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How secure are law partners in their positions when other partners want to expel them from the firm? Historically, the courts have seldom had to address that question. Beginning in the mid-1990s, however, the involuntary expulsion of law partners has been the subject of numerous lawsuits. Thus, the time is ripe to take stock of the present state of the law on law partner expulsion.

The law governing law partner expulsion has substantive and procedural components. The substantive component concerns the reasons for which a law firm may expel a partner, such as, for example, the type of conduct by a partner that might justify expulsion. The procedural component concerns the due process requirements, if any, that a firm must observe in expelling a partner, such as notice and a right to be heard.

I. SUBSTANTIVE LAW ON EXPULSION

A. Background Law In The Absence Of Contractual Agreement

When a partnership agreement has no provision governing expulsion, a law firm generally has no common law right to expel a partner.¹ Nor is there any general statutory right

¹ Ehrlich v. Howe, 848 F. Supp. 482, 490 (S.D.N.Y. 1994); Beasley v. Cadwalader, Wickersham & Taft, 1996 WL 449247, at *1 (Fla. Cir. Ct. Mar. 29, 1996) (interpreting New York law); see also Dawson v. White & Case, 672 N.E.2d 589, 591-92 (N.Y. 1996) (without termination provision in partnership agreement, dissolution is the only method of removing a partner).

to expel that will govern in the absence of a provision in the partnership agreement allowing it.² While the Uniform Partnership Act and the Revised Uniform Partnership Act state that express expulsion provisions in partnership agreements shall be enforced,³ neither Act suggests that expulsion is permissible without such an express provision. Absent an expulsion provision in a partnership agreement, the only alternative available to a partnership is to dissolve itself and reform without the target partner.⁴ But, considering that the process of dissolution generally confers substantial statutory rights on the target partner and that the necessary process of an accounting can be costly and contested,⁵ dissolution is regarded as a far less desirable mechanism to eliminate a partner than expulsion.

B. Expulsion Provision In Partnership Agreement

Given the lack of any common law or statutory rules allowing for the expulsion of law partners, any right to expel must be in the partnership agreement. Indeed, a survey of the case law indicates that most partnership agreements do contain expulsion provisions. The key question in construing such a provision is whether it has a just cause requirement. When an agreement provides merely that a law partner may be expelled and is silent on grounds for

² Ehrlich, 848 F. Supp. at 490.

³ See Uniform Partnership Act, Section 31(d); Revised Uniform Partnership Act, Sections 601(4) - (5).

⁴ Dawson, 672 N.E.2d at 592.

⁵ See id. at 592-93 & n.1; Uniform Partnership Act, Section 38(2).

expulsion, courts will not read a just cause requirement into the agreement. Rather, they will enforce the provision as a general authorization for expulsion with or without cause.⁶

C. Duty Of Good Faith

Even when a law partnership agreement contains an expulsion provision, the firm's exercise of its expulsion prerogatives is constrained. Every court to address the issue has recognized that any expulsion pursuant to such a provision must be undertaken in good faith. The obligation of good faith applies even when the expulsion provision allows for expulsion without cause.⁷ This obligation of good faith is rooted in both the fiduciary duty owed by all law partners (and all partners generally) to one another and the contractual relationship created by the partnership agreement. The fiduciary duty required between law partners has been variously characterizes as one of "the utmost good faith,"⁸ one of the "utmost good faith and honesty in all matters relating to the partnership business,"⁹ and an "obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect

⁶ See Heller v. Pillsbury Madison & Sutro, 58 Cal. Rptr. 2d 336, 346 (Ct. App. 1996) (expulsion provision contained no language requiring that expulsions be for cause); Winston & Strawn v. Nosal, 664 N.E.2d 239, 243 (Ill. App. Ct. 1996) (expulsion provision contained no "just cause" requirement); Lawlis v. Kightlinger & Gray, 562 N.E.2d 435, 443 (Ind. Ct. App. 1990) (court will not "engraft[] a 'for cause' requirement upon the agreement" where it is not expressly provided); Holman v. Coie, 522 P.2d 515, 523 (Wash. Ct. App. 1974) (expulsion provision contained no language requiring that expulsions be for cause, and court refused to imply a cause requirement).

