"Disintegrating Erosion" of Fiduciary Duty in the Dissolution of a Partnership at Will

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In Thomas v. Marvin E. Jewell & Co., 232 Neb. 261, 440 N.W.2d 437 (1989), which is the primary focus of this Article, the authors represented Marvin E. Jewell & Co.
I. INTRODUCTION

Partnership is anchored in the law of contract.1 But while many contracts are arms' length transactions which may arise between complete strangers, the decision to enter into a partnership ordinarily entails a commitment by the prospective partners to work closely together to achieve a common business goal. Since partnership, by definition, requires partners to share resources, talents and effort in a communal pursuit of business profit, the relationship must be founded on a considerable degree of trust between them. To foster this necessary foundation of trust, partnership law recognizes a fiduciary relationship which requires one partner to refrain from the untrammeled quest of his self-interest at the expense of the others.

Perhaps in part because of the necessity for this implicit trust between partners, it is extremely common for a partnership to exist at the will of the partners: that is, without any definite term or undertaking.2 Most partnerships are probably formed to carry on a continuous and ongoing business over an indefinite period, rather than being founded for a specific and limited short-term project. In addition, while it may not be advisable from a legal point of view, many partnerships are still formed and carried on with the observance of no greater formality than a handshake between the principals.3 In some in-

1. Baum v. McBride, 143 Neb. 629, 630, 10 N.W.2d 477, 478 (1943), quoting Waggoner v. First Nat. Bank of Creighton, 43 Neb. 84, 61 N.W. 112 (1894), defines a partnership as "a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions."

3. It is curious, if not surprising, that many lawyers seem to operate their partnerships without the benefit of a written agreement, just like people who are not in the business of drafting contracts for a living. In one such case the Nebraska Supreme Court stated:

The lesson to be learned from all of this is that most disputes and subsequent litigation could be eliminated if parties reduced to writing that to which they agreed. Once again we have the situation of the poor shoemaker's son who has no shoes—only this time it is the shoemakers themselves who are barefoot.

stances, a partnership may conduct a successful and extensive busi-
ness, grossing hundreds of thousands or even millions of dollars
annually, with only a past course of dealing or a core of ill-defined oral
understandings among the partners about how the business will be
conducted, how profits and losses will be allotted, and how disputes
will be resolved. Furthermore, since the partnership may be unwork-
able as a practical matter if the partners are no longer able or willing
to rely on each other, it is not surprising that so many partnership
exist at the will of their members, rather than for a fixed and definite
period.

The shared trust upon which partnerships are founded also ac-
counts for a phenomenon which may become evident upon the break-
up of a partnership: the rancor and ill-feeling engendered are not un-
like the emotions that frequently accompany a divorce. Like success-
ful marriage partners, business partners' day-to-day relationships are
characterized by working together to accomplish common goals, the
give-and-take which goes along with sharing common responsibilities,
problems and rewards, and implicit trust in the integrity and good
faith of other members of the enterprise. When one participant de-
cides to abandon a close-knit partnership—in which the other mem-
bers may have a great personal and financial investment—the quitting
partner may be viewed as betraying the others' trust as well as their
common enterprise. These feelings are especially likely to occur when
the partner who leaves has decided to go into competition with his old
partners. In such cases former business partners, like former mar-
riage partners, have been known to act out of spite, revenge, or for
other emotional reasons to damage their former partners and
partnership.

Thomas v. Marvin E. Jewell & Co. required the Nebraska
Supreme Court to consider many of these factors. In that case the
court reversed lower court findings that a partner had breached his
fiduciary duty and wrongfully dissolved a partnership at will. While
that result may have made it easier for a partner to leave and go into
competition with his former partnership, it ignores and may ulti-

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5. See Beckman v. Farmer, 579 A.2d 618, 645 (D.C. App. 1990)(one law partner alleg-
edly told another he "would see the Farmer [his partner's] children starve," before agreeing to share $6 million fee).
mately undermine the foundation of trust upon which successful partnerships are founded.

II. THOMAS v. MARVIN E. JEWELL & CO.

A. Factual Background and District Court Judgment


Although the Jewell & Co. partners had often discussed entering into a written partnership agreement, one had never been finalized and there was no specified duration or limited undertaking for the firm. It was, therefore, a partnership at will operating in accordance with oral agreements and the course of conduct which had been established over the years.

On December 21, 1982, Dale Thomas left a hand-written note addressed to his partners on Marvin Jewell's desk:

I wanted to talk to you but you were in conference. I have heard that I am to be terminated by Jan. 1, 1983. This has been reported from 3 sources. I suggest that the partnership should be dissolved & that some type of settlement or accounting be accomplished. My attorney . . . will be contacting you. Good luck in future.

Dale Thomas
12/21/82

On the same day, Thomas also told Dennis Baumert that he was leaving the firm. That afternoon Thomas and three Jewell & Co. employees who had left without notice—a receptionist and two other accountants—began business in direct competition with Jewell & Co.

In the fall of 1983, Dale Thomas brought suit against his former partnership for an accounting and the firm counterclaimed, alleging

7. Bill of Exceptions at 4-5, Thomas v. Marvin E. Jewell & Co., 232 Neb. 261, 440 N.W.2d 437 (1989)(No. 376-166). In Nebraska state court the transcribed record of trial testimony is referred to as the bill of exceptions and the pleadings, orders and other court filings are referred to as the transcript.
that Jewell & Co. had been damaged by wrongful dissolution.\textsuperscript{13}

Since the accounting suit was an action in equity it was tried to the court without a jury.\textsuperscript{14} The district judge\textsuperscript{15} made detailed findings of fact and conclusions of law,\textsuperscript{16} finding Thomas had breached his fiduciary duty to the firm and had wrongfully dissolved Jewell & Co. The trial judge, therefore, awarded damages to the partnership.\textsuperscript{17} The evidence on these issues related to division of the 1982 partnership income, Thomas' use of Jewell & Co. client files, and letters which Thomas wrote to former clients of the firm.

1. Allocation of Income

The income of Jewell & Co. was divided by paying each partner a "salary," drawn during the course of the year as cash became available from fee receipts.\textsuperscript{18} In April, final income distributions would be made when the partnership tax return was prepared after deducting the partners' "salaries" which had been drawn during the year from firm profits. The remaining profits were allocated to the partners' re-

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\textsuperscript{13} Jewell & Co. contended that Thomas had wrongfully dissolved the partnership by breaching his fiduciary duties to the firm. Second Amended Answer & Counterclaim at ¶ 13, Thomas v. Marvin E. Jewell & Co., 232 Neb. 261, 440 N.W.2d 437 (1989)(No. 376-166).

\textsuperscript{14} In Nebraska an action for an accounting which involves "the intimate relationships of the parties," such as a suit between partners, is an action in equity. \textit{E.g.}, Philip G. Johnson & Co. v. Salmen, 211 Neb. 123, 124, 317 N.W.2d 900, 902 (1982). \textit{Cf.} Trump, Inc. v. Sapp Bros. Ford Center, 210 Neb. 824, 317 N.W.2d 372 (1982) (for equitable remedy of accounting, a fiduciary or trust relationship or a complicated series of accounts must be shown.)

\textsuperscript{15} Judge Bernard J. McGinn.


\textsuperscript{17} \textit{Id.} at §§ 46-55. The total damages awarded were approximately $220,000 plus interest on the Union Bank debt, $220,000 for wrongfully taking Jewell & Co. files and soliciting accounts, and $44,000 for interfering with collection of accounts.

spective capital accounts in proportion to equity ownership.19

Dale Thomas prepared the 1980 and 1981 partnership tax returns. In those years, partners' "salary" distributions during the year had exceeded profits for the first time; the partners had never discussed how income would be distributed among them if this happened.20 Without consulting the others, Thomas allocated the shortfall—the amount by which "salaries" exceeded profits—according to equity ownership, the same way profits in excess of salaries had been allocated. This had the opposite effect on income because he was allocating a negative number—the shortfall—rather than a positive one—the excess. This gave Thomas himself a greater portion of the profits than would be expected for a relatively new partner with ten percent of firm equity. In 1980 Thomas received approximately the same income as Baumert, who had been a partner for twelve years longer and owned twenty-four percent more capital. The following year Thomas' income was greater than any other partner's, including Jewell's, and almost twice as large as the other ten percent partners.21

In 1980 and 1981, Marvin Jewell signed the tax returns after Thomas had prepared them, and each partner received an IRS K-1 form indicating his share of partnership income.22 The partners besides Thomas testified that they never reviewed the partnership tax returns or partnership accounts in sufficient detail to discover the relative incomes of the partners, however, until sometime in the spring of 1982.23 At a meeting in June, Thomas' partners expressed dissatisfaction with the way income had been distributed and it was agreed a different method of allocating income would be used for 1982. Thomas left the partnership, however, before the issue was discussed.24

The partners other than Thomas testified the firm had a policy of allocating income between partners in accordance with their respective equity ownership and years of partnership.25 After Thomas' departure the remaining partners decided that 1982 income should be allocated in a way which resulted in Thomas receiving less than Jewell and Baumert, but more than the other partners.26

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20. Id. at 208-10, 499, 539-40, 604.
24. Id. at 396-97, 402-04, 501-02, 585-87.
25. Id. at 435, 498-501.
26. Culwell, McChesney and Thomas each owned 10% of the firm equity, but Thomas had been a partner for a longer time and therefore received a larger share. Id. at 267-69; Trial Exhibits 223, 225, Thomas v. Marvin E. Jewell & Co., 232 Neb. 261, 440 N.W.2d 437 (1989)(No. 376-166).
The trial court accepted the testimony that there was a policy of compensating partners on the basis of their respective partnership shares and their years as partners in the firm. The court found that the other partners had never agreed to allocate shortfalls in the manner that Thomas had used in 1980 and 1981, and credited Jewell's testimony that he had not reviewed the partnership tax returns before signing them. If Thomas' method were followed in 1982, the court noted, Thomas' income would exceed any of the other partners', regardless of equity percentage or seniority. The trial judge concluded that since none of the partners had agreed to the method used by Thomas to distribute the shortfalls in 1980 and 1981, the effect of the 1982 shortfall on distribution of income could be decided by a majority of the partners, rather than by a unanimous vote, under section 67-318(h) of the Nebraska Statutes. The district court found that the allocation of 1982 income, which the other partners adopted after Thomas' departure, was in accordance with the firm's compensation policy and it had been adopted by a majority of the partners. Therefore, Thomas was not entitled to an additional share of the partnership's 1982 income.

2. Client Files and Solicitation

In mid-December, 1982, before informing any of the other partners that he planned to dissolve the firm, Thomas and two accountant employees of the partnership made a secret agreement to go into business in competition with Jewell & Co. The three also hired a Jewell & Co. receptionist for their new firm.

