

ORAL ARGUMENT - 11/20/96
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BOHATCH V. BUTLER & BINION 11

TUCKER: May it please the court. The CA's opinion has raised a frightening barrier to a law partner who wants to comply with the ethical reporting requirements that this court has imposed upon attorneys in this state.

PHILLIPS: Well first of all she's not a member of our bar?

TUCKER: That's correct. But the decision of this court today and the decision of the CA will affect members of this bar. The fear of those attorneys is that they will report an unethical act and be expelled by their partners.

PHILLIPS: Supposing that she were a member of this bar or that we're attempting to interpret what the DC, whatever their local CA is called, who's the duty to report to? I mean if you find what you believe to be an ethical violation, and there is a duty to report, does that go to reporting it to a fellow partner?

TUCKER: In Texas or in DC?

PHILLIPS: Both.

TUCKER: In DC Ms. Bohatch read the rule, she first consulted Mr. Powers, the other partner in the DC office of Butler & Binion about what it meant, and then she talked to a number of lawyers about what it meant and what her obligations were under that rule. And she came to the conclusion that her obligation was to report it to Lewis Paine, the managing partner of the firm.

PHILLIPS: And that was under the DC rules then in effect prior to the ones that are now in effect?

TUCKER: That's right. The DC rules that affected her at the time that she acted. In Texas the general rule is that the requirement is that an attorney report it to the grievance committee; however, note 4 of the rule indicates that there may be circumstances where a junior partner can comply with the rule by reporting it to the managing partner of the firm.

PHILLIPS: If one is going to comply with this rule is there subsequently a duty to cooperate with any investigation that a grievance committee might undertake? and what does the record say about your

client's cooperation with the DC investigation?

TUCKER: The record says nothing about it. And the reference in their brief is outside the record, and I don't wish to get into what is outside the record. The answer to your question is, I'm not sure what the rules require, but generally speaking one would expect a lawyer to cooperate. But I don't think there's any evidence in the record that she did not cooperate with the DC bar committee.

But consumers of legal services in this state and lawyers who have integrity and want to do the right thing have a stake in the reversal of this CA's opinion. The 3 most significant errors by the CA are: 1) it has created the first exception to the traditional definition of fiduciary duty in this state. In so doing it has lowered the standard and has invited others to seek other exceptions.

PHILLIPS: Is there any difference between a partnership, say if you and I put our life savings together into selling lawnmowers, and a partnership that is spread over different states or even different countries that involves 100s of people where there are hierarchies of decision-makers, are the same Fitz-Gerald v Hall language one size fits all?

TUCKER: The jurisprudence in Texas at this point says that one size fits all.

PHILLIPS: Does that need to be modified in light of market place changes over the last 50 years?

TUCKER: No your honor, particularly as it relates to law partners. Because in Judge Cardozo's words, it is not the morals of the marketplace that controls the fiduciary relationship among partners, but the highest _____ of honor. And that applies particularly to attorneys, because we are officers of the court, we are not merely businessmen.

SPECTOR: Is there a different standard in your view between partnerships of lawyers and partnerships of other business enterprises?

TUCKER: There is not a different definition of fiduciary duty.

SPECTOR: Should there be?

TUCKER: I don't think so. I think if we begin making exceptions as the CA had we are on the slippery slope toward a lot of litigation. Every time a fiduciary is caught with his or her hand in the till, there will be a hand raised and say there is an exception for me. The definition of fiduciary duty has served this state well, it has not created a substantial amount of litigation, there's not a lot of precedent, it has not caused lawyers or other partners to sue each other willy nilly, and the standard has served us well. And what we are asking is that this court restore the traditional standard that has served this state - lawyers and

business people alike - throughout its history.

OWEN: What do you say the standard is when you were seeking to expel a partner? what is the standard of care or duty that a partnership has to exercise?

TUCKER: The standard is the duty that was submitted by the TC to the jury. And I don't think this court should make an exception for expelling a partner, because then we have to ask is there an exception for admitting a partner, for changing a partner's points, for sending the partner to the DC office...

HECHT: Which is you can't act in bad faith, that's the basic standard?

TUCKER: The standard is that you must act with the highest honor, loyalty, no bad faith...

PHILLIPS: Every partner has to put every other partner's well-being ahead of himself or herself?

TUCKER: That language is not in the definition that was submitted to the jury by the court. That is frequently part of the discussion of what this means.