⁷ Nosal, 664 N.E.2d at 240 (citing Bohatch v. Butler & Binion, 905 S.W.2d 597, 602 (Tex. App. 1995)).

⁸ Holman, 522 P.2d at 523-24.

⁹ Nosal, 664 N.E.2d at 244-45 (quoting Bakalis v. Bressler, 115 N.E.2d 323, 327 (Ill. 1953)).

to matters pertaining to the enterprise.”¹⁰ Numerous courts addressing the expulsion of a law partner have invoked Justice Cardozo’s famous statement of partners’ high fiduciary duty to one another: “Not honesty alone, but the punctilio of an honor most sensitive, is . . . the standard of behavior.”¹¹ While courts have focused primarily on the fiduciary duty among law partners as the source of the good faith requirement, it bears mentioning that the requirement is further supported by the duty of good faith and fair dealing that inheres in the partnership agreement as a matter of contract law.¹²

Accordingly, courts have concluded that with respect to law partner expulsion “the fiduciary duty is not to expel in bad faith,”¹³ and “if the power to involuntarily expel partners granted by a partnership agreement is exercised in bad faith . . . the partnership agreement is violated”¹⁴

D. What Constitutes Bad Faith?

The issue of what, *in practice*, the duty not to expel a partner in bad faith entails is the core controversy in most law partner expulsion cases, and is the area in which courts have issued divergent and perhaps contradictory decisions. Giving some flesh to the concept of a bad faith expulsion requires examining some individual cases.

¹⁰ Bohatch v. Butler & Binion, 977 S.W.2d 543, 545 (Tex. 1998).

¹¹ Holman, 522 P.2d at 523; Ehrlich, 848 F. Supp. at 491; Beasley v. Cadwalader, Wickersham & Taft, 1996 WL 438777, at *1 (Fla. Cir. Ct. July 23, 1996), rev'd in part on other grounds, 1998 WL 405919 (Fla. Dist. Ct. App. July 22, 1998).

¹² Holman, 522 P.2d at 523-24; Heller, 58 Cal. Rptr. 2d at 347.

¹³ Heller, 58 Cal. Rptr. 2d at 348.

¹⁴ Lawlis, 562 N.E.2d at 440.

1. Economically Self-Interested Expulsions

Every court to consider the issue has agreed that expulsion of a law partner motivated by economically predatory reasons would constitute bad faith in violation of fiduciary duties. Perhaps the most noted case to apply this principle is Beasley v. Cadwalader, Wickersham & Taft¹⁵, in which a partner was expelled as part of a downsizing effort. The effort apparently was precipitated by the firm's falling share value, and it was spearheaded by younger and more productive members of the firm who were dissatisfied with their compensation. This group devised a plan aimed at "identifying less productive partners for elimination from the partnership," calculated to "improve the compensation for the remaining partners."¹⁶ Beasley was among those expelled. The firm's partnership agreement did not have an expulsion provision.

Beasley asserted both breach of contract and breach of fiduciary duty claims. The court determined that, because the partnership agreement had no expulsion provision, and because no common law or statutory right to expel exists, the fact that Beasley was expelled itself constituted a breach of contract.¹⁷

With respect to the breach of fiduciary duty claim, the court concluded in a strongly worded opinion that the firm expelled Beasley in bad faith. Regarding the plan to expel some partners to increase the profit share of others, the court stated:

These facts compel the conclusion that the management committee breached its fiduciary duty to Beasley. This was not a situation where the management committee was merely

¹⁵ 1996 WL 438777 (Fla. Cir. Ct. July 23, 1996).

¹⁶ Id. at *1-*2.

¹⁷ Id. at *3-*6; Beasley, 1996 WL 449247, at *1.

fulfilling its management function. Rather, it was participating in a clandestine plan to wrongfully expel some partners for the financial gain of other partners. Such activity cannot be said to be honorable, much less to comport with "the punctilio of an honor."¹⁸

The Beasley court, though, gave no indication that an expulsion motivated by economic self-interest was the *only* type of law partner expulsion that would constitute bad faith in violation of the fiduciary duty.