Dale Thomas obtained a list of clients from Jewell & Co. records, and he and his new partners went through the list and discussed which clients might retain their new firm. On the weekend before

28. Id. at ¶ 8.
29. Id. at ¶ 8.
30. Id. at ¶ 14. Under Thomas' method his 1982 income would exceed Jewell's by over $30,000, Baumert's by approximately $24,000, and Culwell's and McChesney's by $45,000.
31. NEB. REV. STAT. § 67-318(h)(1990) is Nebraska's enactment of UNIF. PARTNERSHIP ACT § 18(h), 6 U.L.A. 1, 213-14 (1969). The statute provides:
   The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules: . . . (h) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners.
their departure, Thomas and one of the other accountants went to Jewell & Co. after the close of business. They unlocked the office and used a list accessible to only Jewell & Co. partners and employees to select approximately 150 client files, which they put in Thomas' car and hauled to his garage. The information in these files was needed to service the clients and would have been difficult for Jewell & Co. to reconstruct. None of the other partners, and none of the firm's partners were told that these files had been removed. Dale Thomas testified he took the files because another partner, who had previously left the firm, had had difficulty obtaining files from Jewell & Co. for clients who wanted him to do their accounting work. Thomas admitted he knew the files were partnership property and that he was taking them for his own use, not for any use of Jewell & Co.

Thomas and his new partners kept their planned departure secret until December 21, 1982, when Thomas left a note on Marvin Jewell's desk and told Baumert he was leaving. That afternoon Thomas' new partnership began doing business. He and his new partners began by contacting all of the clients whose files they had taken from Jewell & Co. personally by telephone or by letter. These letters stated:

We are pleased to announce that after many years of association with Marvin E. Jewell & Co., we have formed our own accounting firm of Thomas, Watts and Hershberger, Certified Public Accountants. This decision was made after much deliberation after which it was determined that it was in the best interest of everyone to make this change. . . . We have all your files in our possession and look forward to serving you in the future as we have in the past. We will assume that you desire us to continue doing your work and will retain your files unless you inform us differently.

Thomas and his new partners also wrote to Jewell & Co. clients whose files they had not taken, informing them of their new association and expressing interest in performing the clients' accounting work. These clients received forms they could fill out which instructed Jewell & Co. to transfer their files to Thomas' new partnership. The great majority of the clients whose files were taken by Thomas and his partners retained the new accounting firm. Although Thomas was a ten percent partner in Jewell & Co., the former clients of Jewell & Co. who retained the new partnership had provided seventeen and one-

34. Id. at 140-147, 150-51.
35. Id. at 127-29, 140-42.
36. Id. at 143-46.
37. See supra notes 10 & 11 and accompanying text.
half percent of Jewell & Co.'s gross receipts in 1982.\textsuperscript{41}

The district court found that the client lists which had been used and the client files that had been removed from Jewell & Co. were partnership property taken without authority for Thomas' personal use, and that Thomas was required to account to the partnership for any benefits he obtained from using them.\textsuperscript{42} The court noted that the letters written to the clients were solicitations of clients served by Jewell & Co., in conflict with the professional standards governing the accounting profession.\textsuperscript{43} It credited expert testimony that these letters caused damage to Jewell & Co. by suggesting dissension within the firm, and by suggesting that Jewell & Co. had agreed its clients should be served by the new firm without asking the clients' consent.\textsuperscript{44} The trial court found that Thomas' taking and use of partner-

\begin{itemize}
  \item \textsuperscript{41} Bill of Exceptions at 416-17, 428; Trial Exhibit 251, Thomas v. Marvin E. Jewell & Co., 232 Neb. 261, 440 N.W.2d 437 (1989)(No. 376-166).
  \item \textsuperscript{42} Judgment Order at ¶¶ 52 and 54, Thomas v. Marvin E. Jewell & Co., 232 Neb. 261, 440 N.W.2d 437 (1989)(No. 376-166). The court cited NEB. REV. STAT. § 67-321 (1981)(*UNIF. PARTNERSHIP ACT § 21, 6 U.L.A. 1, 258 (1969)) as authority for this holding. That section provides: "(1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners . . . from any use by him of its property."
  
  In finding the client files were partnership property the trial judge relied on Thomas' admission and NEB. REV. STAT. § 1-168 (1983):
  
  All statements, records, schedules, working papers, and memoranda made by a certified public accountant or public accountant incident to or in the course of professional service to clients by such accountant . . . shall be and remain the property of such accountant . . . to anyone other than one or more surviving partners or new partners of such accountant.

  \item \textsuperscript{43} Judgment Order at ¶ 51, Thomas v. Marvin E. Jewell & Co., 232 Neb. 261, 440 N.W.2d 437 (1989)(No. 376-166). Rule 5 of the Revised and Substituted Rules of Professional Conduct of the Nebraska State Board of Public Accountancy provided in subsection 6(d) in part:
  
  The licensee shall not by any direct personal communications solicit an engagement to perform professional services (i) where the engagement would be for a person not already a client of the licensee, unless such person has requested such a communication, and is seeking to secure someone for the performance of professional services and has not yet engaged another to perform them . . . or (iii) by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct.

  Subsection (e) stated: "The sending of announcements of changes in locations or relationships for the practice of public accountancy by a licensee shall be subject to the applicable rules for advertising and solicitation."

  \item \textsuperscript{44} Judgment Order at ¶ 54, Thomas v. Marvin E. Jewell & Co., 232 Neb. 261, 440 N.W.2d 437 (1989)(No. 376-166).

  A letter received by Marvin Jewell from a client who went with Thomas' new firm bolsters this conclusion:
  
  When I opened my business in 1979, I chose your firm without hesitation:
ship property and solicitation of its accounts, along with letters written to asperse Jewell & Co. billing practices, wrongful dissolution of Jewell & Co. The court awarded damages to the partnership based on expert opinion testimony concerning the amount of damage these acts had caused.

3. **Accounts Receivable Letters**

After Thomas and his new partners left, Jewell & Co. billed the clients who had gone with Thomas for work it performed before dissolution. Some of these clients contacted Thomas or his new partners about receiving the Jewell & Co. statements. After fielding some of these inquiries, Thomas and his new partners sent form letters to many of the clients who had formerly been with Jewell & Co., stating:

> It has been brought to our attention that the firm we were previously associated with, Marvin E. Jewell & Co., has been billing various clients in recent weeks for unexplained “Services” rendered. Before our separation from that firm, we had participated in billing all clients for whom work had been completed through December 17, 1982. As we have your files in our possession and cannot understand how any work could have been completed since December 17 by Marvin E. Jewell & Co., we feel that these unexplained “Services” rendered should be explained by them.

> If you have received any of these unexplained billings please return them to Marvin E. Jewell & Co. and request detailed explanations of what work was performed, by whom and when performed. We would be very interested in discussing their explanation with you if one is forthcoming. We also request

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because of the friendship developed in our eight years as neighbors, and also because of the favors you did for me during those eight years. . . . Several weeks ago Nancy advised me that Dale had left your firm and taken our account with him. I was surprised that this had occurred, but was more concerned that this was done without my approval. Obviously, since we are in the middle of a major IRS audit, I have no choice but to stay with Dale, but I would have appreciated the courtesy of an explanation nonetheless.


45. These letters are discussed infra subsection II.A.3.


47. *Id.* at ¶ 55. The expert testified that it was customary within the accounting profession to value accounting practices based on the prior year’s gross receipts. Bill of Exceptions at 555-56, Thomas v. Marvin E. Jewell & Co., 232 Neb. 261, 440 N.W.2d 437 (1989)(No. 376-166). The Jewell & Co. partners had used this method in determining the amount of a new partner's buy-in when he was admitted to the firm. An expert called by Thomas testified that this was the customary measure of the value of goodwill in an accounting firm. *Id.* at 374-75. Based on this testimony the court determined that damages attributable to Thomas' wrongful use of partnership property were the amount of 1982 gross receipts attributable to the clients whose files were wrongfully taken and who later retained Thomas' new firm.
DISSOLUTION OF PARTNERSHIP

that you send us copies of these unexplained billings.\textsuperscript{48} Since many of the records which supported these billings were in the files which Thomas and his partners had taken, it was difficult for Jewell & Co. to provide the requested explanations. Several of the clients who went with Thomas' new firm refused to pay Jewell & Co. for the services on these statements.\textsuperscript{49} At trial no evidence was presented to suggest that Jewell & Co. had in fact acted improperly in billing for these services.

The court found that sending these letters impugned the integrity of Jewell & Co. and along with the other acts discussed above, wrongfully dissolved Jewell & Co.\textsuperscript{50} It found that sending these letters was a breach of Thomas' fiduciary duty to Jewell & Co. which prevented it from collecting its fees from some of the clients who had changed to Thomas' new firm. The court awarded damages to Jewell & Co. based on the amount of the uncollectible fees.\textsuperscript{51}

B. Nebraska Supreme Court Opinion

After motions for new trial and for stay of execution were overruled,\textsuperscript{52} Thomas appealed the district court judgment to the Supreme Court of Nebraska. On appeal the supreme court affirmed the lower court decision in part and reversed in part.\textsuperscript{53} Of greatest significance for the present analysis, the court reversed the trial court's decision that Dale Thomas had wrongfully dissolved Marvin E. Jewell & Co.,

\textsuperscript{50} Judgment Order at ¶ 53, Thomas v. Marvin E. Jewell & Co., 232 Neb. 261, 440 N.W.2d 437 (1989)(No. 376-166). In the opinion of the district judge, Thomas' letters amounted to tortious interference with Jewell & Co.'s contractual relations with these former clients. \textit{Id.} at ¶ 55.
\textsuperscript{51} \textit{Id.} at ¶ 55.
\textsuperscript{52} After the motion for stay of execution was overruled Thomas filed for bankruptcy and the federal bankruptcy court entered a stay which prevented execution on the judgment of the district court.

Since this accounting action between partners was an equitable action, the supreme court's review was \textit{de novo} on the record:

In an appeal of an equity action this court tries the factual questions \textit{de novo} on the record and reaches a conclusion independent of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witness and accepted one version of the facts rather than another.

and found Thomas had not breached his fiduciary duty to the partnership.

