

# IN THE SUPREME COURT OF TEXAS

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No. 95-0934  
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COLETTE BOHATCH, PETITIONER

v.

BUTLER & BINION, ET AL., RESPONDENTS

=====  
ON APPLICATION FOR WRIT OF ERROR TO THE  
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS  
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Argued on November 20, 1996  
JUSTICE SPECTOR, joined by CHIEF JUSTICE PHILLIPS, dissenting.

[W]hat's the use you learning to do right when it's troublesome to do right and ain't  
no trouble to do wrong, and the wages is just the same?

— *The Adventures of Huckleberry Finn*

The issue in this appeal is whether law partners violate a fiduciary duty by retaliating against one partner for questioning the billing practices of another partner. I would hold that partners violate their fiduciary duty to one another by punishing compliance with the Disciplinary Rules of Professional Conduct. Accordingly, I dissent.

## I.

This dispute arose after Colette Bohatch, a partner in Butler & Binion's Washington, D.C. office, expressed concerns to the firm's managing partner, Louis Paine, about possible overbilling by another partner, John McDonald. The firm had hired Bohatch to join McDonald as one of three attorneys in the firm's Washington office, which was devoted almost exclusively to Pennzoil matters. Bohatch had several years' experience working at the Federal Energy Regulatory Commission, ending her tenure there as Deputy Assistant General Counsel for Gas and Oil Litigation.

Once Bohatch became a partner in Butler & Binion, just over two years after being hired, she began receiving billing reports that indicated McDonald was charging Pennzoil for eight to

twelve hours of work each day. Bohatch developed doubts about McDonald's billing practices after observing that he only worked an average of three to four hours per day.

She first expressed her suspicions about McDonald's billing practices to Richard Powers, the other partner in the Washington office, when he approached her with similar concerns. Together, Powers and Bohatch examined McDonald's time diary. They saw many vague entries that did not comply with firm requirements for keeping time records; Bohatch thought the records might have been falsified in an attempt to conceal overbilling. Powers told Bohatch that she should do something about her concerns.

Before reporting her suspicions, Bohatch reviewed the District of Columbia's ethical rules and consulted counsel. She ultimately met with Louis Paine, the firm's managing partner, to report that she suspected McDonald was overbilling Pennzoil on the level of \$20,000 to \$25,000 each month. Paine told Bohatch that she was right to report her concerns to him. Within a few hours, Bohatch informed Powers, upon his inquiry, that she had made a report to Paine.

The *day after* Bohatch made her report and immediately after an-long conversation with Powers, McDonald, the partner whose billing was in question, told Bohatch that Pennzoil had been dissatisfied with her work and that he would be supervising her future work. Bohatch testified that McDonald delivered this criticism with "red-faced anger." She also maintained that she had never before heard any criticism of her work for Pennzoil. Bohatch phoned Paine that night and expressed fear that McDonald's criticism was a response to her report. Within a few weeks, McDonald removed her from a pending Pennzoil case, reassigning it to an associate of one month's tenure, and barred her from taking on any new work for Pennzoil.

Within six weeks of Bohatch's initial report, Paine met with her and told her she should look for a new position. But the firm continued to provide her with a monthly draw, office space, and a secretary. Later, Bohatch's share in the distribution of the firm's profits was reduced to zero, and ultimately, her monthly draw was cut off. Bohatch eventually found new employment and filed this suit. Butler & Binion's partners then formally voted to terminate her from the partnership.

Bohatch contends that instead of properly investigating and responding to the allegations, McDonald, Paine, and the firm's management committee immediately began a retaliatory course of action that culminated in her expulsion from the partnership. The partners deny these claims.

Paine and another partner on the management committee, Hayden Burns, conducted an investigation of the overbilling allegations and testified at trial that they concluded the allegations were groundless. They maintain that Bohatch made her report for selfish or spiteful reasons, not out of a desire to fulfill her ethical responsibilities as a lawyer.

The jury heard Bohatch's and the firm's versions of the events and weighed the credibility of Bohatch, McDonald, Paine, and other witnesses. It returned a verdict in favor of Bohatch, finding that the defendants had failed to comply with the partnership agreement and had breached their fiduciary duty to Bohatch. The jury found that \$57,000 would compensate Bohatch for lost earnings sustained before October 21, 1991 and \$250,000 would compensate her for mental anguish suffered in the past. The jury also awarded \$4 million in punitive damages against Paine, Burns, and McDonald. The punitive damages were substantially reduced on remittitur.