2. Only Economically Self-Interested Behavior Constitutes Bad Faith

Other courts have taken the position, however, that an expulsion motivated by an economically self-interested purpose, and *only* an expulsion so motivated, constitutes a bad faith expulsion. This position was first asserted in the Washington case of Holman v. Coie¹⁹, where two brothers were expelled from a law firm in which they were partners. The partnership agreement provided for the expulsion of a partner with or without cause upon a vote of a majority of the firm's executive committee. The expulsion appears to have occurred because one brother, who was a state senator, had angered an important client by remarks he made in a political speech, and the client asked that he not work on its matters in the future. Shortly after this request was made, the executive committee voted to expel the brothers. When the brothers requested an explanation of the grounds for the expulsion, the firm refused to provide one.

In addressing the brothers' claim of breach of fiduciary duty, the court adopted a purely economic approach to fiduciary good faith. The court stated that, "the personal relationships between partners to which the term[] . . . 'good faith' relate[s] are those which have

¹⁸ Id. at *6 (quoting Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928)).

¹⁹ 522 P.2d 515 (Wash. Ct. App. 1974).

a bearing upon the business aspects or property of the partnership and prohibit a partner, to-wit, a fiduciary, from taking any personal advantage touching those subjects."²⁰ Applying this principle, the court concluded that there had been no breach of the fiduciary duty of good faith because "[t]here is no evidence the purpose of the severance was to gain any business or property advantage to the remaining partners."²¹

The Indiana case of Lawlis v. Kightlinger & Gray²² followed Holman in adopting a purely economic approach. There, the firm expelled a partner pursuant to a partnership agreement provision permitting expulsion with or without cause by a vote of the senior partners. The reason for the expulsion was Lawlis' history of alcoholism. While Lawlis had been in and out of treatment for many years with the firm's knowledge and cooperation, he apparently had not been drinking for several years prior to his expulsion. He therefore contended that his expulsion was a breach of fiduciary duty. The court rejected this claim, stating that "[w]here the remaining partners in a firm deem it necessary to expel a partner under a no cause expulsion clause in a partnership agreement freely negotiated and entered into, the expelling partners act in 'good faith' regardless of motivation if that act does not cause a wrongful withholding of money or property legally due the expelled partner at the time he is expelled."²³

²⁰ Id. at 524 (citation omitted).

²¹ Id.

²² 562 N.E.2d 435 (Ind. Ct. App. 1990).

²³ Id. at 442-443. While the expelled partner did maintain that the firm had expelled him with the economically predatory purpose of increasing partner compensation by increasing the firm's "lawyer to partner ratio," the court rejected this claim based largely on the position that the firm's cooperation and assistance in his alcohol treatment program showed that this was not its purpose. Id. at 440-41.

Finally, the California case of Heller v. Pillsbury Madison & Sutro²⁴ also adopted the Holman court's narrow economic conception of fiduciary good faith between law partners. The Heller court upheld the expulsion of a partner based upon allegedly inappropriate personal and professional conduct, failure to bill the number of hours expected, and failure to collect on an inordinately high proportion of his hours billed. The court rejected Heller's claim of breach of fiduciary duty, ruling that such a duty "applies only to situations where one partner could take advantage of his position to reap personal profit or act to the partnership's detriment."²⁵ The court then formulated the governing rule as follows: "the fiduciary duty as to partner expulsions is not to expel in bad faith," where "the phrase 'bad faith' in the context of an expelled partner 'means only that partners cannot expel another partner for self-gain.'"²⁶ Applying this rule, the court found no evidence that the partners who expelled Heller had done so to enrich themselves. While the court acknowledged that Heller's expulsion would increase the remaining partners' profit shares, it characterized this financial incentive as too insubstantial to plausibly motivate an economically self-interested expulsion.²⁷

Thus, Holman, Lawlis, and Heller stand for the "economic advantage only" rule – that is, a law partner expulsion motivated by economic self-interest is the *only* type of expulsion that can constitute bad faith in violation of the fiduciary duty.

²⁴ 58 Cal. Rptr. 2d 336 (Ct. App. 1996).

²⁵ Id. at 348 (citation omitted).

²⁶ Id. (quoting Bohatch, 905 S.W.2d at 602).

²⁷ Id.