1. **Allocation of Income**

The supreme court agreed with the lower court’s finding that none of the other partners had ever agreed upon the method Thomas used in 1980 and 1981 to distribute shortfall—i.e., the allocation of income among partners when profit did not cover the “salaries” partners had drawn during the year.\(^{54}\) The court noted, however, that Marvin Jewell had signed the tax returns Thomas had prepared which showed division of partnership income and that each partner had received an IRS K-1 form.\(^{55}\) These factors may have been significant to the court in reaching its decision, as indicated in its discussion of wrongful dissolution. In that portion of the opinion the supreme court again addressed Thomas’ division of profits in 1980 and 1981, stating, “His method of income allocation was acquiesced to by the partners.”\(^{56}\)

The supreme court also found that the Jewell & Co. partners, except Thomas, were dissatisfied with Thomas’ method of allocating the shortfalls in 1980 and 1981 and had decided to adopt a different method for 1982, but Thomas dissolved the firm before that occurred.\(^{57}\) The appellate court held, however, that the 1982 profit division which the remaining partners adopted after Thomas’ departure was invalid:

Neb. Rev. Stat. § 67-318 (Reissue 1986) provides the partners [sic] rights shall be decided by agreement. Outside of “ordinary matters connected with the partnership business,” all decisions which are contrary to the basic agreement or a course of dealing amounting to an agreement must be unanimous. There was no unanimous agreement to a new formula for income distribution. Thomas is therefore entitled to have his share of the division of profits based on the same formula as used in 1980 and 1981.\(^{58}\)

Although the supreme court expressly recognized that the other partners had not agreed to the method Thomas devised to divide profits in 1980 and again in 1981,\(^{59}\) the court apparently concluded the use

55. Id.
56. Id. at 270-71, 440 N.W.2d at 443.
57. Id. at 264, 268, 440 N.W.2d at 440, 442.
58. Id. at 268, 440 N.W.2d at 442 (citation omitted). Section 67-318(h), the portion of the statute from which the court quoted, is set out in note 31 supra.
59. The partners did not discuss allocation in the event the partnership income was less than the assigned “salaries.” Jewell prepared the firm’s tax returns for the years 1977 and 1978 and divided the income according to the agreed formula. In the years 1979, 1980 and 1981, Thomas prepared the partnership tax returns. In 1980 and 1981, the profit level of Jewell & Co. was not enough to meet the target “salaries” for that year. As noted above, there was no agreement to deal with this contingency. Thomas assigned the shortfall according to capital ownership in the firm. Although no other partner
of his method in those years gave rise to a "course of dealing amounting to an agreement." This agreement arose, according to the supreme court, because the partners acquiesced in the method Thomas used to calculate the division of profit in those years. The court held that under section 67-318(h), a unanimous decision of the partners was required to adopt any different method of distributing income in 1982.

2. Client Files and Letters to Clients

Thomas argued before the supreme court that since Jewell & Co. did not have a written partnership agreement, it could not be wrongfully dissolved. In what it recognized was dictum, the supreme court rejected this contention, noting that every partnership rests on a contract between the partners, whether written or oral, express or implied. "This argument ignores the fact that a partnership agreement need not be written; by its very nature, the existence of a partnership implies an agreement."

The court held, however, that none of Thomas' actions amounted to wrongful dissolution, including his allocation of income, taking of client files, letters to solicit clients, or letters concerning Jewell & Co.'s statements:

Thomas did nothing to harm the partnership while he was a member. His method of income allocation was acquiesced to by the partners. Prior to the dissolution, he had the right to possess the client files. Pursuant to the agreement, Thomas was as free to pursue former clients as was the new version of Jewell & Co. Nothing which occurred after the partnership was dissolved is applicable to the determination of this issue. Therefore, the trial court erred in awarding any damages for wrongful dissolution.

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60. See supra note 31.
61. Thomas' argument was based on Neb. Rev. Stat. § 67-338(2)(Unif. Partnership Act § 38(2), 6 U.L.A. 1, 456-57 (1969)), setting forth the rights of partners upon wrongful dissolution. The prefatory language to the section states: "When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows: ..." From this language, Thomas concluded that any dissolution was not wrongful if not in contravention of a partnership agreement, and since this was a partnership at will his dissolution of it was not violative of any partnership agreement. Neb. Rev. Stat. § 67-331(1)(b) (1990)(Unif. Partnership Act § 31(1)(b), 6 U.L.A. 1, 376 (1969)("Dissolution is caused: (1) Without violation of the agreement between the partners, ... (b) By the express will of any partner when no definite term or particular undertaking is specified. ... ").
63. Id. at 269-70, 440 N.W.2d at 443.
III. ANALYSIS OF THE NEBRASKA SUPREME COURT'S OPINION IN THOMAS v. MARVIN E. JEWELL & CO.

Thomas v. Marvin E. Jewell & Co. called on the Nebraska Supreme Court to balance important and potentially competing interests in commercial relations. The decision preserves a partner's individual freedom of action and discretion in the conduct of partnership affairs and protects a departing partner's employability in the marketplace. The result may also reflect the court's awareness of the difficulty of determining former partners' rights from conflicting and biased testimony when they have not defined those rights in an antebellum written agreement.

The opinion evidences a clear preference for unfettered freedom in partner relations and allowing immediate competition between former partners once the partnership is dissolved. The result may have been reached, however, at the expense of longstanding and desirable fiduciary duties between partners, which have fostered and maintained successful partner relationships. An examination of Thomas in light of recent decisions from other jurisdictions raises the question of whether the Nebraska court gave adequate consideration to enforcing fiduciary duties which make the necessary trust between partners possible.

A. Wrongful Dissolution

Although the Nebraska Supreme Court rejected the district court's finding that Thomas had wrongfully dissolved Jewell & Co., the court's dictum suggests that it has not rejected the possibility that a partnership at will may be wrongfully dissolved. Rather, the stated reason for its holding on this issue was that Thomas had not wronged the partnership prior to dissolution.

The determination of whether the dissolution of a partnership is "wrongful" has important ramifications under the Uniform Partnership Act. Under section 38 of the Act, when the dissolution is caused in contravention of a partnership agreement, the partner who has caused the dissolution wrongfully may be liable to the other partners for damages and cannot receive the value of his share of good will. The Uniform Partnership Act does not define the terms "partnership agreement" or "wrongful dissolution," leaving these terms and the effects of section 38 somewhat ambiguous.

Many courts have interpreted the reference to "partnership agreement" in section 38 to preclude a finding that a partnership at will has been wrongfully dissolved. Under section 31(1)(b) of the Act, "Dis-

64. UNIF. PARTNERSHIP ACT § 38, 6 U.L.A. 1, 456-57 (1969)(NEB. REV. STAT. § 67-338 (1990)).
65. E.g., Johnson v. Kennedy, 350 Mass. 294, 298, 214 N.E.2d 276, 278 (1966); 2 A.
solution is caused: (1) without violation of the agreement between the partners, . . . (b) [b]y the express will of any partner when no definite term or particular undertaking is specified. . . .”  

As the supreme court noted in *Thomas*,  however, a partnership cannot be formed absent an agreement; whether the partnership is at will or for a specific term or undertaking, the partners must agree to work together for a mutual goal. Within the formation of any partnership, including those at will, is the implicit agreement that each partner will refrain from undermining the partnership's best interests. Section 21 of the Uniform Partnership Act also expressly provides that in any partnership, every partner must account to the partnership for any benefit, and hold as trustee for the partnership any profits derived through the partnership without the consent of the other partners.

It is reasonable to construe section 31 of the Act to say that dissolution of a partnership by the will of a partner does not violate any agreement of the partners as to the term or undertaking in the absence of any specific provision to that effect. It seems unduly restrictive of section 38 of the Act, however, to go further and state that dissolution of a partnership at will cannot contravene any other agreement between the partners. Such an interpretation effectively strips innocent partners at will of the remedies provided under section 38 for loss of their share of goodwill and other damages when a wrongfully dissolving partner significantly injures the partnership. Simply stated, a partnership at will, although not formed for an express term or undertaking, relies on a partnership agreement. Therefore, a breach of fiduciary duty or other wrongful act dissolving the partnership should be considered a wrongful dissolution entitling other partners to the remedies of section 38 of the Uniform Partnership Act.

Admittedly, this interpretation has not been widely adopted. Its support lies in logic and the enforcement of the fiduciary duties within all partnerships, including partnerships at will. The contrary argument relies on the distinction between a "legal wrong" and an "equitable wrong." The courts have reasoned that if the partnership is at will, it can be dissolved at any time, in any manner and by any method. Under this narrow interpretation of sections 31 and 38 of the Uniform Partnership Act, the only breach of a partnership agree-
ment which triggers the remedies of section 38(2) is the dissolution of a partnership before its prescribed term has expired or before the undertaking is complete, regardless of the contravention of other provisions of the agreement. It seems ironic that the remedy provided under section 38 forecloses the wrongfully dissolving partner from recovery of his interest in the value of the goodwill of the partnership, but the goodwill of the partnership is more likely to be harmed by a misrepresentation, concealment or misappropriation in violation of fiduciary duty than by the "legal wrong" of dissolving a partnership before the term expires. Accordingly, it is unreasonable to interpret sections 31 and 38 of the Uniform Partnership Act to provide a remedy only for a "legal wrong"—violation of the term of a written agreement—when "equitable wrongs" are equally, if not more, directly related to the statutorily prescribed remedy.

A remedy for wrongful dissolution of a partnership at will was recognized in *Page v. Page*, wherein the California court stated that a partner can wrongfully dissolve a partnership at will by breaching his fiduciary duties to the partnership. In *Page*, a partnership was formed by oral agreement for the operation of a linen supply business. A significant issue in the case was whether the partnership was at will or for a term or particular undertaking. The *Page* court, recognizing that under the Uniform Partnership Act a partnership may be dissolved by the express will of any partner when no definite term or particular undertaking is specified, determined that the linen business was a partnership at will. The court went on to say, however, that if on such dissolution it should be established that the one seeking it is acting in bad faith and is violating his fiduciary duties by attempting to appropriate to his own use the prosperity of the partnership without adequate compensation to his copartners, the dissolution would be wrongful and such partner would be liable... for violation of the implied agreement not to exclude his partners wrongfully from the partnership business opportunity.

Other courts have similarly indicated that one can "wrongfully dissolve" a partnership at will by breaching fiduciary duties owed to his or her copartners. Although the courts may be willing to recognize that a partner can wrongfully dissolve the partnership at will by violating his duties of loyalty, there is an apparent unwillingness to provide the statutory remedies set forth in section 38 of the Uniform Partnership Act for such wrongful dissolution. The unfortunate result is that a partner in a partnership at will may seriously breach his fiduciary duties to the partnership and yet retain the same rights to

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72. Id. at 531, 18 Cal Rptr. at 901.
recovery in an equitable accounting as if the partnership had dissolved by the amicable and mutual consent of the partners. It is likely that the provisions of section 38 which preclude recovery of good will and provide for recovery of damages by a wrongfully dissolving partner were intended to provide consistent enforcement of the fiduciary duties that provide the foundation of the partnership, as well as the legal right to enforce the written provisions of the contract which set forth the term and undertaking of the enterprise. The current interpretation of the Act provides none of this assistance if the partner finds himself in the unfortunate situation of being in a partnership at will.

Perhaps it is encouraging that in *Thomas v. Marvin E. Jewell & Co.* the Nebraska Supreme Court seemed receptive to an argument that a partnership at will could be wrongfully dissolved in contravention of a partnership agreement,74 although it was not necessary to a determination of the case. It is troublesome, however, that the court found no wrongful dissolution in *Thomas* because it found no breach of any fiduciary duty to the partnership.