The court of appeals held that under the Texas Uniform Partnership Act and the common law, partners violate a fiduciary duty in expelling another partner only if they act in bad faith for self-gain. 905 S.W.2d 597, 602. It concluded that the record in this suit contains no evidence of a breach of fiduciary duty because there was no evidence that the partners expelled Bohatch for self-gain. *Id.* at 604. This Court, however, has never limited claims for a breach of fiduciary duty to circumstances in which a partner acts for self-gain. *See, e.g., Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992). Today, the Court should have followed the advice of several leading legal scholars and disapproved of the court of appeals' opinion.<sup>1</sup> Instead,

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<sup>1</sup> Professors Richard L. Abel (University of California at Los Angeles School of Law), Leonard Gross (Southern Illinois University School of Law), Robert W. Hamilton (University of Texas School of Law), David J. Luban (University of Maryland School of Law), Gary Minda (Brooklyn Law School), Ronald D. Rotunda (University of Illinois College of Law), Theodore J. Schneyer (University of Arizona College of Law), Clyde W. Summers (University of Pennsylvania School of Law), and Charles W. Wolfram (Cornell Law School) offered their analyses as *amici curiae*, concluding that self-gain is not the sole element of a breach of fiduciary duty among partners.

this Court, by affirming the court of appeals' judgment, discards the jury's conclusion that the partners violated their fiduciary duty.

## II.

The majority views the partnership relationship among lawyers as strictly business. I disagree. The practice of law is a profession first, then a business. Moreover, it is a self-regulated profession subject to the Rules promulgated by this Court.

As attorneys, we take an oath to “honestly demean [ourselves] in the practice of law; and . . . discharge [our] duty to [our] *client[s]* to the best of [our] ability.” TEX. GOV'T CODE § 82.037 (emphasis added). This oath of honesty and duty is not mere “self-adulatory bombast” but mandated by the Legislature. *See Schwabe v. Board of Bar Exam'rs*, 353 U.S. 232, 247 (Frankfurter, J. concurring) (noting that the rhetoric used to describe the esteemed role of the legal profession has real meaning). As attorneys, we bear responsibilities to our clients and the bar itself that transcend ordinary business relationships.

Certain requirements imposed by the Rules have particular relevance in this case. Lawyers may not charge unconscionable fees. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(a), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G app. A (TEX. STATE BAR R. art. X, § 9); *see* D.C. R. PROF'L CONDUCT 1.5(1) (West 1997).<sup>2</sup> Partners and supervisory attorneys have a duty to take reasonable remedial action to avoid or mitigate the consequences of known violations by other lawyers in their firm. TEX. DISCIPLINARY R. PROF'L CONDUCT 5.01; *see* D.C. R. PROF'L CONDUCT 5.1. Lawyers who know that another lawyer has violated a rule of professional conduct in a way that raises a substantial question as to that lawyer's honesty or fitness as a lawyer must report that violation. TEX.

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<sup>2</sup> Before January 1, 1991, the D.C. Bar's ethics rules were embodied by the Code of Professional Responsibility. Under the old code, DR 2-106 forbids excessive fees, as does the new Rule 1.5, and EC 1-4, DR 1-102(A)(2), and DR 1-103(A) require the reporting of ethical violations, as do the new Rules 5.1 and 8.3. Although the Code was in place during the majority of the D.C. events at issue in this case, the new Rules contain substantially the same provisions.

DISCIPLINARY R. PROF'L CONDUCT 8.03(a); D.C. R. PROF'L CONDUCT 8.3.<sup>3</sup> In Texas, Rules 5.01 and 8.03 are essential to the self-regulatory nature of the practice of law and the honor of our profession itself.

This Court has the exclusive authority to issue licenses to practice law. TEX. GOV'T CODE § 82.021. This Court also has the jurisdiction to discipline errant attorneys and establish procedures for doing so. *Id.* §§ 81.071, 81.072 (a)-(c). Attorneys, whether they are sole practitioners, employees, or partners, are still “officers of the court.” *In re Snyder*, 472 U.S. 634, 644 (1985) (quoting *People ex rel. Karlin v. Culkin*, 162 N.E. 487, 489 (N.Y. 1928)); *Dow Chem. Co. v. Benton*, 357 S.W.2d 565, 567 (Tex. 1962).

In sum, attorneys organizing together to practice law are subject to a higher duty toward their clients and the public interest than those in other occupations. As a natural consequence, this duty affects the special relationship among lawyers who practice law together.

It is true that no high court has considered the issue of whether expulsion of a partner for complying with ethical rules violates law partners' fiduciary duty.<sup>4</sup> The dearth of authority in this area does not, however, diminish the significance of this case. Instead, the scarcity of guiding case law only heightens the importance of this Court's decision.