HECHT: And it can't be can it? When you're setting compensation among partners you can't say: oh, here, take this. At some point you've got to say I get some too.

TUCKER: That's correct. That's absolutely right.

CORNYN: You're not arguing that Butler & Binion could not expel Ms. Bohatch from the partnership are you, pursuant to the partnership agreement?

TUCKER: Pursuant to the partnership agreement they had done what the partnership agreement required early on. They could have expelled her. We still ...

CORNYN: Could they have done that without breaching their fiduciary duty?

TUCKER: We don't think so.

CORNYN: Well is the consequence of that argument then that they could not expel her without incurring liability of some kind?

TUCKER: Not at all. Here's how we got to where we are. The CA relied on these out of state cases. These cases weren't breached by either party in the CA. The first time anybody say them was in the opinion of the CA. Because they weren't briefed, the CA I don't believe considered those cases

correctly. Those out of state cases relied upon by the CA say quite clearly that one of the limits on the freedom of partners to contract among themselves a freedom recognized by all those courts and certainly should be recognized by this court is that they may not violate public policy. In the Gelder case for example I would like to read...

CORNYN: And I mentioned it in your further explanation, but could you first address the question: How does Butler & Binion or any other partnership choose not to continue to be partners with one or more members of the partnership without violating a fiduciary duty or can they?

TUCKER: Yes they can.

CORNYN: And how do you do that? That concerns me.

TUCKER: Well if a partner is producing it is not a violation of the fiduciary duty to say that: we're going to expel you because you're not producing. At that point there has been no breach of a fiduciary duty unless in the unlikely event that that partner can show that there was a lack of honesty, or a lack of good faith, or a lack of loyalty, or a failure to disclose information. And the burden is on that partner, and that's always been the standard in Texas. And lots of partners have been expelled for failing to produce and it hasn't _____ in litigation.

HECHT: What if you don't just like the partner, just want them gone?

TUCKER: That's fine.

HECHT: Why is that in good faith?

TUCKER: Again it depends on some of the facts. I've got some partners I would love to expel because I don't like them - but I haven't. On the other hand if they've brought in a big barrel money and I expel them the day before they get their share of the money, then they probably can prove that I haven't acted honestly, that I haven't acted with loyalty.

CORNYN: Is it because of the reason why Butler & Binion you say expelled Ms. Bohatch?

TUCKER: Yes your honor. The evidence in this case...

CORNYN: If they had done it for reasons of economics or because they just didn't want to be associated with her anymore because there was a conflict of personalities, there would be no breach of fiduciary duty?

TUCKER: If she had not made this report. If they had said for example: that she was a poor

lawyer they could have expelled her for that reason. If there had been some evidence in this case that there was in fact a conflict of personalities, and I submit this record contains no evidence of that. Even after she made the report, Mr. McDonald said: I will continue to work with her and I will supervise her work if that's what Pennzoil wants. And Mr. Paine testified: I had no idea, and I don't believe it's true that McDonald refused to supervise her work. So those facts don't exist in this case.

HECHT: If he had, would that make a difference?

TUCKER: If who had done what?

HECHT: Mr. McDonald had refused to supervise her work?

TUCKER: No your honor I don't think so. Because Mr. Paine had some options that is ignored by the CA's opinion. There was another partner in that Washington, DC office and he also worked only for Pennzoil, Mr. Powers. She could work with him. And Pennzoil never said: We don't want to work with Ms. Bohatch. They testified explicitly that they wanted to continue her working on the firm. On their work, they just wanted the final product reviewed for awhile.

HECHT: If one of the partners in a firm goes to the senior partner or management committee and reports that another partner is not adequately representing the clients, just bad judgment, bad advice, not doing all that ought to be done, and the other partners don't feel that way and that comes to light, it's kind of hard to continue the relationship after that isn't it?

TUCKER: It depends on the specific facts of the case and how it's reported. Ms. Bohatch did everything right. She looked at the internal records for a long time, she deliberated with her partner, she sought legal advice, and she reported very discretely to Louis Paine what she thought.

OWEN: Once she made this allegation how long was the firm required to keep her as a partner? When could they expel her under the partnership agreement without breaching the fiduciary duty?

