under this rationale, an attorney in Bohatch’s situation is faced with a difficult decision. The attorney could report the potential misconduct with the possibility of being expelled from the partnership if found to be incorrect.\(^5\) Alternatively, if

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1. 977 S.W.2d 543 (Tex. 1998).
2. Id.
3. D.C. RULES OF PROF’L CONDUCT R. 5.1(c) (1999). Although this is a Texas decision, both lawyers were licensed in the District of Columbia, and the court applied the District of Columbia’s Rules. Bohatch, 977 S.W.2d at 545.
4. See Bohatch, 977 S.W.2d at 545.
5. Id. at 546-47.
the attorney chooses not to report the potential misconduct, and the misconduct is legitimate and brought to light, the bar ethics committee could discipline the attorney for having knowledge of another attorney’s misconduct and failing to report it.\textsuperscript{6}

This Comment will argue that the court in \textit{Bohatch v. Butler & Binion}, in allowing partnerships to expel partners in Bohatch’s situation, failed to consider the negative implications on ethical duties in the legal profession. More precisely, the court should have implemented a public policy exception to partnership-at-will, similar to those found in whistleblower protection statutes.\textsuperscript{7} Such an exception would promote ethical duties of lawyers without seriously hindering the at-will nature of partnerships.

Part II of this Comment discusses the facts of \textit{Bohatch}, and the rationale behind the majority’s decision not to recognize an exception to the at-will nature of partnerships based on fiduciary duties. Part III discusses the fiduciary duties that partners owe to each other—including how various courts have defined the ambiguous term “good faith.” Part IV will extrapolate the ethical considerations that revolve around the \textit{Rules of Professional Conduct}. Part V will discuss the use of whistleblower protection statutes applied to other kinds of employment. Finally, Part VI will present an argument in favor of whistleblower protection as a solution to the struggle between fiduciary duties, ethical duties, and the at-will nature of partnerships.

\section*{II. \textit{BOHATCH V. BUTLER & BINION}}

\subsection*{A. Facts}

In \textit{Bohatch v. Butler & Binion},\textsuperscript{8} the plaintiff, Colette Bohatch, became a partner at the Washington D.C. law firm of Butler & Binion in February 1990.\textsuperscript{9} During her time as a partner, Bohatch received internal firm reports containing information on the number of hours that each attorney worked and billed to his or her clients.\textsuperscript{10} Upon reviewing the reports, Bohatch became worried that another partner, John McDonald, was overbilling their client, Pennzoil.\textsuperscript{11} On July 15, 1990, Bohatch decided to voice her concerns to the

\textsuperscript{6} See infra notes 118-36 and accompanying text.
\textsuperscript{7} See infra notes 137-53 and accompanying text.
\textsuperscript{8} 977 S.W.2d 543 (Tex. 1998).
\textsuperscript{9} Id. at 544.
\textsuperscript{10} Id. Under the Model Rules of Professional Conduct, Bohatch could be held responsible for having knowledge of another attorney’s misconduct and failing to report it. See infra notes 118-36 and accompanying text.
\textsuperscript{11} Bohatch, 977 S.W.2d at 544.
firm's managing partner, Louis Paine, who decided to investigate the matter.\textsuperscript{12} Paine and another managing attorney, R. Hayden Burns, reviewed Penzoil's bills along with their supporting computer printouts.\textsuperscript{13} They then contacted Penzoil's in-house counsel, John Chapman,\textsuperscript{14} who told the partners that the bills were reasonable and that Pennzoil was satisfied.\textsuperscript{15} After the partners determined that Bohatch had no basis for her contentions, Paine met with Bohatch and told her to begin seeking other employment.\textsuperscript{16} On October 21, 1991, Bohatch was formally expelled from the partnership by vote.\textsuperscript{17}

Three days prior to her expulsion, Bohatch filed a suit against the firm for wrongful discharge, breach of fiduciary duty, and breach of duty of good faith and fair dealing.\textsuperscript{18} After winning on partial summary judgment and a jury verdict, Bohatch was awarded $57,000 for lost wages, $250,000 for past mental anguish, and $237,000 for punitive damages.\textsuperscript{19} On appeal, the court of appeals held that the only duty the firm owed to Bohatch was "not to expel her in bad faith."\textsuperscript{20} The court concluded that the other partners did not expel Bohatch for self-gain, and thus she could not recover for breach of fiduciary duty.\textsuperscript{21} The court found that she was entitled to $35,000 in lost earnings, but disallowed damages for mental anguish.\textsuperscript{22} The case was eventually appealed to the Supreme Court of Texas.