**B. Fiduciary Duties Between Partners**

The law of partnership is a branch of the law of principal and agent, with each partner acting as an agent for every other partner within the partnership.75 The Nebraska Supreme Court, even prior to the adoption of the Uniform Partnership Act, recognized that: “Partners owe to each other the most perfect good faith, reasonable diligence, and the exercise of their best judgment and discretion.”76 Under these fiduciary principles, profits made by a partner inure to the benefit of the partnership and a partner cannot hold back a proportion of funds or property due his copartner.77

The scope of fiduciary duties within partnerships has been described and exalted as a stringent standard which effectively requires each partner to think first of the interests of the partnership and his copartners before acting for personal gain. Within a partnership, partners are trustees for each other, and therefore have imposed upon themselves the obligation of the utmost good faith and integrity in dealing with one another and with partnership affairs.78 In further describing the relationship of trust between partners, Justice Cardozo's holding in 1928 has evolved into a definition of the partnership relationship which has been uniformly adopted:

Copartners, owe to one another, while the enterprise continues, the duty of

75. Catron v. Shepherd, 8 Neb. 308, 315-16, 1 N.W. 204, 207-08 (1879).
76. *Id.* at 316, 1 N.W. at 208.
77. *Id.*
the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. ... Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.\textsuperscript{79}

Under the guidelines of the common law standards of a fiduciary relationship, there is an implied agreement between partners that they will act in the best interest of the partnership, even though neither a written nor oral partnership agreement to that effect exists.\textsuperscript{80} A partner who agrees to give his personal attention to partnership business cannot engage in any other business which gives him an interest adverse to the firm or prevents him from giving to the partnership all of the attention which would be advantageous to it.\textsuperscript{81} Accordingly, a partner breaches the implicit agreement between himself and his copartners when he competes with the partnership or when his attention to the partnership business is distracted by a conflicting desire for personal gain. These acts which undermine the partnership's best interest are considered patent violations of his fiduciary duties.

The fiduciary limitations placed on partners are not novel or at odds with public policies favoring competition. The essential basis for determining that a partner may not compete with the partnership closely parallels the principles of agency which prohibit an agent from utilizing his principal's proprietary advantages for his own benefit. Information that is considered confidential cannot be utilized by an agent under the guise of maintaining fair competition in the marketplace.\textsuperscript{82} Competition is not the only goal to which commercial relations should aspire; maintaining the relationship of trust and fair dealing requires equal consideration when determining the rights of the principal against the agent.

Similarly, the law of partnership has evolved to require that partners not use any advantage which was derived by virtue of being a partner to directly compete for their own benefit. To permit a contrary result would effectively allow a partner to eviscerate the purpose


\textsuperscript{80} Olivet v. Frischling, 104 Cal. App. 3d 831, 843, 164 Cal. Rptr. 87, 93 (1980).

\textsuperscript{81} Id.

\textsuperscript{82} See Restatement (Second) of Agency §§ 393-396 (1958).
of imposing fiduciary duties upon partners: the assurance of honesty, loyalty, trust and fair dealing.

In *Leff v. Gunter*, the Supreme Court of California rejected an argument that an asserted public policy of facilitating competitive bids on public projects excused withdrawing partners' breaches of fiduciary duty. To the extent that such a public policy was applicable, it was outweighed by the necessity of enforcing the fiduciary relationship between partners. "Defendants point to no authority which suggests that enforcement of the fiduciary obligations between partners is of less than paramount importance. Even in times of fiscal constraint, the dilution of a partner's ethical responsibilities is too high a price to pay for the maximizing of bids on public projects."84

Nearly all cases holding that a partner breached a fiduciary duty have arisen from two similar scenarios of operative facts. In most circumstances, the alleged breach occurred because one partner either remained silent when he had a duty to speak, or obtained partnership property or partnership business opportunities for his own purposes.85

While the partnership relationship lasts, "one partner cannot clandestinely and exclusively profit by the trust relationship."86

C. Duration of the Fiduciary Relationship

Fiduciary duties owed between copartners are stringent during the life of the partnership, but when the relationship ends they cease to exist.87 Therefore, when a partnership is being terminated, issues often arise concerning when the partnership ceases, what the partnership property includes and what duty is owed to the partnership. Accusations of a breach of fiduciary duty to the partnership rarely rise to the level of being litigated absent at least one partner unilaterally declaring that the partnership is "dissolved." Dissolution does not, however, terminate the partnership. "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."88 Following the declared dissolution of the partnership, it must be "wound up" and the assets must be distributed either through the agreement among the partners or if no agreement can be reached (which is often the case where accusations of serious breaches of fiduciary duty have been made), through an action for an

84. Id. at 518, 658 P.2d at 747, 189 Cal. Rptr. at 384.
accounting. 89

The Uniform Partnership Act expressly recognizes that dissolution does not conclude the fiduciary relationship in section 21(1): "Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the... liquidation of the partnership." 90

The decisions of most jurisdictions, 91 both before and since enactment of the act, have consistently recognized that as to partnership affairs, the fiduciary duties of partners last after dissolution until the partnership is finally terminated by winding up. 92

The dismantling of a partnership requires three steps: dissolution, winding up, and termination, with each step changing to some extent the relationship between the partners. 93 While the partnership is being amicably carried on by the partners, each unquestionably owes the utmost duty to the other. When a dissolution is declared, however, the partnership goes through the period of winding up, completing unfinished business while paying close attention to the liquidation and just distribution of the partnership assets.

During the winding up period, the partners are required to adhere to any partnership agreements, including the implied agreement of good faith and fair dealing. 94 The formal and unilateral declaration of dissolution by one partner does not change this equation. 95 The purpose for retaining the fiduciary duty during the winding up period is to secure and hold all partnership business opportunities and properties obtained during the course of the ongoing partnership for the benefit

90. UNIF. PARTNERSHIP ACT § 21(1) 6 U.L.A. 1, 253 (1969)(NEB. REV. STAT. § 67-321(1) (1990)).
91. Some New York decisions hold the fiduciary duty of a partner ceases upon dissolution. E.g., In re Silverberg, 81 A.D.2d 640, 641, 438 N.Y.S.2d 143, 144 (1981). According to Ebker v. Tan Jay Int'l, Ltd., 741 F. Supp. 448, 469 (S.D. N.Y. 1990), under New York law the fiduciary duty between partners terminates upon dissolution, but a requirement of "good faith and full disclosure continues as to dealings affecting the winding up of the partnership. . . ."
of all partners.\textsuperscript{96}

1. \textit{The Fiduciary Duty After Dissolution of Marvin E. Jewell & Co.}

Despite these established statutory and common law rules continuing the fiduciary relationship during winding up, in \textit{Thomas v. Marvin E. Jewell & Co.}, the Nebraska Supreme Court ignored any of Thomas' actions after he dissolved the partnership:

Pursuant to the agreement, Thomas was as free to pursue former clients as was the new version of Jewell & Co. \textit{Nothing which occurred after the partnership was dissolved is applicable to the determination of this issue. Therefore, the trial court erred in awarding any damages for wrongful dissolution.}\textsuperscript{97}

In holding as it did, the court swept aside the trial judge’s findings that Thomas had breached his fiduciary duty by interfering with collection of the partnership accounts receivable, and improperly soliciting partnership accounts for his new firm.

Regardless of whether Thomas wrongfully dissolved the partnership by his actions, the supreme court’s resolution of the issue fails to recognize that dissolution of a partnership does not terminate a partner’s fiduciary duties. By failing to address Thomas’ post-dissolution actions, the court left the impression that partners in a partnership at will may terminate their fiduciary duties by the simple expedient of dissolving the partnership. A bright-line rule which cuts off the fiduciary relationship upon dissolution may be easy to apply, but it can easily result in a partner personally taking advantage of the trust and confidence placed in him by his partners to the disadvantage of the partnership as a whole.

The Supreme Court of California, sitting \textit{en banc}, refused to permit this sort of unjust result in \textit{Leff v. Gunter}.\textsuperscript{98} In that case a partnership or joint venture was formed to prepare and submit a bid for an Internal Revenue Service Center. During preparation of the bid some of the partners indicated they were withdrawing from the project due to other business. After dissolution, the partners who withdrew secretly submitted their own bid on the IRS Center, ultimately obtaining the contract by underbidding their former partners.\textsuperscript{99} A jury trial resulted in a verdict against the withdrawing partners for breach of their fiduciary duties, which was affirmed by the Supreme Court of California.

\textsuperscript{96} The imposition of a constructive trust on behalf of the partnership is expressly provided for under the UNIF. PARTNERSHIP ACT § 21(1), 6 U.L.A. 1, 255 (1969) (NEB. REV. STAT. § 67-321 (1990)), quoted supra note 91 and accompanying text.


\textsuperscript{98} 33 Cal.3d 508, 658 P.2d 740, 189 Cal. Rptr. 377 (1983)\textit{(en banc)}.

\textsuperscript{99} Id. at 513, 658 P.2d at 742-43, 189 Cal. Rptr. at 380.
The withdrawing partners in *Leff v. Gunter* contended that their conduct was not improper because they had withdrawn from the partnership before bidding on the IRS project. The court rejected this argument in strong terms:

The instructions advise the jury that a partner's duty not to compete with his partnership with respect to a partnership opportunity which is actively being pursued by the partnership survives his withdrawal therefrom. Defendants have cited no contrary authority. Nor do defendants assert any persuasive reason in logic or principle which relieves a partner from such continuing duty. There is an obvious and essential unfairness in one partner's attempted exploitation of a partnership opportunity for his own personal benefit and to the resulting detriment of his copartners. It may be assumed, although perhaps not always easily proven, that such competition with one's own partnership is greatly facilitated by access to relevant information available only to partners. Moreover, it is equally obvious that a formal disassociation of oneself from a partnership does not change this situation unless the interested parties specifically agree otherwise. It is no less a violation of the trust imposed between partners to permit the personal exploitation of that partnership information and opportunity to the prejudice of one's former associates by the simple expedient of withdrawing from the partnership.100

The California Supreme Court's solicitous regard for the fiduciary obligations of partners was not shared by the court in *Thomas v. Marvin E. Jewell & Co.* Breach of fiduciary duty was one of Jewell & Co.'s pleaded theories of relief,101 and the district court found several breaches by Thomas of fiduciary duties to the partnership.102 Yet the Nebraska Supreme Court's opinion on de novo review does not cite section 21 of the Uniform Partnership Act103 or make any mention of the concept of a partner's fiduciary duty to the partnership.