### III.

The few cases that provide guidance here do so with conflicting results, but each case highlights the grave implications of those decisions for a self-regulated profession. Ultimately, agreements to practice law may not by their terms or effect circumvent the ethical obligations of attorneys established by law. *See Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 n.1

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<sup>3</sup> This rule is derived from the American Bar Association's Model Rules of Professional Conduct. As of 1993, the majority of jurisdictions, including the two at issue in this case, Texas and the District of Columbia, have adopted some version of the Model Rules. Anthony J. Blackwell, *Wieder's Paradox: Reporting Legal Misconduct in Law Firms*, 1992/1993 ANN. SURV. AM. L. 9, 25 n.94 (1993).

<sup>4</sup> None of the numerous partnership cases cited by the majority concern a law partner ousted for complying with the ethical rules of our profession. \_\_\_ S.W.2d at \_\_\_.

(Tex. 1991); *Central Educ. Agency v. George West Indep. Sch. Dist.*, 783 S.W.2d 200, 202 (Tex. 1989).

#### A.

In *Wieder v. Skala*, the New York Court of Appeals held in an at-will employment context that an associate terminated for reporting another associate's misconduct had a valid claim for breach of contract against his law firm based on an implied-in-law obligation to comply with the rules of the profession. 609 N.E.2d 105, 110 (N.Y. 1992). The court recognized that "[i]ntrinsic to [the hiring of an attorney to practice law] . . . was the unstated but essential compact that in conducting the firm's legal practice both plaintiff and the firm would do so in compliance with the prevailing rules of conduct and ethical standards of the profession." *Id.* at 109-10. To find otherwise would amount to "nothing less than a frustration of the only legitimate purpose of the employment relationship," *id.* at 110, that is, "the lawful and ethical practice of law." *Id.* at 108. *See also* Seymour Moskowitz, *Employment-at-Will and Codes of Ethics: The Professional's Dilemma*, 23 VAL. U. L. REV. 33, 56-66 (1988) (arguing for a public policy exception to at-will employment for professional codes of ethics). The plaintiff was not just an employee, but also an "independent officer[] of the court responsible in a broader public sense for [his] professional obligations." *Wieder*, 609 N.E.2d at 108.

Only one reported case involves an attorney who was punished solely for failing to report another lawyer's misconduct. The case is more notable for its rarity and effect than for the holding itself. The Illinois Supreme Court suspended an attorney for one year for failing to report misconduct pursuant to a settlement agreement forbidding reporting of unprivileged information about the conversion of client funds by another attorney. *In re Himmel*, 533 N.E.2d 790, 795 (Ill. 1988). Aware of the possible practical effect of its holding in setting an ethical standard for attorneys, the court found that "public discipline is necessary in this case to carry out the purposes of attorney discipline." *Id.* at 795. Together these cases illustrate that lawyers, by their agreements, may not sidestep their ethical obligations.

## B.

I believe that the fiduciary relationship among law partners should incorporate the rules of the profession promulgated by this Court. *See Central Educ. Agency*, 783 S.W.2d at 202 (noting that employment contracts incorporate existing law). Although the evidence put on by Bohatch is by no means conclusive, applying the proper presumptions of a no-evidence review, this trial testimony amounts to some evidence that Bohatch made a good-faith report of suspected overbilling in an effort to comply with her professional duty. Further, it provides some evidence that the partners of Butler & Binion began a retaliatory course of action *before* any investigation of the allegation had begun.

In light of this Court's role in setting standards to govern attorneys' conduct, it is particularly inappropriate for the Court to deny recourse to attorneys wronged for adhering to the Disciplinary Rules. *See Blackwell, supra*, at 44-48. I would hold that in this case the law partners violated their fiduciary duty by retaliating against a fellow partner who made a good-faith effort to alert her partners to the possible overbilling of a client.

## C.

The duty to prevent overbilling and other misconduct exists for the protection of the client. Even if a report turns out to be mistaken or a client ultimately consents to the behavior in question, as in this case, retaliation against a partner who tries in good faith to correct or report perceived misconduct virtually assures that others will not take these appropriate steps in the future. Although I agree with the majority that partners have a right not to continue a partnership with someone against their will, they may still be liable for damages directly resulting from terminating that relationship. *See Woodruff v. Bryant*, 558 S.W.2d 535, 539 (Tex. Civ. App.--Corpus Christi 1977, writ ref'd n.r.e.).

## III.

The Court's writing in this case sends an inappropriate signal to lawyers and to the public that the rules of professional responsibility are subordinate to a law firm's other interests. Under the

majority opinion's vision for the legal profession, the wages would not even be the same for "doing right"; they diminish considerably and leave an attorney who acts ethically and in good faith without recourse. Accordingly, I respectfully dissent.

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Rose Spector  
Justice

OPINION DELIVERED: January 22, 1998