\textbf{B. Opinion}

The Supreme Court of Texas recognized that "'[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.'"\textsuperscript{23}

The court went on to cite various cases standing for the propositions that a

\begin{itemize}
  \item \textsuperscript{12} \textit{Id.}
  \item \textsuperscript{13} \textit{Id.}
  \item \textsuperscript{14} \textit{Id.}
  \item \textsuperscript{15} \textit{Id.}
  \item \textsuperscript{16} \textit{Id.} After the meeting with Paine, Bohatch stopped receiving projects, and, in January 1991, the firm reduced her partnership distribution share to zero. \textit{Id.} at 544-45.
  \item \textsuperscript{17} \textit{Id.} at 545.
  \item \textsuperscript{18} \textit{Id.}
  \item \textsuperscript{19} \textit{Id.} Bohatch initially was awarded $4,000,000 for punitive damages, but the award was reduced under remittitur. \textit{Id.}
  \item \textsuperscript{20} \textit{Id.}
  \item \textsuperscript{21} \textit{Id.}
  \item \textsuperscript{22} \textit{Id.} She was allowed lost earnings because the partnership agreement was breached. \textit{Id.}
  \item \textsuperscript{23} \textit{Id.} (quoting Fitz-Gerald v. Hull, 237 S.W.2d 256, 264 (Tex. 1951)).
\end{itemize}
partner can be expelled for purely business purposes,\textsuperscript{24} for the protection of relationships within the firm and with clients,\textsuperscript{25} or for the mitigation of a "fundamental schism."\textsuperscript{26} Moreover, the court stated that the fiduciary duties that partners owe one another do not give an expelled partner the right to sue for tort damages.\textsuperscript{27} Thus,

\[\text{just as a partner can be expelled, without a breach of any common law duty, over disagreements about firm policy or to resolve some other 'fundamental schism,' a partner can be expelled for accusing another partner of overbilling without subjecting the partnership to tort damages. Such charges, whether true or not, may have a profound effect on the personal confidence and trust essential to the partner relationship.}^\text{28}\]

Although the court did give some credence to Bohatch's and amici's argument that not protecting a partner who, in good faith, reports suspected overbilling would fail to encourage lawyers to comply with the \textit{Rules of Professional Conduct},\textsuperscript{29} the court ultimately concluded that protecting whistleblowers would no more encourage attorneys to report suspected overbilling than the ethical duties in and of themselves.\textsuperscript{30}

Finally, the court emphasized the at-will nature of partnerships. The court stated that "partners have no obligation to remain partners; 'at the heart of the partnership concept is the principle that partners may choose with whom they


\textsuperscript{27} \textit{Id.} at 546.

\textsuperscript{28} \textit{Id.} at 546-47.

\textsuperscript{29} \textit{Id.} at 546. The following nine distinguished professors submitted amicus curiae briefs arguing that the expulsion of a partner for reporting unethical conduct constitutes bad faith and is a breach of fiduciary duty: Professor Richard L. Abel of the University of California at Los Angeles School of Law, Professor Leonard Gross of Southern Illinois University School of Law, Professor Robert W. Hamilton of the University of Texas School of Law, Professor David J. Luban of the University of Maryland School of Law, Professor Gary Minda of the Brooklyn Law School, Professor Ronald D. Rotunda of the University of Illinois College of Law, Professor Theodore J. Schneyer of the University of Arizona College of Law, Professor Clyde W. Summers of the University of Pennsylvania School of Law, and Professor Charles W. Wolfram of the Cornell School of Law. \textit{Id.} at 554 (Hecht, J., concurring).

\textsuperscript{30} \textit{Id.} at 547.
wish to be associated." In the end, the court refused to recognize that the fiduciary relationship among partners creates an exception to the at-will nature of partnerships and held that the firm did not have a duty to retain Bohatch for her reporting of suspected overbilling.

III. FIDUCIARY DUTIES AMONG PARTNERS

A. The Revised Uniform Partnership Act

The Revised Uniform Partnership Act of 1997 (RUPA) was created after the states became dissatisfied with the Uniform Partnership Act of 1914. RUPA provides two fiduciary duties that partners owe to each other: the duty of loyalty and the duty of care. The duty of loyalty is limited to the following three standards:

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

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

(3) to refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

As for the duty of care, a partner’s duty to the partnership is "limited to refraining from engaging in grossly negligent or reckless conduct, intentional