TUCKER: I think as long as the reason that they expelled her was because she had followed the requirements of the DC bar, followed her ethical obligation, as long as that was the reason they were expelling her they could not do it. If something else had come up in the future they could have expelled her for some other reason. Just like any partner can be expelled for any other reason that does not violate public policy. And here there's no question about what the public policy is of this state.

GONZALEZ: You started to say 3 reasons why the CA opinion was incorrect and you've been interrupted. What are the other 2?

TUCKER: The second reason is the CA failed to review the sufficiency of the evidence based

upon the definition of fiduciary duty submitted by the TC despite the defendant's failure to object to that definition, and despite the fact that the definition submitted is correct. It violated this court's rule in the Sage Street case. The Sage Street case applied to a factual sufficiency review, but the same reasons should apply to a legal sufficiency.

The third reason is the court said that it was conducting a legal sufficiency, a no evidence review of the evidence. But in fact it did not. It acted as a juror. It acted as a jury and reviewed the evidence as if it were a jury.

Looking at page 10 for example from the CA's opinion you see repeatedly that they are referring to facts that are favorable to the defendant and the standard of a no evidence review is well known to this court, the court may only consider those facts which are favorable to the one who has prevailed and the inference is to be drawn therefrom and may not consider the matters that are contrary.

HECHT: Your argument in this case is that in considering the legal sufficiency of the evidence we may not even consider the fact that Pennzoil was satisfied or said they were satisfied with the bill?

TUCKER: That's correct.

HECHT: But it's a hole different case of whether Pennzoil was satisfied or they weren't satisfied?

TUCKER: No it's not your honor. It makes no difference whether Pennzoil was satisfied or not. What makes a difference is whether Ms. Bohatch had a good faith belief that he was over-billing the client. That's the standard by which we are obligated to report, and we can be wrong. We can make mistakes. But if we have a good faith belief and if we're acting to protect the client as she was, and she testified: My sole motivation was to protect the client; that's what this court ought to foster. That's what the public policy of this state ought to support.

There is nobody else out there who's going to know when a client is being over-billed in this situation other than the lawyers. If you will look at the bills and if you read the testimony of Mr. Shadocks and Mr. Chapman, the attorneys for Pennzoil, they did not and could not know whether they were being over-billed, because the bills give no information from which one can determine.

HECHT: But doesn't it make it difficult for one partner in a law firm to work with another partner in a law firm who has in essence grieved him?

TUCKER: Sure it makes it difficult.

HECHT: They just have to keep doing it?

TUCKER: Life is full of difficulties and partners have disputes among themselves all the time that get resolved. The question here is who's the court going to support with its opinion here? A partner who was fully...who was clearly over-billing his client, and the record is absolutely clear that he was over-billing the client...

OWEN: Was there any evidence what the fee agreement was with Pennzoil?

TUCKER: Yes. The testimony is that it was hourly based upon the work done. And her complaint and that's undisputed, and her observation was that he was simply not doing the work. He was billing on the order of 10-12 hours a day, and he was working about 3-4 hours a day. And Mr. Powers agreed with her.

GONZALEZ: After Pennzoil and the firm reviewed the billing records wasn't there _____ that there was no over-billing?

TUCKER: By Pennzoil, and by the firm.

GONZALEZ: Correct. Pennzoil said: we've looked at it, but there is no over-billing?

TUCKER: Yes your honor. But what the record also reflects is that when Butler & Binion went to Pennzoil they deceived their client. They went to Mr. Chapman and they told him that she had retaliated against Mr. McDonald after Mr. McDonald had raised a suggestion about her work. But the facts were just the opposite. They also said Chapman testified that Mr. McDonald said that there was a lot of acrimony from her. That Mr. McDonald said: No, she just sat there and stunned silent. There was no acrimony. And Mr. Paine confirmed that.

GONZALEZ: Well silence can be deadly also. The fact that you're silent...

TUCKER: Well the fact of the matter is there was no acrimony and she testified to that. And they misled the clients. The client never looked. Mr. Chapman never conducted a review. When this was reported to him and he testified as a reporting as a billing irregularity he said: I've already reviewed the bills. Mr. Shadocks only talked to Mr. Chapman. There was no review of the bills. And again if you will look at the bills, you will see you can't tell whether you're being over-billed because they don't reflect who's doing the work, how many hours are spent, or even much detail about work that was done.