D. Partners' Fiduciary Duty of Full Disclosure

Engulfed in the strict moral standards of partners is the concept that partners owe to one another full and frank disclosure of all relevant information: "Each partner has the right to know all that the others know, and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs."104 The silence of one partner regarding his motives and the business opportunities he intends to collect through the vehicle of the partnership is a breach of fiduciary duty. Section 20 of the Uniform Partnership Act has been interpreted to codify this longstanding rule: "Partners shall render on demand true and full information of all

100. Id. at 514, 658 P.2d at 744, 189 Cal. Rptr. at 381.
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things affecting the partnership to any partner. . . ."105 Although the wording of the statute conditions the requirement of disclosure "on demand," pre-existing law generally did not require any express request to trigger the duty of disclosure when a partner was acting in his self-interest.106 Enactment of the statute has not changed this rule.107

The Nebraska Supreme Court adhered to this fiduciary requirement of full disclosure in a case where one partner had secretly taken title in his own name to assets used by the partnership and then claimed he had leased them to the firm without his partner's knowledge.

The explanation made by plaintiff of the purchase of these two items, which have become valuable, and which he attempts to own as his own individual property, would, if accepted, resolve all doubts in plaintiff's favor, except for the fact that he failed to disclose to his partner anything about these two deals. It is barely possible that the partner might have consented to the deal, but now that the evidence has brought out the entire transaction, the defendant objects to it all, as he has a right to do.

The law requires the utmost frankness and absolute honesty in the dealings of one partner with another. As trustees, they cannot derive a secret profit from partnership transactions unknown to the other.108


In Thomas v. Marvin E. Jewell & Co., the court ignored Thomas' failure to adhere to the fiduciary duty of full disclosure and sanctioned Thomas' unilateral adoption of a system of compensation which was in his favor at the expense of his partners. This the court did by finding that the other partners' acquiescence in Thomas' distribution of income amounted to a partnership agreement.

In its de novo review the court was not required to accept the trial judge's finding that the other partners were not aware of Thomas' method of allocating income in 1980 and 1981. Nevertheless, its stated rationale for finding acquiescence is difficult to accept. Under section 18(h) of the Uniform Partnership Act,109 in order for a binding agreement by acquiescence to occur, at least a majority of partners would

108. Bode v. Prettyman, 149 Neb. 179, 188, 30 N.W.2d 627, 631-32, modified, 149 Neb. 469, 31 N.W.2d 429 (1948) (citations omitted). Although the court did not cite the Uniform Partnership Act, it had already been adopted in Nebraska.
have to "agree"; possibly unanimous agreement would be required. The court's finding that the other partners acquiesced in Thomas' method presupposes that they were aware of the method. The only apparent bases recited in the opinion for holding the partners acquiesced, however, were that Jewell signed tax returns in which there were schedules disclosing division of income, and each partner received an IRS K-1 form. Neither of these circumstances gives rise to knowledge sufficient to support the court's finding of acquiescence.

Jewell testified that he made only a cursory review of the returns before signing them, and the district court so found. But even if the supreme court rejected this testimony and the trial judge's finding, Jewell's personal knowledge would not establish any other partner's knowledge of or acquiescence in Thomas' way of dividing profits. An IRS Schedule K-1 (Form 1065 — "Partner's Share of Income, Credits, Deductions, Etc.") would not show division of the partnership's profits or a partner's income relative to other partners. A K-1 schedule reveals only a partner's personal income, without any indication of his partners' incomes. Although section 12 of the Uniform Partnership Act makes notice to one partner attributable to the partnership, this statute does not apply to intrapartnership relationships, but applies only to relations with third parties. Constructive notice to one partner is no substitute for complying with the obligation of full and frank disclosure to all partners.

The unwritten policy to which Jewell & Co. partners (except for Thomas) testified—that partners' relative shares in firm income would vary in proportion to their years as a partner and equity in the partnership—accords with common experience and the custom of partnerships generally. Is it reasonable to expect that partners would acquiesce in a system which gave a middle level partner more income than the senior partners and twice as much income as partners with the same shares of equity?

110. Engel v. Rhen Marshall, Inc., 206 Neb. 265, 269, 292 N.W.2d 307, 310 (1980) ("Knowledge of a condition, it would seem, is necessary before it can be said that one had acquiesced in its continuation.").
115. There was no testimony that attempted to justify Thomas' increased share of the firm's income due to any factor which differentiated him from his partners, such as unusual ability to attract clients or inordinate devotion, industry or talent in comparison to the other Jewell & Co. partners.
116. See note 30 above for the relative income levels for 1982 under Thomas' method, to which the court held the partners acquiesced.
It may be that the Nebraska Supreme Court's unstated reason for its holding on the 1982 partnership income was a feeling that the Jewell & Co. partners, as accountants familiar with financial recordkeeping, should have been more vigilant in overseeing Thomas and they, therefore, should not complain that he took advantage of his position as the partner who calculated the final distribution of partnership income.\(^{117}\) If that was its conclusion, however, it is not expressed, and moreover it is at odds with general partnership law.

Rather, the express finding of the court was that Thomas unilaterally adopted a method giving himself a larger share of income than the other partners, regardless of his relative years of partnership or equity in the firm. The opinion suggests that because one partner signed the tax return showing this division of income, and each partner knew of his own earnings, they all acquiesced in this method of distributing profits. By permitting Thomas to secretly benefit himself at his partners' expense, this holding clearly erodes the well-established fiduciary duty one partner owes others to meticulously disclose all personal dealings affecting the partnership business.

### E. Partnership Interests in Property and Benefits Upon Dissolution

As recent cases illustrate, a partner cannot misappropriate for his own use any benefits derived from "any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property."\(^{118}\) Although the rule sounds simple, complex issues are often presented which determine the partners' respective rights in a dissolving partnership: What duties do individual partners owe with respect to partnership interests, and what type of conduct violates those duties?

Partnership interests sometimes cannot be neatly classified, yet some loosely defined categories can be recognized by analyzing accounting actions throughout the United States. Partnerships have both vested and contingent rights or interests. Vested property rights exist, for example, in the partnership funds,\(^{119}\) partnership equip-

\(^{117}\) Cf. Burke v. Farrell, 656 P.2d 1015 (Utah 1982)(managing partner could not complain of other's breach of fiduciary duty to disclose value of partnership assets where managing partner had kept books and always had full access to them; no contention, however, that other partner had falsely misrepresented or concealed actual value).


\(^{119}\) See e.g., Catron v. Shepherd, 8 Neb. 308, 1 N.W. 204 (1879); Veale v. Rose, 657 S.W.2d 834 (Tex. Ct. App. 1983).
ment, and stock held by the partnership. The partnership also owns a vested interest in its accounts receivable; the services underlying these accounts have already been performed, entitling the partnership to payment.

When vested property rights of the partnership are at issue, one partner cannot unilaterally divest the partnership of its right to use the property and gain profit or benefit from it. For example, secretly leasing partnership equipment, with the leasehold profits being retained by only one partner, is clearly self-dealing and a breach of fiduciary duty. Similarly, a partner who performs services for a client and receives payment which is retained personally and not distributed through the partnership, has breached a duty owed to the partnership by misappropriating its property. A breach also occurs when a partner secretly fails to bill for services rendered to clients either by the partner or by an employee of the partnership. In the case of failing to bill, the partnership has a vested right to receive payment for services it renders, and one partner's determination not to collect for these services deprives the partnership of its property. Finally, a partner may not give himself an undisclosed salary or stock in a partnership asset at the partnership's expense.

Although the courts have not had difficulty deciding that one partner cannot divest the partnership of its vested property rights, a partnership also possesses contingent property rights which cannot so easily be analyzed or assessed in determining the respective rights and liabilities of the partners. However, these contingent interests can be loosely categorized: (1) new business opportunities which the partnership was pursuing prior to the declared dissolution, (2) the right to continue receiving profits on work in progress (unfinished business) during the time period following dissolution and before the projects are complete, and (3) the right to secure future benefits provided by profitable clientele or business arrangements of the partnership. The fiduciary duties of the partners with respect to these categories of property are:

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124. Id. at 838.
126. Although profitable business arrangements may, in a given case, overlap or be identical to good will, an extended analysis of that topic is beyond the scope of this article. For purposes of this analysis, the category of contingent interests in profitable business arrangements is intended to be exclusive of good will and include the type of partnership benefits discussed in such cases as Fulton v. Baxter, 596 P.2d 540 (Okla. 1979)(contingent or at will insurance agency contracts and "equitable expectation" of a lease) and Olivet v. Frischling, 104 Cal. App. 3d 831, 164 Cal. Rptr. 87 (1980)(partnership included members of its sole client's board of directors).
interests may differ, owing to the fact that our society is based on a competitive marketplace and public policy dictates that unreasonable restraints on future competition should not be allowed to harm an individual's pursuit of a livelihood.

1. Business Opportunities

As an example of contingent partnership interests, certain partnerships which bid for business may invest time and resources in an effort to obtain profitable business opportunities. An architectural firm may submit a bid to assist in construction of a building only after obtaining extensive information regarding building sites, engineering data and construction plans for the project. Thereafter, time, money and effort must be invested in the project by the partnership before the bid is ever submitted. In such circumstances, the partnership has an interest in not only the plans it has prepared, but also the new business opportunity.\textsuperscript{127} The partnership effectively owns an interest in the ideas generated and the efforts invested by the partnership in anticipation of bidding for or otherwise attempting to acquire a new business opportunity.\textsuperscript{128} As stated by the Supreme Court of California in \textit{Leff}, a fiduciary duty is appropriate under such circumstances because "although perhaps not always easily proven... competition with one's own partnership is greatly facilitated by access to relevant information available only to partners."\textsuperscript{129}

2. Unfinished Business

A partnership also has an interest in all "unfinished business" of the partnership at the time of dissolution. Each partner of a dissolved partnership has the duty to wind up and complete the business of the dissolved partnership. A duty to perform services as to any unfinished business also rests on the partnership at the time of dissolution and continues thereafter. In other words, all cases, claims or matters which were started during the partnership's existence, but remain unfinished at dissolution belong to the firm, and the profits from them


\textsuperscript{129} Id. at 514, 658 P.2d at 744, 189 Cal. Rptr. at 381. Another method of robbing a partnership of business opportunity is exemplified in the case of \textit{Wright} v. \textit{Ogle}, 283 Or. 505, 584 P.2d 737 (1978), in which the partnership was attempting to secure a land development opportunity but required financing. Two partners were sent to apply for loans. When the loan applications on behalf of the partnership were rejected, the partners immediately reapplied on their own behalf, obtained the financing and went forward without the partnership. The Oregon court held the partners violated their fiduciary responsibilities to the partnership.
must be distributed through the partnership. 130 "Each partner has a fiduciary duty to wind up this unfinished partnership business solely for the benefit of the former partnership." 131 Once the unfinished business is complete, the partnership is "wound up" and can liquidate, but the total value of the partnership assets includes profits from partnership business which has been finished between dissolution and termination.