31. Id. at 545 (quoting Gelder Med. Group v. Webber, 363 N.E.2d 573, 577 (N.Y. 1977)).
32. Id. at 547.
34. ROBERT W. HAMILTON, CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 18 (7th ed. Supp. 2001). The Uniform Partnership Act of 1914 had been adopted by forty-nine states. Id. at 1. As of 2000, the 1997 version of RUPA had been adopted by twenty-four jurisdictions: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Idaho, Iowa, Kansas, Maryland, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Oregon, Puerto Rico, U.S. Virgin Islands, Washington, and the District of Columbia. Id. at 19.
35. See infra notes 36-37 and accompanying text.
misconduct, or a knowing violation of law."\textsuperscript{37}

In addition to those statutory duties, common law has created two fundamental standards that partners must follow. First, partners have "obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs."\textsuperscript{38} Second, "the partners' relationship is one of trust and confidence when dealing with each other in partnership matters."\textsuperscript{39} Although RUPA does not specifically define the duty of good faith, an implied covenant of good faith exists in every contract.\textsuperscript{40} Whenever a partnership exercises a contractual right or uses its power to involuntarily expel a member from the partnership, "[i]t must not appear that the partnership acts out of a desire to gain a business or property advantage for the remaining partners in bad faith."\textsuperscript{41} Because RUPA has failed to define good faith, courts often turn to common law definitions of good faith or adopt their own definitions.\textsuperscript{42}

\textbf{B. Common Law}

In light of the fact that RUPA does not define the duty of good faith owed by partners, the following cases display how courts from various jurisdictions have interpreted the ambiguous concept of "good faith" and applied it to various instances involving the expulsion of a partner from a law firm. Although some of these cases were decided before the existence of RUPA, they all remain the law in their respective jurisdictions. The following two subsections are divided into cases in which the courts ultimately held that the parties did not violate the duty of good faith and those cases in which the court held that the parties did violate the duty of good faith.

\textsuperscript{37} Id.


\textsuperscript{40} See RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).


1. Cases in Which the Duty of Good Faith was not Violated

In *Holman v. Coie*, plaintiffs Francis Holman and William Holman were both partners in a law firm. The partnership agreement of the law firm stated that any member could be expelled by a majority vote of the executive committee. The partnership agreement, however, failed to specify whether members of the firm could be expelled without cause.

Subsequent to the Holmans becoming partners, their relationship with the firm began to wane. William Holman questioned whether a client, Boeing, was being adequately charged for legal services rendered by the firm. In addition, in 1968 Francis Holman was elected to the Washington State Senate. During his tenure he was not only praised in a newspaper article for his independence from Boeing in regards to a tax policy that he favored, but he also gave a speech in April 1969 on personal property tax that irritated top officials at Boeing. In May 1969, both William Holman and Francis Holman were expelled from the firm by a seven to two vote of the executive committee.

The plaintiffs contended that an implied duty of good faith exists between partners and that the executive committee breached this duty by expelling the plaintiffs. The Washington Court of Appeals did recognize that, as a general rule, partners must exercise good faith in their dealings with each other. The court went on to state that """"[t]he relation existing between copartners is one requiring the exercise of the utmost good faith. Each partner is a trustee for all, and no individual or group may take an unconscionable advantage of another."""

The court defined good faith as """"[a]n honest intention to abstain from taking any unconscionitious advantage of another, even through technicalities of law, together with an absence of all information, notice or benefit or belief

44. Id. at 517.
45. Id.
46. Id.
47. Id.
48. Id.
49. Id.
50. Id. at 518.
51. Id. at 519.
52. Id. at 523.
53. Id.
of facts which would render transaction unconscientious.” The court, however, limited the duty of good faith to dealings among partners relating to partnership property or business aspects of the partnership, and thus, the duty did not apply to the situation in this case. The court stated that there was no evidence that the partners were expelled so as to give a business or property advantage to the other partners.

Another case in which a court found that a law firm did not violate the duty of good faith is Lawlis v. Kightlinger & Gray. In Lawlis, the plaintiff Gerald Lawlis, a general partner in the defendant law firm, was unable to practice law for several months due to his alcoholism. When the Finance Committee became aware of Lawlis’s problem, it immediately contacted an area physician, who was an expert in alcohol abuse, to treat Lawlis. Although Lawlis received treatment from 1983 to 1984 by March 1984 he resumed his consumption of alcohol and had to receive treatment a second time.

The Finance Committee then decided Lawlis would have to meet specified conditions to continue with the partnership, including meetings with a specialist and treatment and consultation regarding his alcohol problem. Lawlis eventually resolved his alcohol addiction and was congratulated by several members of the firm. When Lawlis asked the Finance Committee to increase his participation back to normal, however, he was told that the committee was going to sever his relationship with the law firm. The Finance Committee did, in fact, expel Lawlis from the firm by a seven to one vote pursuant to the partnership agreement after he failed to accept a severance package.