3. Preservation Of Internal Firm Cohesion And Confidence

The only state high court to address law partners' fiduciary duty in connection with the expulsion of a partner is Bohatch v. Butler & Binion.²⁸ In Bohatch, the Texas Supreme Court addressed whether a law partnership acted in bad faith when it expelled a partner for reporting to the firm's management committee what she believed in good faith to be the unethical conduct (over-billing) of another partner. The management committee investigated Bohatch's allegations, consulted with the client about the matter, and concluded that the allegations were groundless. After reaching this conclusion, the firm told Bohatch to secure new employment, and when she had done so, it voted to expel her. The partnership agreement provided for expulsion with or without cause.

In reviewing the authority governing law partner expulsion, the Texas Supreme Court, strikingly, did *not* mention the "economic advantage only" rule. Rather, it culled from the cases on law partner expulsion (specifically, Holman, Heller, and Lawlis) two broad principles: (1) "a law firm can expel a partner to protect relationships both within the firm and with clients," and (2) "a partnership can expel a partner without breaching any duty in order to resolve a 'fundamental schism'" within the firm.²⁹ Applying these principles, the court found that the firm had not breached its fiduciary duty of good faith. It reasoned that charges of over-billing, "whether or not true, may have a profound effect on the personal confidence and trust essential

²⁸ 977 S.W.2d 543 (Tex. 1998). The Texas Court of Appeals relied upon Holman and Lawlis to hold that "partners have a general fiduciary duty not to expel other partners from the partnership in bad faith. 'Bad faith' in this context means only that partners cannot expel another partner for self-gain." 905 S.W.2d 597, 602 (Tex. App. 1997). Although the Texas Supreme Court affirmed, as will be discussed, it did not rely upon the "economic advantage only" rationale.

²⁹ Bohatch, 977 S.W.2d at 546.

to the partner relationship. Once such charges are made, partners may find it impossible to continue to work together to their mutual benefit and the benefit of their clients.”³⁰

One further noteworthy aspect of Bohatch is found in its concurring opinion by Justice Hecht, which commented on the “economic advantage only” rule of Holman, Lawlis, and Heller. He correctly observed that, in fact, a law partner expulsion is virtually always motivated by economic advantage, and that such an interest existed in Holman, Lawlis, and Heller, though courts failed to recognize it. Justice Hecht wrote:

Despite statements in these cases that partners cannot expel one of their number for personal profit, in each instance the expelling partners believed that retaining the partner would hurt the firm financially and that the firm and thus the partners themselves stood to benefit from the expulsion. It is therefore far too simplistic to say . . . that partners cannot expel a partner for personal financial benefit; 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. If expulsion of a partner can be in breach of a fiduciary duty, the circumstances must be more precisely defined.³¹

This criticism of Holman, Lawlis, and Heller seems to explain why the Bohatch majority did not adopt the “economic advantage only” rule, but held more narrowly that the specific reason for the expulsion at hand – to maintain cohesion and trust within the firm – did not constitute bad faith in violation of the fiduciary duty.

4. Interference With Partnership Rights As Bad Faith

Other authority has in fact found bad faith in violation of law partners’ fiduciary duty when the motive for a partner’s expulsion obviously was not one of economic advantage.

³⁰ Id. at 546-47.

³¹ Id. at 552.

In the Illinois case of Winston & Strawn v. Nosal,³² the expulsion grew out a partner's threatened lawsuit against the firm. The partner had accused the firm's management committee of mismanagement of the firm, and he repeatedly demanded the firm's financial documents, which he was entitled to review pursuant to the partnership agreement. When he was denied access to the documents, he threatened to sue the firm. Shortly thereafter, the management committee voted to expel him pursuant to the expulsion provision of the partnership agreement, which provided for expulsion with or without cause.

The court ruled that the expulsion was in bad faith. While economic issues were implicated by the dispute over management of the firm, the court did not focus on them in its decision. It reasoned instead:

Nosal was expelled solely because he persisted in invoking rights belonging to him under the partnership agreement Regardless of the discretion conferred upon partners under a partnership agreement, this does not abrogate their high duty to exercise good faith and fair dealing in the execution of such discretion.³³

Nosal, then, stands for the principle that expulsion of a law partner for exercising his or her contractual rights under the partnership agreement can constitute bad faith in violation of the fiduciary duty, regardless of whether the expulsion was motivated by economic self-interest.