In Steeby v. Fial, 132 the Colorado Court of Appeals applied the foregoing fiduciary principles to hold a dissolving partner liable for profits from work in progress at dissolution. The Steeby case involved an auditing partnership at will which had retained independent contractors to perform auditing services for the partnership clients. Fial, the dissolving partner, had generated eighty percent of the revenues and was dissatisfied with sharing them equally with Steeby. When Fial decided to leave, he wrote a letter to his copartner which stated that since there was "no common property and no common liabilities," the separation of the partners "should merely involve the assignments of accounts." 133 Thereafter Fial terminated partnership contracts with the independent auditors and clients and entered into new contracts to provide auditing for the partnership's clients through his own business. When Steeby tried to recover his proportionate share of profits following dissolution, Fial argued that because he had dissolved the partnership and had entered into new contracts with the independent auditors and clients to continue the business, he was not utilizing partnership property and therefore Steeby was not entitled to recover.

The Steeby court held that Fial's actions in concealing the termination of the auditors' and clients' contracts and renegotiating these contracts for his own benefit was a breach of his fiduciary duty. The court held:

A partner is not entitled to take any action with respect to unfinished partnership business which leads purely to personal gain. [citation omitted] Further, a partner completing unfinished partnership business cannot cut off the rights of the other partners in the dissolved partnership by the tactic of entering into a "new" contract to complete such business. 134

Accordingly, the court affirmed the holding that Fial be required to hold all profits obtained in completing unfinished business of the partnership in constructive trust, to be distributed under the partnership agreement.

133. Id. at 1083.
134. Id. at 1084 (citation omitted).
With reference to the "unfinished business" of the partnership, solicitation of accounts is not at issue; it is irrelevant how the client's business came to be in the hands of the dissolving partner.\textsuperscript{135} In Rosenfeld, Meyer & Susman v. Cohen,\textsuperscript{136} a partnership of attorneys, RM & S, was dissolved, resulting in two new partnerships, C & R and the successor to RM & S. Prior to the dissolution, RM & S was handling litigation on behalf of its client, Rectifier. Following the dissolution of the partnership, Rectifier discharged RM & S and hired C & R to finish the case. The court held that even though the client had chosen to terminate the partnership and hire the dissolving partners, C & R had a fiduciary duty to complete the unfinished business on behalf of the dissolved partnership. Any profit from this business could not be retained by C & R, but was to be held in constructive trust on behalf of RM & S as a whole.\textsuperscript{137}

Although "unfinished business" is clearly owned by the partnership, a more vague set of principles is applied when a partnership seeks recovery for loss of established partnership clients for whom no work is being performed at the time of dissolution. Where the interest at issue is merely an expectation of performing future work for an established client, although no work is currently in progress, the client's unsolicited choice to hire a former partner does not result in any breach of trust by the partner. If the client is obtained by a former partner through solicitation, however, the courts will look carefully at when and in what manner the partner acted to solicit the client for his own personal gain.\textsuperscript{138} When solicitation of inactive client accounts is at issue, the courts are forced to weigh the competing public policies of stringently enforcing fiduciary duties against retaining a competitive market. Unless the public policy favoring competition is enforced, every partnership could, upon gaining a client, assert its entitlement to that client in perpetuity and refuse to allow its former partners to compete for the client's business. The result would not only affect the client's ability to choose with whom it did business, but would also unduly limit the partner's ability to maintain a livelihood upon dissolution of the partnership.

Irrespective of these concerns, partners do not have carte blanche to at any time and by whatever method obtain partnership clients for their own personal gain. In Sorenson v. Nielsen,\textsuperscript{139} an early case delineating the obligations of partners with respect to partnership cli-


\textsuperscript{136} Id.

\textsuperscript{137} Id.


\textsuperscript{139} 240 N.Y.S. 250 (1930).
ents, the New York Supreme Court held that a partner must not secretly act on his own behalf to solicit a partnership client for his own benefit. In *Sorenson*, the dissolving partner traveled at the partnership's expense to transact business with a client, but during the same meetings secretly solicited the client's business for his own personal benefit. Following this meeting the dissolving partner wrote several letters advising the client that he was going to be dissolving the partnership and was interested in taking the client's business with him. The language of the *Sorenson* opinion indicates that the New York Supreme Court was incensed with the dissolving partner's behavior. In holding that all profits made from the solicited account were held in constructive trust for the partnership, the court focused on the secretive and scheming methods used by the defendant.

It may be a different result would ensue if Nielsen had acted differently, if he had been candid instead of silent, if he had warned plaintiff of his intention to solicit the Wille account for himself and indicated plaintiff was free to do likewise. Common honesty and good faith required as much. He and his partner then would be on an equal footing. If he had done this, he might have been successful, and again *Sorenson* might.140

*Sorenson v. Nielsen* dealt with solicitation of clients prior to dissolution of the partnership. Following dissolution, a partner has greater latitude, but any solicitation must still allow the partnership to fairly compete. If the dissolving partner solicits clients in a manner which excludes or hinders the partnership in competing for the clients, it may be a breach of fiduciary duty.141

*Fulton v. Baxter*142 concerned contingent interests in profitable business relationships. In that case, the partnership sold insurance and had general agency contracts with various companies. One of the partners announced that he wanted to dissolve the partnership and the partners agreed to value the partnership assets and allow one of them to buy the partnership at the stated value. The parties disagreed, however, as to the value of the partnership's good will and group insurance contracts, and no settlement was reached. Thereafter, the dissolving partner, Baxter, entered into new agency contracts with the insurance company under the name of L. W. Baxter & Associates and cancelled contracts held by the partnership. He then changed the yellow page listing from "Fulton, Baxter" to "L. W. Baxter & Associates", had the telephone company change its records to reflect the change in partnership name, and instructed the postal service to not release partnership mail to Fulton. Baxter's new business entity continued to occupy the partnership offices and when the lease expired, renewed the lease in the name of L. W. Baxter &

140. *Id.* at 257.
142. 596 P.2d 540 (Okla. 1979).
The Oklahoma Supreme Court held that although the partnership had been dissolved before Baxter cancelled and renewed the insurance accounts for his own purposes, the partnership had not terminated at that time because the affairs of the partnership had not been wound up. The court held the partnership not only had an equitable expectancy in the renewal of the lease on the property for the partnership's benefit, but also in maintaining the business relationships it had acquired during the course of the partnership. It was irrelevant that the agency contracts were contingent or cancelable at will; they were nevertheless property of the partnership which could not be converted to Baxter's use even after the partnership had dissolved.

The problem with the type of conduct discussed in the foregoing cases is that it excludes the copartner "from any chance to compete, from any chance to enjoy the opportunity for benefit that had come to him alone by virtue of his agency." A dissolving partner has a duty not to exclude his ex-partners from the opportunity to compete on equal footing for business. If he breaches this duty he will be required to hold the profits in trust for the partnership.

In this manner, the public policies of preserving both competition and fiduciary duties between partners remain intact. The balance is clearly upset, however, if a partner can dissolve a partnership with the intent of appropriating the partnership's business for his own use, if he withholds necessary services from the dissolved partnership to preclude the completion of unfinished business, or if the partner completes the unfinished business and retains the proceeds for himself.

To summarize, although partnership accounting actions rarely lend themselves to bright-line rules, some guidelines on what is (or is not) considered a breach of fiduciary duty can be gleaned from the cases. It is clear that interests owned and possessed or in which the partnership had a vested right prior to dissolution are partnership interests which cannot be used by one partner to the exclusion of the partnership. Profits realized following dissolution, on business which had been started by the partnership before dissolution, also belong to the partnership and cannot be retained by the dissolving partner, irrespective of how he obtained the opportunity of finishing the work. The part-

143. Id. at 541-42.
144. Id. at 543.
145. Id.
ner also cannot, on his own account, competently bid on business opportunities in which the partnership obtained an interest before dissolution. But a dissolving partner can, following dissolution of the partnership, compete for the new business of firm clients, provided that his former partners have an equal opportunity to fairly compete for the business.149 If the form of competition for new business of firm clients following dissolution expressly or effectively precludes the other partners from competing for the clients, the dissolving partner has breached his fiduciary duty to the partnership and must account for any profits he obtains through the unfair competition.

3. Taking Marvin E. Jewell & Co. Files

In Thomas v. Marvin E. Jewell & Co., although the Nebraska Supreme Court found Thomas took files from the firm’s file room and put them in his garage for the purpose of establishing his new partnership the following week, it disagreed with the trial court’s holding that this violated any fiduciary duty to Jewell & Co. The supreme court held: “Prior to the dissolution, [Thomas] had the right to possess the client files.”150 This holding is based on an erroneous premise: that even without his partners’ consent a partner is entitled to possess partnership property151 without regard to his purpose.

The Uniform Partnership Act is explicitly contrary; unless some other provision of the statute controls, and in the absence of a contradictory agreement, a partner’s right to possess partnership property is limited:

(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of [the Uniform Partnership Act] and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any

149. It should be noted that a partnership can consent to allow a dissolving partner to submit “one-sided” solicitations of the partnership’s established clients. Obviously, this is not a common circumstance, but the courts often indicate that forms of solicitation which are considered “unfair” constitute a breach of fiduciary duty absent the partnership’s consent. See e.g., Meehan v. Shaughnessy, 404 Mass. 419, 535 N.E.2d 1255 (1989).


151. Partnership property is broadly defined under the Uniform Act:

(1) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property.

(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

UNIF. PARTNERSHIP ACT § 8, 6 U.L.A. 1, 115 (1969)(NEB. REV. STAT. § 67-308 (1990)).
other purpose without the consent of his partners. . . .\textsuperscript{152}

The testimony at trial was undisputed. Thomas clearly removed the files from the Jewell & Co. offices without the consent or agreement of any of his partners for his own and not the partnership's purpose. He did so for the purposes of forming his new partnership, but that is hardly a "partnership purpose" as contemplated by the act. Mr. Thomas admitted on cross-examination that he did not take the files to his garage for any purpose of Jewell & Co.\textsuperscript{153}

A partner's fiduciary duty, codified in section 21(1) of the Uniform Partnership Act, requires that the partner account to his partners for profits or benefits derived from using partnership property without their consent, and the law will impose a constructive trust upon such profits for the benefit of the partnership.\textsuperscript{154} Therefore, Jewell & Co. argued it was entitled to profits or benefits Thomas obtained by using

\begin{enumerate}
\item[\textsuperscript{152}] See supra note 90 and accompanying text.
\item[\textsuperscript{154}] UNIF. PARTNERSHIP ACT § 21(1), 6 U.L.A. 1, 258 (1969)(NEB. REV. STAT. § 67-321(1) (1990)). 
\end{enumerate}
the partnership's client files. The partnership had a difficult problem of proving the amount of profit or benefit which Thomas derived from his use of the files, although the lower court found it had met its burden of proof on this issue. Nevertheless, the supreme court could have held there was a failure of proof on the elements of causation or quantification of the benefits which Thomas obtained by using the files, without doing violence to the fiduciary obligation owed by one partner to the others.