On appeal Lawlis argued that his expulsion breached the implied duty of good faith and fair dealing. The Indiana Court of Appeals recognized the implied duty and stated that “if the power to involuntarily expel partners

55. Holman, 522 P.2d at 524 (quoting BLACK’S LAW DICTIONARY 822 (4th ed. 1951)).
56. Id. at 523.
57. Id.
59. Id. at 437.
60. Id.
61. Id.
62. Id. at 438.
63. Id.
64. Id. A senior partner who was also a member of the finance committee even commented on Lawlis’s full recovery. Id.
65. Id.
66. Id. The only vote in favor of keeping Lawlis was his own. Id.
67. Id. at 440.
granted by a partnership agreement is exercised in bad faith or for a 'predatory purpose,' . . . the partnership agreement is violated, giving rise to an action for damages the affected partner has suffered as a result of his expulsion.\textsuperscript{68} The court defined good faith as "'a state of mind indicating honesty and lawfulness of purpose: belief in one's legal title or right: belief that one's conduct is not unconscionable . . . : absence of fraud, deceit, collusion, or gross negligence.'"\textsuperscript{69} Similar to the Holman v. Coie court,\textsuperscript{70} the court in this case also recognized that the duty of good faith among partners applies only to partnership property and business relations.\textsuperscript{71} In fact, the court determined that the duty of good faith did not apply under the facts in this case.\textsuperscript{72}

A third case in which a court found that partners did not violate their duty of good faith was Heller v. Pillsbury Madison & Sutro.\textsuperscript{73} In that case, Philip Heller, a partner at the law firm Pillsbury Madison & Sutro, was expelled by his fellow partners for his failure to meet billing requirements\textsuperscript{74} and for conduct that proved detrimental to the relationship between the law firm and some of its more profitable clients.\textsuperscript{75}

The court recognized that although partners owe a fiduciary duty to each other, the duty applies only to instances in which a partner can use his or her position for personal benefit or against the interests of the partnership.\textsuperscript{76} In applying this fiduciary duty to the expulsion of a partner, the court stated that partners cannot expel another partner in bad faith.\textsuperscript{77} According to the court, bad faith in this context means expelling a partner for self-gain.\textsuperscript{78}

The court found no evidence that the partners expelled Heller for their own personal benefit.\textsuperscript{79} Although Heller's expulsion increased the profit shares of the remaining partners, the court found that this amount was

\textsuperscript{68} Id. (internal quotes omitted).
\textsuperscript{69} Id. at 443 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976)).
\textsuperscript{70} 522 P.2d 515 (Wash. App. 1974); see supra notes 43-57.
\textsuperscript{71} Lawlis, 562 N.E.2d at 442.
\textsuperscript{72} See id. (stating that the plaintiff was not expelled for the financial gain of the remaining partners).
\textsuperscript{73} 58 Cal. Rptr. 2d 336 (Ct. App. 1996).
\textsuperscript{74} Id. at 340-42. Heller billed only 1200 hours, 1000 hours less than what he was expected to produce. Id. at 340.
\textsuperscript{75} Id. at 340-42. Significantly, Heller's conduct caused friction between the firm and two of its valued clients whose business to the firm was worth over six million dollars annually. Id.
\textsuperscript{76} Id. at 348 (citing Leigh v. Crescent Square, Ltd., 608 N.E.2d 1166, 1170 (Ohio Ct. App. 1992)).
\textsuperscript{77} Id. (citing Bohatch v. Butler & Binion, 905 S.W.2d 597, 602 (Tex. Ct. App. 1995)).
\textsuperscript{78} Id. (citing Bohatch, 905 S.W.2d at 602).
\textsuperscript{79} Id.
insubstantial in light of the fact that there were over two hundred partners, one hundred of whom earned more than Heller.\textsuperscript{80}

2. Cases in Which the Duty of Good Faith was Violated

The first case in which a court found that law firm partners violated their duty of good faith was \textit{Beasley v. Cadwalader, Wickersham \& Taft}.\textsuperscript{81} \textit{Beasley} involved a partner, James Beasley, who laterally transferred from the New York branch of Cadwalader, Wickersham \& Taft (CW&T) to the Palm Beach office.\textsuperscript{82} Soon after Beasley made the transfer, the Palm Beach office began to suffer financially.\textsuperscript{83} CW&T's management committee decided to terminate partners from each of its offices throughout the country, including the Palm Beach office.\textsuperscript{84}