II. Procedural Rights

A. No Non-Contractual Procedural Rights

Courts have consistently held that a law partner is entitled to no procedural rights before expulsion that are not expressly provided in the partnership agreement. When an

³² 664 N.E.2d 239 (Ill. App. Ct. 1996).

³³ Id. at 246.

expulsion provision in a law partnership agreement is clear and unambiguous, and contains no procedural restrictions, courts have upheld the so-called “guillotine” approach to expulsion – characterized by expulsion without notice, a right to be heard, and sometimes not even disclosure of the reason for expulsion.³⁴ Courts will not imply due process rights from a law partnership agreement,³⁵ and they will not regard a failure to extend such procedural rights as a breach of the fiduciary duty of good faith among law partners.³⁶ The fact that law partnership agreements are negotiated and agreed to by skilled attorneys militates in favor of denying non-contractual procedural rights in the context of law partner expulsion.³⁷

B. Contractual Procedural Rights

Contractual procedural rights will be “strictly enforced.”³⁸ In the New York case of Ehrlich v. Howe³⁹, a law firm expelled a partner nine months before his equity interest in the firm would have vested. (A three year lag existed between becoming a partner and vesting in the

³⁴ Lawlis, 562 N.E.2d at 442 (clause providing for expulsion by vote of partners without any restrictions showed that partners agreed that “the ‘guillotine method’ of involuntary severance, that is, no notice or hearing, only a severance vote to terminate a partner involuntarily need be taken, would be in the best interests of the partnership”); see also Heller, 58 Cal. Rptr. 2d at 347; Holman, 522 P.2d at 21-23.

³⁵ Holman, 522 P.2d at 521-23 (clause providing for expulsion by vote of partners without any restrictions did not “require notice, reasons, or an opportunity to be heard. . . . [because] [t]o inject those issues would be to rewrite the agreement of the parties . . .”).

³⁶ Heller, 58 Cal. Rptr. 2d at 347 (clause providing for expulsion by vote of partners without any restrictions “authoriz[ed] expulsions through ‘the guillotine approach,’” and thus when a partner is expelled pursuant to the clause “there is no breach of the duty of good faith”).

³⁷ Holman, 522 P.2d at 521.

³⁸ Ehrlich, 848 F. Supp. at 490; Beasley, 1996 WL 449247, at *1.

³⁹ 848 F. Supp. 482 (S.D.N.Y. 1994).

equity interest.) The partner contended that the purpose of the expulsion was to deprive him of his anticipated equity interest. He asserted claims of both breach of the partnership agreement and breach of the fiduciary duties owed to him as a partner.

The court did not focus on Ehrlich's claim that the purpose of the expulsion was to enrich the remaining partners, but rather decided the case based upon a procedural violation in the manner of the expulsion. The partnership agreement provided that an expulsion, which required a vote of all partners other than the one expelled, must be proposed "before the partnership." The court construed this provision to require that the expulsion be proposed at a meeting for which *all* partners, including the one to be expelled, were given notice.⁴⁰ Ehrlich had been expelled by a vote of all other partners at a meeting for which he was not given notice and which he did not attend. The court noted that this right is no mere formality, because under the agreement the partner to be expelled needed to win the support of only one other partner to avoid expulsion. On the basis of that procedural violation, the court found both a breach of contract and a breach of the partners' fiduciary duty of good faith.⁴¹ Ehrlich therefore stands for the proposition that, in the procedural domain, a violation of contractual rights in the course of expelling a partner can constitute a bad faith expulsion, without respect to whether the expulsion was motivated by economic self-interest.

SUMMARY

The law governing a bad faith expulsion of a law partner is unsettled. At the very least, an expulsion motivated by an economically predatory purpose of the expelling partners --

⁴⁰ Id. at 491.

as opposed to a concern for the overall economic health of the firm – is a bad faith expulsion in violation of the fiduciary duty. Some cases have held that this is the only type of expulsion that will violate the fiduciary duty. Other cases have declined to embrace such a narrow economic view of bad faith, and several of these have found bad faith in violation of the fiduciary duty when the expulsion was motivated by the target’s exercise of contractual rights under the partnership agreement, or when the expulsion was carried out in a manner that violated the target’s contractual procedural rights.

⁴¹ Id. at 492.

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WHEN AND HOW CAN A LAW FIRM EXPEL A PARTNER?

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