OWEN: Justice Hecht had asked you does it make a difference when one partner has grieved another to expect them to work together and you were in the middle of responding to that till I interrupted you.

TUCKER: I believe I said that partners have difficulties among themselves of all sorts at all times

and continue to work together.

HECHT: Well it doesn't usually involve turning each into the bar association or copying each others daily diaries without anybody knowing it, or going to meetings, start an investigations or bad-mouthing a partner's work to a senior partner. It usually doesn't involve too much of that.

TUCKER: Well this case doesn't either. There was no bad-mouthing of a partner's work to a senior partner.

HECHT: You say that Mr. McDonald did that to Mr. Paine. Bad mouthed Ms. Bohatch's work to Mr. Paine.

TUCKER: Mr. McDonald said to Ms. Bohatch that your work is not doing a good job.

HECHT: And told the senior partners and told that that's what he thought and that's what Pennzoil thought.

TUCKER: He did say that your honor. I believe the answer to the question is that Mr. Paine had several options available to him and he took absolutely the worst option. He was the managing partner of the firm. His first obligation was to see what the facts are and he and Mr. Byrnes said: We're going to expel the partner who's not going to tell the truth. The "investigation" that they did was absolutely not an investigation at all. They did not look at anything that would help them determine whether or not the client was being over-billed.

OWEN: I'm trying to get to the bigger issues, not the facts of this case. Let's suppose that you're in a two-man partnership and your partner files a grievance against you and you decide you want to dissolve the partnership, shouldn't you have that right? Are you going to require those two partners to maintain an on-going partnership relationship although they despise one another?

TUCKER: No. But those are not the facts of this case.

OWEN: Well I am asking you the broader principle, where do we draw the line between a 2-man firm and a 200-person firm? What do you do with a 2-man firm when one partner files a grievance against the other and a no action is taken by the bar committee? Do you require that you prevent the partner who was grieved from dissolving the partnership?

TUCKER: Well dissolving the partnership may be one thing, expelling the other partner and ending that other partner's career...

OWEN: Well let's say it's a 3 person partnership and then the other two decide to expel the

partner. Are you going to tie their hands and say that they can't expel that partner?

TUCKER: I think that's right because I think that...yes. I think that first lawyer is obligated by this court's rule to grieve the other partners. And the consequence of that must not be that they are expelled from the partnership. The consequence of complying with the ethical requirements of this court must not be that they can be expelled. Otherwise, it would be a strange person who would ever do such a thing.

OWEN: And how long do you require those 3 people to practice law together as partners?

TUCKER: Until such times as they can dissolve the partnership or expel a partner for some other reason other than for complying with public policy _____.

PHILLIPS: The Butler & Binion partnership agreement I assume have provisions about dissolving/dissolution of a partnership?

TUCKER: It does.

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RESPONDENTS

HOLMAN: May it please the court. I was prepared to give one argument today, but after hearing Mr. Tucker's argument I think I need to address a couple of the court's concerns. First of all Mr. Tucker said that there was no evidence in the record that Mr. McDonald didn't want to work with here. That's completely wrong.

PHILLIPS: Let's not get off on rabbit trails. Y'all may be making claims you don't need to make. He has to show some evidence - you have to show no evidence to support these findings the jury makes.

HOLMAN: Exactly. But I wanted to point out to the court that he said that after I found out she was lying about me I didn't want to work with her. And Pennzoil, it's undisputed in the record, that Pennzoil testified numerous times about her poor performance and that they told McDonald about this in mid May or early June. They told him about it and told him that they didn't want her doing any work in which she wasn't supervised. Now you have to understand this is a 3-person office in Washington, DC. They have one client - Pennzoil. Two of the lawyers, Bohatch & Powers, were regular lawyers. McDonald was the supervisory partner that had the contact with Pennzoil.

HECHT: But assuming he was over-billing, and assuming that Pennzoil was upset about it, and she blows the whistle as it was, and in retaliation after the smoke clears, they fire he; is that a problem?

HOLMAN: I think assuming that she he was in fact over-billing, assuming that the client had problems with her...

CORNYN: So the only thing she has a case is if she's right?