After Beasley received notice of the management committee's decision to terminate him, Beasley responded by claiming that CW&T's partnership agreement did not bestow upon the management committee the power to expel him.\textsuperscript{85} The management committee then offered Beasley a transfer to either the New York or the Washington D.C. branch of the firm or a severance package.\textsuperscript{86} Beasley rejected both offers as impractical.\textsuperscript{87}

At trial Beasley argued that CW&T breached the fiduciary duties it owed to him.\textsuperscript{88} Beasley based his breach of fiduciary duty claim on three theories: (1) the firm's expulsion of Beasley violated the partnership agreement; (2) the firm failed to give adequate notice of their intention to close the Palm Beach office; and (3) the management committee's decision to expel Beasley and other partners was done for the financial benefit of the remaining partners.\textsuperscript{89} The court determined that CW&T's conduct "cannot be said to be honorable, much less to comport with the 'punctilio of an honor.'"\textsuperscript{90} Thus, the court agreed with Beasley's contention that CW&T breached its fiduciary duty based on the facts and alluded to CW&T's financial motivations for deciding

\textsuperscript{80} Id.
\textsuperscript{81} 728 So. 2d 253 (Fla. Dist. Ct. App. 1998).
\textsuperscript{82} Id. at 255.
\textsuperscript{83} Id.
\textsuperscript{84} Id. In fact, all of the partners of the Palm Beach office were identified for termination. Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id. Although Beasley was a member of the New York bar as well as the Florida bar, id., he had been practicing law in South Florida for twenty-two years. Id. at 255-56.
\textsuperscript{88} Id. at 255.
\textsuperscript{90} Beasley, 728 So. 2d at 259.
to expel Beasley.91

Another case in which a court held that partners violated the duty of good faith was *Ehrlich v. Howe.*92 In June 1989, Richard Ehrlich joined the law firm Sann & Howe.93 As a requirement of his employment, Ehrlich signed a partnership agreement, which in part allowed the expulsion of a partner by unanimous vote by the other partners.94 In September 1991, Ehrlich was terminated from the law firm by a unanimous vote of all the partners pursuant to the partnership agreement.95 Ehrlich was neither given notice, nor was he present at the partnership meeting in which he was expelled.96

The court recognized that there is an implied duty of good faith in all partnership agreements.97 The court went on to state that this duty is one of """finest loyalty' and 'honor most sensitive.""" Moreover, the court stated that the fiduciary duties owed by the partners are based on the partnership agreement.98 Since the court found that the unambiguous language of the agreement required that the issue of expulsion be """before the partnership,"" the failure to notify the plaintiff of the meeting was a breach of the partners' fiduciary duties.100

A third case on the concept of good faith in the context of partnership expulsions is *Winston & Strawn v. Nosal.*101 *Nosal* was a case of first impression for the Illinois Appellate Court on the issue of good faith as it relates to the expulsion of a partner.102

Chester Nosal was a partner for the general practice firm of Winston & Strawn, headquartered in Chicago.103 In 1982, Nosal moved to the

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91. See id. at 256 (stating that the evidence shows that Beasley was anticipatorily expelled by the firm when it decided to close its Palm beach office). For a more in depth look at Beasley, see Karen Dillon, *The Cadwalader Paradox,* THE AMERICAN LAWYER, Sept. 1996.
93. Id. at 484.
94. Id. at 485; see also Donald J. Nettes, Comment, *Do We Really Need Expulsion Procedures in Partnership Agreements: The Inadequacies of Partnership Law as it Relates to Law Partnerships,* J. LEGAL PROF. 209 (2001) (arguing that partnership agreements should not circumvent the duty of good faith); Wayne N. Outten & Sean Farhang, *Firm Governance: When and How Can a Firm Expel a Partner,* LAW FIRM PARTNERSHIP & BENEFITS, Sept. 2000 (discussing the same).
96. Id.; see also Vestal, supra note 89, at 1098 (discussing the *Ehrlich* case).
98. Id. (quoting Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928)).
99. Id.
100. Id. at 492.
103. Nosal, 664 N.E.2d at 240-41.
Washington D.C. branch of the firm where he practiced international law and assisted with office management. In 1992, members of the Washington D.C. branch, including Nosal, were discharged from the firm due to economic reasons. When Nosal refused to vacate the firm, he was expelled by a vote of 55 to 16. Significantly, from 1988 until Nosal’s discharge, Nosal repeatedly asked to view the firm’s financial status, executive committee meeting minutes, and records of partnership compensation. Nosal also sent the firm’s managing partner a written memorandum in regards to the firm’s denying his access to the books and records. Nosal contended that the firm violated the duty of good faith, which it owed to him as a partner. He argued that the sole reason for his dismissal was his insistence on viewing the partnership books and records.