But the opinion does not address the issue of whether Thomas derived any profit or benefit from his use of the files. The court instead held that regardless of Thomas' purpose he had the right to possess the client files before the partnership was dissolved, presumably without abusing any fiduciary duty he had to the partnership. This is an unfortunate precedent, further weakening fiduciary duties between partners. How can one suggest that a partner breaches no duty to the partnership when he secretly takes its property to promote his own advantage in competing against it?

   a. Solicitation Letters

   The letters written by Thomas to clients he had served at Jewell & Co. presented the most difficult question in the case. The court wished to avoid hamstringing Thomas in legitimate competition with his former firm, but in reaching this result it seems not to have considered whether Thomas' conduct was in accordance with his duty to the partnership during the winding up process.

   In the letters Thomas and his new partners wrote to clients which had until then been served by Jewell & Co., pains were taken to inform them the new firm had and would retain the clients' files in its possession, and would "continue" doing the clients' work unless the client instructed otherwise. The letter also informed these clients that "after much deliberation ... it was determined that it was in the best interest of everyone to make this change." In the opinion of an expert witness called by Jewell & Co., these statements and Thomas'

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155. See the discussion below at notes 173-174, 178-180 and accompanying text.
156. The opinion suggests that this resulted because there was no agreement prohibiting competition after a partner left the firm. Thomas v. Marvin E. Jewell & Co., 232 Neb. 261, 270, 440 N.W.2d 437, 443 (1989). Even when there have been such agreements between partners, however, the Nebraska court has been loath to enforce them. See e.g., Philip G. Johnson & Co. v. Salmen, 211 Neb. 123, 129-31, 317 N.W.2d 900, 904-05 (1982).
possession of the clients' files insinuated that all the Jewell & Co. partners had agreed the new partnership could "take" these clients.\textsuperscript{159} The trial judge agreed that the correspondence was misleading in this respect, and found the letters amounted to unethical solicitation of the clients according to applicable Board of Accountancy rules.\textsuperscript{160}

It seems clear that Thomas gained a significant advantage over his partners by secretly taking the partnership files from the firm's office. This allowed him to represent to clients immediately upon dissolution that their retention of the new accounting firm was a \textit{fait accompli}. The letters to these clients and others did more than simply announce Thomas and his new partners had changed affiliations; they told persons who were, up until that time, being served by Jewell & Co. that they would now be served by Thomas' new firm, in apparent violation of the Board of Accountancy rules on solicitation. The supreme court's opinion ignored this aspect of the case.

In view of Thomas' conduct, which had its genesis while he was a partner and continued during the winding up period, the supreme court opinion begged the question by stating, "Thomas was as free to pursue former clients as was the new version of Jewell & Co."\textsuperscript{161} This holding assumes that after Thomas dissolved the firm any relationship between the old version of Jewell & Co. and its "former" clients ended. As Thomas' letter to the clients whose files he had taken recognizes, however, an accountant's clients frequently require services on a continuing basis.\textsuperscript{162} The court's determination that a departing partner may engage in unchecked competition with his former firm during the winding up period is questionable according to a recent decision of the high court of Massachusetts.

\textit{Meehan v. Shaughnessy},\textsuperscript{163} a case with facts analogous to \textit{Thomas v. Marvin E. Jewell & Co.}, is instructive because of its careful application of the principles governing fiduciary duties with respect to unfinished business and solicitation of clients. In \textit{Meehan}, Meehan and

\textsuperscript{162} "We will assume that you desire us to continue doing your work and will retain your files unless you inform us differently." Trial Exhibit 237, Thomas v. Marvin E. Jewell & Co., 232 Neb. 261, 440 N.W.2d 437 (1989)(No. 376-166). Compare a letter written to Jewell & Co. by a disgruntled former client whose file Thomas had taken: "Obviously, since we are in the middle of a major IRS audit, I have no choice but to stay with Dale, but I would have appreciated the courtesy of an explanation nonetheless." Trial Exhibit 241, Thomas v. Marvin E. Jewell & Co., 232 Neb. 261, 440 N.W.2d 437 (1989)(No. 376-166). See supra note 44 and accompanying text.
Boyle were partners in the Parker, Coulter law firm under a formal partnership agreement. Following dissolution of the partnership, Parker, Coulter alleged that Meehan and Boyle had improperly withdrawn cases and clients from the firm and induced employees to join the new firm of Meehan, Boyle & Cohen, P.C. (Meehan Boyle).

Prior to dissolution, Meehan and Boyle decided to establish a new firm and secretly spoke with other partners and associates to solicit their interest in joining the new firm. Under the partnership agreement, leaving partners could remove cases and clients from the firm if they compensated the partnership "for the services to and expenditures for the client."164 Once the partner had removed the case and paid the partnership its "fair charge," the partner was entitled to retain all future fees in the case.165 While these terms of the partnership agreement were intended to avoid the long process of an accounting every time a partner left, the manner in which Meehan and Boyle conducted themselves nonetheless created the necessity of an accounting.

Upon deciding to dissolve the firm, and although the partnership agreement required the dissolving partners to give three months' notice, the partners and associates planning to leave did not advise Parker, Coulter they would be leaving.166 Instead they began making lists of cases they believed they were entitled to take with them under the terms of the partnership agreement. The Meehan Boyle partnership, while practicing law within the Parker, Coulter partnership, obtained office space, executed a lease, and retained an attorney to advise them on how to form the new firm.

Within Parker, Coulter, Boyle was in charge of reassigning cases to balance the workload among attorneys. Although requests for transfer of cases were made following the dissolution decision, Boyle assigned all of the cases to himself and another attorney who was planning on leaving. One month before the planned departure date, Boyle prepared letters to send to the clients he planned to take, notifying them of his intent to separate from Parker, Coulter, and including a form which would authorize the Meehan Boyle partnership to remove their cases from Parker, Coulter. The letters were typed by an outside agency on Parker, Coulter letterhead.

Rumors began to circulate that Meehan and Boyle were planning on leaving the firm, but when specifically asked, Meehan denied that the rumors were true. Ultimately, Boyle was asked. His response was evasive enough to be considered an affirmation of the rumors by the partnership. Because the atmosphere of Parker, Coulter became

165. Id.
166. Id. at 426, 535 N.E.2d at 1258.
"tense, emotional and unpleasant, if not adversarial," Meehan and Boyle decided to announce the dissolution early.

The Parker, Coulter partnership set up a separation committee. Both firms were intending to advise the clients of their continued interest in the clients’ business. Parker, Coulter then provided Boyle with a list of cases and asked him to identify which cases he intended to take with him. Prior to receiving that list, Boyle had begun his telephone calls to referring attorneys and on December 3 mailed the letters and authorization forms to the clients which had been secretly listed. The partnership did not become aware of the extent of these communications until December 12 or 13 and the requested list of cases was not provided by Boyle until December 17.

The Meehan court held that under the partnership agreement, the attorneys leaving the firm were entitled to make the list of cases and take those cases with them. In that respect, Meehan and Boyle had not breached any fiduciary duty. The court found, however, that a fiduciary duty had been significantly breached by the manner in which Meehan and Boyle ultimately secured the client accounts. The court stated, ‘Partners . . . ‘may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty.’ . . . Meehan and Boyle owed their copartners at Parker, Coulter a duty of the utmost good faith and loyalty, and were obliged to consider their copartners’ welfare, and not merely their own.’”

The Supreme Judicial Court of Massachusetts held the departing partners had breached their fiduciary duties by unfairly competing with the old firm for clients and cases. Their preparation for obtaining the clients’ consent, their secrecy concerning clients which they intended to take, and the substance and method of the communications with the clients, provided them with an unfair advantage over their former partners in breach of their fiduciary duties.

The court specifically focused on the letters to the clients, holding that the contents of the letters were unfair to Parker, Coulter. The letters did not “clearly present to the clients the choice they had be-

167. Id. at 426, 535 N.E.2d at 1259.
168. Id. at 434, 535 N.E.2d at 1263 (citation omitted).
169. Id. at 436-38, 535 N.E.2d at 1264-65. The court noted that under Massachusetts’s adoption of section 30 of the Uniform Partnership Act: “Each partner has a fiduciary duty to wind up . . . unfinished partnership business solely for the benefit of the partnership.” Id. at 430, 535 N.E.2d at 1261. This duty was modified in this case, however, by a written partnership agreement. The court interpreted the agreement to permit a departing partner to remove any case from the firm upon payment of a reasonable charge to the partnership for work prior to dissolution. The court held these provisions were subject, however, to the requirement that the departing partners comply with their fiduciary obligations to the firm. Id. at 432, 535 N.E.2d at 1262. This they had failed to do.
170. Id. at 436, 535 N.E.2d at 1264.
between remaining at Parker, Coulter or moving to the new firm. By sending this one-sided announcement of departure on Parker, Coulter letterhead, Meehan and Boyle had excluded their former partners from effectively presenting themselves as an alternative to Meehan Boyle.\textsuperscript{171}

The opinion summarized the effect of Meehan Boyle’s breaches as follows:

Meehan and Boyle could have foreseen that the news of their departure would cause a certain amount of confusion and disruption among their partners. The speed and preemptive character of their campaign to acquire clients’ consent took advantage of their partners’ confusion. By engaging in these preemptive tactics, Meehan and Boyle violated the duty of utmost good faith and loyalty which they owed their partners. Therefore, we conclude that the judge erred in deciding that Boyle and Meehan acted properly in acquiring consent to remove cases to [their new firm].\textsuperscript{172}

Having decided that a breach of fiduciary duty had occurred, the Meehan court was in a position to determine the amount of loss to the Parker, Coulter partnership. The court held that there must be a causal connection between the claimed losses and the breach of fiduciary duty by the Meehan Boyle attorneys. It also recognized that the attorneys breaching the duty had access to the clients which had been lost by Parker, Coulter and were, therefore, in a better position to present evidence on whether the breach of fiduciary duty had caused a client’s transfer.\textsuperscript{173} Simply stated, the Meehan court held that a party acting in bad faith to solicit clients from the partnership has the burden of proving that the client would have consented to the removal even in the absence of any breach of duty. This shift of burden of proof was justified on the grounds that it would encourage loyalty within the partnership and the seasonable disclosure of the plan to dissolve a partnership and remove cases and clients from it.\textsuperscript{174} Such a disclosure would be desirable because it would allow the partnership and the departing partner an equal opportunity to present to the client the options of who might continue serving the client.

By focusing on the “preemptive” efforts of the dissolving partners, Meehan draws the line between permitting a partner to compete fairly with his partnership for new business after dissolution, and taking unfair advantage of his fiduciary position to exclude the partnership from receiving its fair share of the business which the clients represented. The court stated that section 21 of the Uniform Partnership

\textsuperscript{171} \textit{Id.} at 437, 535 N.E.2d at 1265. The Massachusetts court held Parker, Coulter could not prevail on another claim of breaching fiduciary duty because Meehan and Boyle had induced employees of Parker, Coulter partnership to work in the new firm. The court stated that Parker, Coulter could identify no specific loss resulting from the breach (e.g., cost of retraining new employees).