HOLMAN: No, I didn't say that. Let's assume that everything that she says is true. What then was the partnership to do? Was the partnership supposed to fire McDonald when the client was perfectly satisfied with him? Were they supposed to expel both of them? Were they supposed to expel McDonald when they had essentially unfounded accusations? You will find if you review the record that at every time that Mr. Paine was faced with a choice, every time, he chose the high road. He chose to report it immediately to the client. He chose to conduct an investigation. He chose to report it to the state bar. Instead of giving her the _____ method of severance which is speedy, quick expulsion without cause, which the courts have approved, he gave her the step-down severance.

HECHT: I have a little different question though. And that is assuming he hadn't. Assuming he meant to do her harm, but...

HOLMAN: When you say he?

HECHT: Mr. Paine, Mr. McDonald, the management committee, the firm. They said: We don't want somebody among us who blows the whistle on us to the bar. We just don't want to work with them. Irrespective of how much business they bring in, that's kind of hard to imagine. Irrespective of a lot of other factors we just don't, so you're out for doing this. Is that a breach of fiduciary duty?

HOLMAN: Yes and no. Let me give you my best assessment of that analysis to that question. This court certainly has the power to intervene in contract disputes on the basis of public policy. There's no question about that. In the Phillips v. Phillips case that you wrote Justice Hecht that this court issued in 1991 you said that a contract that is illegal will not be enforced as a matter of public policy. It was an agreement between partners in which one partner said that: well if we have any actual damages mine will be 10 times the actual damages. And that of course cannot be enforceable. If their conduct here contravened the laws of this state, in other words were illegal, then I think that you could say that public policy should step in and intervene.

HECHT: Well but you're begging the question. My question is very simple: If they fire her for whistle blowing is that a breach of fiduciary duty?

HOLMAN: I don't believe so, and I will tell you why. First of all fiduciary duty deals with the business aspects of the partnership, business and property of the partnership. There is a separate cause of action for retaliatory discharge it's called. That cause of action has only been recognized in very few instances in at-will types of grievances. The courts in other states that have looked at this particular

problem when you have an expulsion provision on the one side that says you can expel her for any cause - it doesn't matter if it's good bad you can expel her for any cause - we are not going to import a for cause requirement in that expulsion agreement. Of course there's a good reason for that because the whole idea of a partnership is an expression of will. You want to be somebody's partner. At some point when you don't want to be somebody's partner for whatever reason, the policy of the court should be that the partners are entitled to have an expeditious severance. That's what the courts have said.

PHILLIPS: There is a difference between you and I don't want to be partners anymore - we dissolve - and you don't want to be my partner so I'm out.

HOLMAN: There's a difference between saying well I'm going to coverup, you reported to me that this guy is over-billing, I'm going to coverup that by getting rid of you so that this issue doesn't come up. But that's not what we have here. We have a situation where it was immediately reported to the client, it was immediately investigated, the client conducted it's own investigation. They reported to the state bar although that evidence was excluded by the court we thing wrongfully. They did everything, they chose the high road in every situation.

CORNYN: Well you say that counsel but the CA chronicles over a 14-month period that the firm took away, didn't assign her any more work, then reduced her partnership interests, then withheld her year-end distribution, then cut-off her draw and finally on Oct. 21, 1991, formally expelled her?

HOLMAN: That's the step-down severance. The Lawless case talks about that. They had a choice of just cutting off and expelling her completely. But instead of expelling her they allowed what's called the step-down severance. During that whole period of time, during that whole year, she did no work for the firm. She billed no hours. The firm had no option...

BAKER: They didn't give her any work did they?

HOLMAN: Well yes that's true they did not give her any work because there was no work...

BAKER: Well there's no hours if she doesn't have any work?

HOLMAN: Well she admitted in the trial below that it's the obligation of the partner to find work to do. And she said in a number of her letters: I'm working on business development activities. In fact Burns said they asked him: Well how could she have remained a partner? And he said: well if she could have landed a big client that would have helped. You know if she would have brought in any business that would have helped. But she never brought in any work.

BAKER: Why would she have to do that if you had Pennzoil as your only client and you're billing \$1.2 million a year?

HOLMAN: Well because her supervisor didn't want to work with her and because Pennzoil didn't want her to work for them without supervision.

SPECTOR: You said a minute ago that Pennzoil was dissatisfied with her work before she reported the over-billing. Was that communicated to her?