The Nosal court recognized that “a fiduciary relationship exists between partners and that each partner is bound to exercise the utmost good faith and honesty in all matters relating to the partnership business.” Furthermore, the court stated that there were sufficient facts to raise an inference that Nosal was expelled because of his persistence in trying to view partnership books and records. Although the partnership agreement required no showing of cause to expel a partner, the court found that “this does not abrogate [the partner’s] high duty to exercise good faith and fair dealing in the execution of such discretion.” Moreover, the court overturned the trial court’s summary judgment ruling against Nosal’s argument for dissolution of the partnership, even though the partnership agreement said that no such dissolution would occur by the expulsion of a partner.

As shown above, courts from various jurisdictions have interpreted the concept of good faith in different ways. In some cases the courts held that the 

104. Id.
105. Id.
106. Id.
107. Id. at 243.
108. Id.
109. Id.
110. Id.
111. Id. at 244-45 (citing Couri v. Couri, 447 N.E.2d 334 (1983); Bakalisu v. Blessler, 115 N.E.2d 323 (1953); Labovitz v. Dolan, 545 N.E.2d 304 (1989)).
112. Id. at 246. One should note that the partnership agreement specifically gave partners the right to view partnership books and records. Id. at 245.
113. Id. at 242.
114. Id. at 246 (citing Labovitz, 545 N.E.2d 304).
115. Id. at 244.
116. Id. The court wrote that a dissolution may be ordered if a single partner is wrongfully excluded from a partnership business. Id. at 246.
partners did not violate the duty of good faith, and in other cases courts held the opposite. The issues of partnership expulsion and good faith become even more complex when they intertwine with the ethical considerations of the Rules of Professional Conduct.  

IV. RULES OF PROFESSIONAL CONDUCT

Another important issue that the court addressed in *Bohatch v. Butler & Binion* was the effect of the Rules of Professional Conduct. The legal profession is essentially regulated by the people that make up the profession. A lawyer's duty to report another lawyer's misconduct is important to the legal profession in accomplishing the task of self-regulation. The rationale behind charging attorneys with a duty to report other lawyers' misconduct is based on three concerns:

The first is shielding clients from potential abuses, such as misrepresentation, misappropriation of funds, or betrayal of confidences.... A second concern involves safeguarding the administration of justice from those who might subvert it through subordination of perjury, misrepresentation, bribery, or the like.

....

[A]... less frequently articulated, rationale for character screening rests on the bar's own interest in maintaining a professional community and public image....

....

.... An overriding objective of any organized profession is to enhance its members' social standing, and the bar is scarcely an exception.

In addition, "[i]f lawyers cannot be held accountable for reporting their

118. 977 S.W.2d 543 (Tex. 1998).
peers’ misconduct, then they are protecting little, and their professional skills and services have little value.”

In Bohatch, although the case was tried in Texas, both Bohatch and the partner who was investigated for overbilling were licensed to practice in the District of Columbia. Thus, the court applied the District of Columbia Code of Professional Responsibility.

Today, the District of Columbia follows the Model Rules of Professional Conduct. Rule 5.1(c) applies to situations where lawyers are held responsible for another lawyer’s misconduct:

A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if: (1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) The lawyer has direct supervisory authority over the other lawyer or is a partner in the law firm in which the other lawyer practices, and knows or reasonably should know of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The reasonable standard as mentioned in the rule involves an objective analysis of the surrounding circumstances such as the size of the firm and how it is organized, the type of interaction between the lawyers, the position of the lawyer within the firm, the type of responsibilities that the lawyer is given, the type of misconduct, and the circumstances surrounding the supervision that was exercised, if any was exercised at all.

Another significant provision articulated in the District of Columbia Rules is Rule 8.3, which states that “[a] lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.” Moreover, a lawyer is guilty of committing such misconduct

123. Richmond, supra note 120, at 176.
125. The District of Columbia Code of Professional Responsibility governed the conduct of lawyers licensed in Washington D.C. through 1990. Id.
126. The Rules of Professional Conduct, which took effect in the District of Columbia in January 1991, are more or less the same as the rules involved in the Bohatch case, which were taken from the District of Columbia Code of Professional Responsibility. Bohatch, 977 S.W.2d at 560 n.2 (Specter, J., dissenting); Finklestein, supra note 102, at 114 n.128.
128. Id. R. 5.1 cmt. 4.
129. Id. R. 8.3(a). The term “substantial” in this provision refers to the seriousness of the
under the Rules of Professional Conduct when he or she "[v]iolate[s] or attempt[s] to violate the Rules of Professional Conduct, knowingly assist[s] or induce[s] another to do so, or do[es] so through acts of another;... [e]ngage[s] in conduct involving dishonesty, fraud, deceit, or misrepresentation."  