\textsuperscript{172} \textit{Id.} at 437-38, 535 N.E.2d at 1265.

\textsuperscript{173} \textit{Id.} at 441, 535 N.E.2d at 1266.

\textsuperscript{174} \textit{Id.} at 441, 535 N.E.2d at 1267.
Act required imposition of a constructive trust on profits from clients who had been improperly taken from the partnership.

We have reasoned that this rule requiring the imposition of a constructive trust "does not rest [merely] upon the narrow ground of injury or damage to the [partnership] resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purposes of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation." Under this rule, "the innocent partner is to be put as nearly as possible in the same position which he would have occupied if there had been no wrongdoing." We do not, however, seek to "deprive the wrong-doing partner of any participation in the fruits of his wrongful actions." We merely require that the fruits be shared among the parties as if they had been "earned by the partnership in the usual course of its business."175

*Meehan* preserved a reasonable balance between competing public policies which are at stake in such controversies while still obtaining an equitable and just result.176

In *Thomas v. Marvin E. Jewell & Co.*, the trial judge concluded that the large number of Jewell & Co. clients who selected Thomas' new firm did so because of preemptive tactics which induced them to change—using their files taken from Jewell & Co. and unfairly soliciting their business immediately following dissolution. Using these methods to obtain clients and exclude the other Jewell & Co. partners from the opportunity to compete effectively to retain them was a breach of Thomas' fiduciary duties to the partnership. Under the analysis in *Meehan v. Shaughnessy*177 the partnership was entitled to receive its share of the benefits which Thomas improperly appropriated. The district court adopted expert testimony which set the benefit lost to the partnership from Thomas' appropriation as equal to the value of those accounts, an approach also approved by the court in *Steeby v. Fial*.178

Although the trial court was satisfied that Thomas' wrongful conduct resulted in Thomas obtaining these accounts, the supreme court did not reach this question. One reason the court may have avoided looking at Thomas' solicitation of clients was a concern about the question of causation. The court may have been bothered by the possibility that clients who ended up with Thomas' firm would have chosen him even had he not taken their files or preempted Jewell & Co. from

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175. *Id.* at 446, 535 N.E.2d at 1270 (citations omitted) (emphasis by the court).
176. The actions of the dissolving partners in *Meehan v. Shaughnessy* occurred before they left the partnership, but the teachings of the case are applicable during the liquidation period as well since fiduciary duties of a partner survive until the partnership's affairs are wound up. UNIF. PARTNERSHIP ACT § 21(1), 6 U.L.A. 1, 258 (1969).
178. 765 P.2d 1081, 1084 (Colo. Ct. App. 1988): "The trial court, sitting in equity, concluded the only fair way to determine Steeby's lost profits was to assign a value to the auditors and existing partnership clients as partnership assets."
competing. It would be exceedingly difficult for Jewell & Co. to prove that clients who changed to Thomas would not have done so in the absence of the methods he used, since those clients had presumably developed allegiance to Thomas' new firm by the time of trial. This factor led the Supreme Judicial Court of Massachusetts to conclude in *Meehan* that where there had been a breach of fiduciary duty, the burden should fall to the dissolving partner to prove that clients' exodus from his former partnership was *not* caused by his breach.179 Precedent for shifting the burden of proof may be found in cases holding that a fiduciary who has engaged in self-dealing or obtained a corporate opportunity, and who has easier access to information concerning the consequences of the breach, must prove his actions did not harm the corporation or partnership.180

Shifting the burden of proof in such an action makes sense because the breaching party's actions have deprived the partnership of access to the source of proof; at the very least clients are reluctant to become involved in what they view as a squabble between their former and present business associates. Under these circumstances it is fair to expect the party who caused the situation by his breach of fiduciary duty and who has the best current access to the client to bear the burden of proving the client's action did not result from the breach.

The same factors which the court considered in *Meehan* concerning a partner's unfair solicitation of partnership accounts were presented to the Nebraska court in *Thomas*. Although this type of dispute presents difficult questions, and reasonable men might differ concerning the relative importance of competing policies in such a situation, *Thomas*' solicitation of accounts should at least have been discussed.

b. The Accounts as "Unfinished Business"

The clients whose files Thomas took from Jewell & Co. were being actively served by the partnership on an ongoing basis, bringing into play the rules pertaining to unfinished business and partnership opportunities. Under section 21(1) of the Uniform Partnership Act, profits or benefits which are derived from the unfinished business of a partnership during the winding up period must be held in trust for the partnership, without regard to how a partner came to complete the unfinished business and receive the associated profits or benefits.181

The business of an accounting firm may not fit as neatly into the category of "unfinished business" as a contingent fee case in a law

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179. *Id.* at 441, 535 N.E.2d at 1267.
Accounting services consist of many smaller, more discrete tasks rather than a large piece of litigation which spans many months or years and has a definite beginning and end. Nevertheless, the court in Steeby v. Fial had no trouble in concluding that work the auditing firm had been doing for its clients on a continuing basis was unfinished business which Fial was required to account for and to hold the proceeds in trust for the partnership.

The same analysis should hold for the clients that Thomas obtained from Jewell & Co. The letters which were sent by Thomas and his new partners recognized that they had been serving the same clients under their association with Jewell & Co. up to the time Thomas dissolved the partnership, and that the work Thomas' new firm did during the winding up period may have continued these same services. Thomas' fiduciary duty to Jewell & Co. subsequent to dissolution required him to wind up any unfinished business represented by these accounts for the exclusive benefit of his former partnership and to hold any profits or benefit from these accounts as a trustee in accordance with section 21(1) of the Uniform Partnership Act.

c. Summary—The Problem of Contingent Partnership Interests in its Accounts

An interest in a contingent business opportunity may be speculative in some cases. Moreover, allowing partnerships to have rights in tenuous interests may inhibit legitimate competition. Yet the difficulty of fashioning workable guidelines should not be a reason to permit an erosion of fiduciary duty or a wrong without redress in a case where real and legitimate partnership opportunities have been misappropriated by one partner for his own benefit.

Here, the clients Thomas acquired from Jewell & Co. had provided a significant portion of the firm's revenues in 1981. Even if some of those clients were inactive at the moment Thomas dissolved the firm, the partnership had reasonable expectations that these same clients would require accounting services that would provide partnership revenues in the foreseeable future. Under these circumstances, Jewell & Co. should have been able to recover any benefit or profit Thomas received as a result of his breach of fiduciary duty in intercepting business opportunities which may have been represented by those clients.

184. Trial Exhibit 237, Thomas v. Marvin E. Jewell & Co., 232 Neb. 261, 440 N.W.2d 437 (1989)(No. 376-166), stated: "We... look forward to serving you in the future as we have in the past. We will assume that you desire us to continue doing your work... ."
185. At trial Jewell & Co. presented expert testimony concerning the valuation of the
The supreme court erroneously concluded that Jewell & Co. could have no compensable interest in the business of the clients that were taken by Thomas, and that Thomas had no duty to Jewell & Co. after he announced the dissolution. Therefore, the court did not analyze the nature of the business represented by the clients Thomas acquired, nor Thomas’ fiduciary duty to his former partnership.

5. Letters Concerning Marvin E. Jewell & Co. Accounts Receivable

During the winding up period Jewell & Co. billed some of its former clients who had switched to Thomas' new firm. These statements were to obtain payment for services rendered by the partnership prior to dissolution. Letters written by Thomas and his partners on the letterhead of his new firm insinuated these statements did not represent legitimate charges and suggested that the charges could not be explained by Jewell & Co. Several of the billed clients refused to pay the partnership for these services, even though they paid Thomas' new firm for accounting services during the winding up period. At trial there was no evidence to suggest that the Jewell & Co. statements were improper.

The collection of outstanding accounts receivable is a classic example of unfinished firm business to be conducted during the winding up period. Dissolving partners have a fiduciary duty to assist in the completion of this task for the exclusive benefit of the partnership; in Thomas, the district court concluded that Thomas' letters breached this duty and he was, therefore, required to account to the firm.186

The supreme court did not directly address this issue except in its general holding that any of Thomas' conduct after he dissolved the firm was not relevant to the question of wrongful dissolution. There may be a legitimate issue about whether the client accounts taken by Thomas were unfinished business. However, there can be no doubt regarding the accounts receivable of the firm or Thomas' fiduciary duty to assist, not interfere, with the collection of these accounts during the winding up period. The court did not express doubt about the measure of damages awarded or whether there was sufficient evidence

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186. Judgment Order at ¶55, Thomas v. Marvin E. Jewell & Co., 232 Neb. 261, 440 N.W.2d 437 (1989)(No. 376-166). The trial court judge concluded that these letters tortiously interfered with Jewell & Co.'s contractual relations and were an element of Thomas' wrongful dissolution of the firm. He found that Thomas' letters had damaged the firm in the amount of the fees it had been unable to collect, and awarded damages in this sum.
of causation, either of which would have presented a more reasonable basis upon which to deny a recovery to the partnership. As it applies to Thomas' interference with collection of these accounts during the winding up of Jewell & Co., however, the court's determination to disregard post-dissolution conduct is extremely difficult to understand.

IV. CONCLUSION

The court's holdings that Thomas had the right to possess the partnership files, regardless of his purpose or his partners' consent, and that his actions after dissolution were irrelevant to wrongful dissolution led it to find that "Thomas did nothing to harm the partnership while he was a member." It thus excused Thomas' actions before dissolution and made no effort to determine whether conduct after dissolution violated any fiduciary duty to the partnership. This willingness to "look the other way" has eroded the fiduciary duty between partners in Nebraska.

The Nebraska Supreme Court's attention appears to have been focused on the issue of wrongful dissolution, which was the primary basis for the lower court's decision. After determining there was no wrongful dissolution, the court may have believed there was no need to examine Thomas' conduct any further.

Nevertheless, the issue of violations of fiduciary duties before and after partnership dissolution and the operation of section 21 of the Uniform Partnership Act were presented in the pleadings, briefs, and the lower court's Judgment Order. It does not seem possible that the supreme court's failure to discuss fiduciary duty or cite section 67-321(1) of the Nebraska Statutes in its opinion could have been the result of mere oversight. The supreme court's findings that Thomas' undisclosed method of compensation and his possession of partnership files did no wrong to the partnership, and its implied holding that Thomas was free of any obligation to the partnership after dissolution, seem to indicate a willingness to overlook breaches of fiduciary duty between partners in deference to a policy of unrestrained competition. Such an inclination, if it is consistent, could have a cost in the conduct of partnership relations. It is to be hoped that in the future the supreme court will adhere more closely to Chief Judge Cardozo's famous prescription for the maintenance of trust between partners by protecting the fiduciary relationship between them:

Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. . . . Only thus has the level of conduct of fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.187