HOLMAN: No it was not. It was communicated for the first time on the day after she reported the over-billing to Mr. Paine. And that was before Mr. Paine had contacted Mr. McDonald to let him know about Ms. Bohatch's complaints. But Ms. Bohatch believes that the reason for that was that Powers had communicated to Mc Donald about the over-billing, and that McDonald was then communicating to her in retaliation. But of course the Pennzoil folks who were the disinterested witnesses at trial they testified: We communicated to them in mid May and told them we didn't want her to do any work without being supervised because of her poor performance. And they detailed it. I mean they talked about the specific instances where they were dissatisfied with her work. And they talked about the people at Pennzoil who were dissatisfied with her work.

CORNYN: Wouldn't a fiduciary duty that one partner owes another require at some point Butler & Binion to tell Ms. Bohatch the client doesn't want you doing their work anymore, you're going to need to find other work, or you're going to need to be reassigned to another section or basically it's not economically feasible to maintain you within the partnership and we might ultimately have to terminate, expel you from the partnership for financial reasons?

HOLMAN: That's exactly what she was told by Lewis Paine at the August 23 meeting.

CORNYN: August 23 of what year?

HOLMAN: 1990. He came to her and said our investigation reveals no over-billing; Pennzoil said they were dissatisfied with your work; I can't imagine this supervisory partner wanting to work with you after you have accused him of this criminal conduct. Basically he said I think it will be in your best interest and the best interest of the partnership for you to look for other work. And in order to help you look for other work, we've decided we're going to give you this period of time where you can collect a draw of \$7,500 per month, maintain your office, maintain your secretary, maintain your phone, maintain your insurance benefits, we're not going to expel you just yet.

CORNYN: So you're saying that the decision to expel her essentially had been formed on Aug. 23, 1990, they were just going to draw it out over a period of time? So she really wasn't given an opportunity to develop other work; it was a decision really made at that time to expel her?

HOLMAN: Well they hadn't made the formal decision to expel her. They had said that they thought it was in her best interest to look for other work and they said that you know you will be getting

an opportunity to remain here as a partner while you are looking for other work and do no work. And that's exactly what she did. She did no work at all.

PHILLIPS: Do you object to, well you do in your briefs, does this court have any alternative other than to review this evidence under the standards submitted to the jury that you did not object to?

HOLMAN: Absolutely. They're talking about that this court is somehow bound by the definition of duty that's in the jury charge. And of course the jury doesn't make a determination of duty, that's a court made determination. The court determines the duty based upon the facts and surrounding circumstances. That's exactly what the CA did. We raised the issue of duty in our post-trial motions...

BAKER: Doesn't the argument go that _____ submitted to the jury didn't include the phrase for "self gain," and that is the crux of the CA decision? And so the argument is that you are supposed to review, their view, no evidence of claim in light of the question and instructions submitted to the jury and that didn't happen in this case?

HOLMAN: I have no problem with that concept if you're talking about disputed fact issues; when you're talking about what the jury was instructed to do. But if you're talking about a duty, that's particularly unique to the court's determination, the jury doesn't make that determination.

PHILLIPS: A breach of that duty is a factual issue? Determining the duty is a law issue. Breach of duty is a fact issue and if the judge instructs the jury on what the law is through an instruction, and it's not objected to, how can we in the appellate courts clean that up and pretend that the jury's breach finding was on another duty, and look to see if there's evidence of that and resolve a case on this hypothetical basis that the jury didn't know about?

HOLMAN: Well I submit to you that the case of Shell Oil Co. v. Humphrey, which is a Houston 14th case, 1994, addresses that directly. It says: that the failure to object to an instruction, when you're not complaining about the submission...you're not complaining about the submission of the issue, you're complaining that there is no evidence because there's no duty.

PHILLIPS: But there was some duty here.

HOLMAN: Well it's a limited duty.

PHILLIPS: You don't deny there's a duty, but you deny that this case should have ever had gone to the jury; there should have been an instructed verdict?

HOLMAN: That's correct. He mentions that these cases the CA relied on were never briefed by the courts. You will see in the briefing in the record that these were briefed in the TC. We were alleging

that they did not have this broad-base duty. And there's a good reason for that. The relationship between..

OWEN: You said twice in your briefs I think: well we did preserve it in our post-trial motions which you were very vague about exactly what you did. Can you tell us what you asked for specifically that goes with this whole issue of duty and where you asked for it?