The first case in which a lawyer was held responsible for failing to report the misconduct of another lawyer was In re Himmel. In Himmel, attorney James H. Himmel, learned through his client that another lawyer, John R. Casey, converted the client’s settlement check. The court found that Himmel was guilty of professional misconduct for failing to report Casey’s wrongdoing. The Hearing Board recommended that Himmel be privately reprimanded; however, the Illinois Supreme Court imposed a one-year suspension on Himmel. The court also stated that a lawyer can be disciplined for failing to report another lawyer’s misconduct even if dishonesty was not involved and that the attorney’s failure to report such misconduct interfered “with the administration of justice.”  

As the above discussion has shown, the Rules of Professional Conduct create important ethical duties for lawyers when discovering misconduct. To better encourage lawyers to follow such ethical duties, whistleblower protection is the answer.

V. WHISTLEBLOWER PROTECTION

To encourage the reporting of misconduct by employees, Congress devised the whistleblower statute. Federal whistleblower statutes fall into two categories. The first category is comprised of statutes promulgated to encourage whistleblowing through incentives. The second and more
popular category of statutes protects employees against retaliation. Since the 1960s, Congress has enacted many federal statutes that limit the employment at-will doctrine through the use of whistleblower provisions, which protect employees who report illegal conduct from vengeful employers.

State legislatures have also passed statutes to protect employees who seek to report violations of laws or regulations. The majority of the states follow the notion that actual misconduct is not required for an employee to recover under a whistleblower statute. To address the problem of employees making unsubstantiated accusations, several states remove protection from an employee whose claims are poorly investigated or completely unreasonable.

138. See, e.g., infra note 139.
142. See, e.g., Colo. Rev. Stat. § 24-50.5-103(1)(a) (1979) (standing for the proposition that an employee who knowingly or recklessly discloses false information is exempt from whistleblower protection); Ohio Rev. Code Ann. § 4113.52 (Anderson 2001 & Supp. 2001) (requiring a "good faith effort to determine the accuracy of any information . . . reported").
VI. WHISTLEBLOWER PROTECTION FOR LAWYERS REPORTING SUSPECTED MISCONDUCT

The flaw in Bohatch lies in the assumption that lawyers will continue to report other lawyers’ potential wrongdoings even though a reporting lawyer could very well lose his or her job in the process. The court bases this assumption on the duties found in the Rules of Professional Conduct.\(^{143}\)

However, the court failed to realize that there can be instances in which a lawyer’s misconduct is so subtle that only a fellow lawyer working in the same office as the offending lawyer would have the ability to discover such misconduct. These subtle instances could very well cause a lawyer to think twice about reporting such misconduct in light of the possible repercussions if he or she is later found to be wrong. For example, a lawyer could easily conduct unnecessary research on behalf of a client and then bill the client for the additional cost without the client ever knowing, or a lawyer could simply bill for work not done. The danger of lawyer misconduct is especially apparent when dealing with unsophisticated clients who have little knowledge of billable hours and legal work. In these instances of subtle misconduct, nothing short of a person with a legal background working in the same workplace as the deviant lawyer could even hope to have the opportunity to discover such misconduct. Because these subtle instances of misconduct are not easily discoverable, a lawyer has little motivation to report such conduct. Plainly stated, if a lawyer reports such conduct and is found to be wrong, he or she could be expelled from a partnership. On the other hand, if the suspiciously acting lawyer is indeed involved in such subtle misconduct and the other lawyer does not report it, there is a good chance the misconduct will go undiscovered.

The problem with Bohatch is that a lawyer apprised of the case may very well think twice about reporting evidence of a fellow lawyer’s potential misconduct if the misconduct, if true, would not be readily discoverable. Moreover, in making the decision to report such misconduct, a lawyer not only finds himself or herself in the difficult situation of effectively accusing a fellow lawyer, but also has the potential of being terminated through expulsion if the charges are found to be incorrect. And one must remember that, according to the court in Bohatch, a lawyer who reports potential wrongdoing with the utmost good faith in mind, but is later found to be wrong, is not safe from the retaliatory vote of his or her fellow partners.\(^{144}\) Thus, a lawyer in such a position could easily be dissuaded from ever

\(^{143}\) See supra notes 118-36 and accompanying text.