HOLMAN: I can't. I haven't reviewed the post-trial motions. I have reviewed the initial...there were numerous post-trial motions that were submitted in this case. Post-trial motions there were two submitted before I even got involved in the case. In the post trial motions that I submitted, motions for new trial and so forth, I made a no evidence challenge. Under Bill Power's article, which is another look at no evidence, no duty issues are subsets or duty issues are subsets of a no evidence challenge.

CORNYN: But you concede that there is a duty...there's some fiduciary duty here, or are you saying there is no fiduciary duty of any kind?

HOLMAN: Well under this record there's no breach of fiduciary duty. But you're asking whether this court should recognize some duty at all?

CORNYN: No. I am asking whether under these circumstances there is a fiduciary duty of some kind or another?

HOLMAN: Yes, I believe there is. I think that the courts that have dealt with this question have unanimously held there is some duty. But it's limited to whether another partner is expelling you in order to get a advantage for himself.

SPECTOR: Isn't that always the case?

HOLMAN: No I don't believe that it is always the case. In fact if that were always the case, then I think that it would be a meaningless standard. But you're not trying to gain...the concept of fiduciary duty arises from the business aspects or property of the partnership. And so for example I can lie to my partner about what the score of the Cowboy's game was last week, and that's not a breach of fiduciary duty. Similarly I can conceal from my partner the fact that I loaned my brother-in-law \$1,000, that's not a breach of fiduciary duty.

PHILLIPS: But here this court and the DC local court of appeals have written some rules that puts some obligation on lawyers. If there is some evidence that this lawyer had a good faith belief that events that had happened at the firm called upon her to fulfil that duty that the court had promulgated by making some report to her managing partner; isn't a retaliation based on that exercise a violation of the type of fiduciary burdens that we have imposed upon lawyers in the partnership?

HOLMAN: I don't believe so. I think that that would be more along the lines of retaliatory discharge and not breach of fiduciary duty. Breach of fiduciary duty deals with trying to gain a profit at another partner's expense. What Mr. Tucker mentioned the fiduciary with his hand in the _____, or the guy that expels a partner and doesn't want to give him his share. I mean those kind of things certainly would be a breach of fiduciary duty.

CORNYN: But that considers a law partnership merely to be a business and I guess we have these perhaps archaic notions that law partnerships and law practices is something other than just a business?

HOLMAN: I don't think those are archaic notions Judge. And I think in this situation if they had done something to take advantage of her, I think that would be one thing.

CORNYN: So the duty might be broader than purely a business relationship?

HOLMAN: I think it's self gain and self gain can be a broad concept. If you were trying to improve your position within the firm by getting rid of a partner, I think that that might be a breach of fiduciary duty as well.

I think that what we're really confronted with here is kind of a reversal of the old maxim(?) We are talking about two rights don't make a wrong. She may have been right in reporting over-billing. I am sure she thought she was right reporting over-billing even though she didn't have documentation. On the other hand nothing that Paine did was wrong. He did the right things in responding to that situation. And he should not be subjected to liability for the things that he did. Because if he is, then we are going to force partners to remain together who aren't supposed to be together. We are going to force people not to tell the State Bar, not to tell the client, not to conduct investigations. I mean everything that he did was in order to try and resolve a situation that had grown intolerable. And the cases say that removal of a partner in order to resolve a fundamental schism in the partnership is not a breach of fiduciary duty, whatever the parameters of fiduciary duty may be.

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COUNTISS: I simply want to address in the short time remaining two of our cross-points, because I think two of these cross-points frankly eliminate the need to even address most of the problems this court has been talking about for the last 20-25 minutes.

Unless this court overrules Southwestern Bell v. Delaney and Parkway v. Woodruff, Ms. Bohatch has nothing except a cause of action, if any cause of action, for breach of contract. That's the only litigation area where she can work. Here's why. Delaney was based primarily on this court's opinion in the 1940s International Pressman in which a union member was expelled from the union, and the court found contract

in that case. And then faced the question of whether the union man had a contract action or a tort action. And the court used this analysis. It said: an action in contract for breach of duty arising out of a contract is either express or implied. An action in tort is for the breach of a duty imposed by law. Now that's a nice morphous statement, but what does it mean? I think it means and I think this is what the court said in Delaney: if the cause of action stands alone, if it exists regardless of the existence of a contract, then it can be a tort cause of action. But if its very existence is dependent upon the existence of the contract, then the cause of action is for breach of contract.