\(^{144}\) See Bohatch v. Butler & Binion, 977 S.W.2d 543 (Tex. 1998).
reporting potential misconduct in the likelihood that the misconduct will never come to light.\footnote{145} In the end, only the client suffers.

A simple and equitable way to resolve the problems that are involved with lawyers reporting misconduct is to provide lawyers with the same whistleblower protections given to other employees. To accomplish the dual goals of encouraging lawyers to report the misconduct of other lawyers while allaying any fears that lawyers may have about being expelled, the court should apply the same standards of protections found in many whistleblower protection provisions. A good example would be the standard of protection adopted by New Hampshire.\footnote{146} New Hampshire provides protection for employees who, in good faith, disclose conduct that they reasonably believe violates any law or regulation.\footnote{147} Why not apply similar protections to lawyers? A standard such as the one found in New Hampshire encourages lawyers to report potential misconduct, yet it provides no protection for those lawyers who seek to make unfounded accusations. In fact, applying such a standard to Bohatch, the court arguably would not have afforded Bohatch any protection. Bohatch provided no real evidence that the accused partner ever engaged in any such conduct.\footnote{148} The only thing the partner was guilty of was keeping sloppy time records.\footnote{149} Thus, Bohatch would have likely not met the “reasonably believed” requirement.

Justice Hecht, who wrote the concurring opinion in Bohatch, stated that a partner at a law firm who reports suspected misconduct but is later found to be incorrect can never be afforded recovery for being expelled.\footnote{150} Under a whistleblower standard like New Hampshire’s that contains a “good faith” and a “reasonable belief” element, incorrect claims that are unsubstantiated would receive no protection; however, one can imagine some instances when a lawyer who, in good faith and with reasonable belief, reports suspected misconduct, which is later found to be untrue. Although Justice Hecht would not provide protection for lawyers in these instances, this rationale is ill-reasoned. A lawyer who, in good faith and with reasonable belief, reports suspected misconduct, whether found true, has the same good intentions, and thus, it makes little sense to provide protection for one but not the other.

\footnote{145} See Thomas A. Kuczajda, Self-Regulation, Socialization, and the Role of Model Rule 5.1, 12 GEO. J. LEGAL ETHICS 119, 119 (1998) (arguing that “as incentives for reporting violations of such rules decrease, incentives to step around the rules rise . . .”).


\footnote{147} § 275-E:2; see also In Appeal of Osram Sylvania, Inc., 706 A.2d 172 (N.H. 1998) (applying New Hampshire’s whistle blower statute).

\footnote{148} Bohatch, 977 S.W.2d at 555.

\footnote{149} Id. (Hecht, J., concurring).

\footnote{150} Id. (Hecht, J., concurring).
In addition, Justice Hecht articulated concerns of hindered partner relationships due to a partnership's inability to expel partners who are mistaken in reporting potential misconduct. The problem with this argument is that it essentially claims that it is more important to maintain the law firm business than to promote ethics. A quarrelsome office environment could negatively impact how efficiently partners work and, thus, have a negative impact on the law firm as a business. This emphasis on business over ethics is precisely why the majority and Justice Hecht had to interpret the fiduciary duty of good faith as not applying to Bohatch's situation. Promoting the financial stability of a law firm as opposed to promoting ethical duties likely falls outside of any concept of good faith.

VII. CONCLUSION

Overall, the court's refusal in Bohatch v. Butler & Binion to create an exception to the at-will nature of partnerships will likely have serious negative implications on a lawyer's willingness to report suspected misconduct, which will only hurt clients. The purpose behind the Rules of Professional Conduct is for lawyers to regulate their own profession. The ruling in Bohatch is counterproductive to this purpose. Furthermore, the Bohatch court essentially held that the at-will nature of partnerships outweighs the fiduciary duties of good faith and fair dealing in expulsion situations.

The legislature and courts of other jurisdictions must heed the implications of Bohatch and make a conscious effort to choose ethics over business. The solution is simple. These jurisdictions need only enact a statute that contains the same whistleblower protections applied to many other professions in state and federal governments. The statutes can be formulated in such a way as to promote the reporting of ethical violations while still ensuring that those lawyers who choose to make unsubstantiated claims will not enjoy any statutory protection, thereby striking a balance between the concepts of good faith, ethical duties, and the at-will nature of a partnership.

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151. Id. at 557-58 (Hecht, J., concurring).
152. See Kirkpatrick, supra note 42, at 1794-95 (arguing that the court's emphasis on an "irreparable schism" of partners in Bohatch shows that the court placed strong importance on law firms thriving as a business).
153. See id. (discussing the concern of the court in Bohatch that such reporting could cause instability in the firm).

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