CORNYN: Well if there wasn't a partnership agreement here though there would still be a duty wouldn't there not a fiduciary duty?

COUNTISS: And that depends on what the relationship is if there is no contract, if there is no partnership agreement. If they are in fact partners under the law as most of us unfortunately have been at one time or another, we've don't have a partnership agreement, we just say let's be partners, that still a contract. It's a contract implied in law. And the suit would still be for breach of that contract. Her relationships got to be one or the other in this kind of situation. It can only be an employee at will in which there is no fiduciary duty.

OWEN: But you can still bring a cause of action against your partner for breach of the fiduciary duty can you not?

COUNTISS: Yes, under the correct circumstances, the correct facts. Certainly.

OWEN: But the fact that your underlying fiduciary duty arises from the partnership agreement doesn't negate a tort cause of action for breach of fiduciary duty?

COUNTISS: It may not negate it, but under the language of Delaney and Pressman it can exist only if it would exist without the partnership agreement because that's what those cases say. They say if the tort can exist without the contract, then there can be a tort cause of action.

OWEN: As a partner you're not supposed to use certain partnership opportunities without telling your other partners about it and getting their permission?

COUNTISS: Correct.

OWEN: Let's suppose that's not spelled out, you have an at-will implied in fact partnership agreement and a partner does violate that duty, you can still sue them for breach of a fiduciary duty even though their relationship is based on a contract can you not?

COUNTISS: Yes, but you sue them because they're taking something that belongs to you - in

effect - they're stealing from you.

OWEN: But it's still a breach of fiduciary duty as opposed to a breach of the partnership agreement?

COUNTISS: It may be. It always depends on the facts and circumstances. But I come back again to Pressman and Delaney. If you could not sue them but for the contract, then your cause of action is for breach of contract.

SPECTOR: So that an attorney who is not a partner who reports a grievance of some sort would have a tort cause of action?

COUNTISS: No, an attorney who is not a partner would be guided by the terms of the partnership agreement, and probably would be...well it just depends on the terms of the partnership agreement. But I don't think in that circumstance there would be a tort cause of action.

SPECTOR: He could be fired at will?

COUNTISS: Yes unless there's something in the contract that prohibits it.

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REBUTTAL

TUCKER: I said I would be assisted by Mr. Thomas, and let me give a better answer to Justice Owen's question about the three partnership firm situations. The better answer is that we're not saying that the partner who reports the grievance can't be expelled if he reports on an ethical violation in a 3-person firm. What we are saying that if he is expelled for doing that, that he has a cause of action based upon breach of fiduciary duty for any damages that he can prove. The other option is for the partners to do what was testified was an option in this case and that is if they stepped across the line they can step back and get on the right side of the line. Behavior can be changed and that is the purpose for reporting requirements, to call to the attention of lawyers and have lawyers conform their behavior to the rules.

OWEN: But in a 3-man office that's a fairly significant breach of trust is it not - for one lawyer to report another?

TUCKER: It is. Well I don't think it's a breach of..

OWEN: Let's assume that the State Bar took no action. There had been a report. It was questionable whether it was a violation or not, but if there had been a report, are you still going to say that the other partners their hands are tied, they can't expel the partner who made the call, who was obligated,

who had a good faith belief that he was obligated to report. Now what do you do in that situation where you have a breach of trust among the partners?

TUCKER: The answer I gave before is that no they couldn't expel him, but I think that's the wrong answer. The answer is they can't expel the partner who...

HECHT: _____ they have to pay for.

TUCKER: They have to pay for it if there are any damages.

OWEN: What damages would there be if he followed the partnership agreement in expelling?

TUCKER: There may be none.

OWEN: The damages would only come if you expelled him in violation of the agreement about how to split up the assets wouldn't it?

TUCKER: If you violate them in breach of the fiduciary duty, then there are tort damages because that is a tort and it depends on what the facts of the case may be. The argument that there is no duty I think is wrong for 2 reasons: the legislature in §31 of the Partnership Act recognizes that the bona fide requirement that's involved in a dissolution or expulsion of a partner, and this court has throughout its jurisprudence recognized that the fiduciary duty exist. I don't think this court has to answer that question.

HECHT: Doesn't this boil down to or not whether it's bona fide to expel a partner in a law firm for reporting another partner's violation of the ethical code?

TUCKER: Absolutely. That's what the case is all about.

PHILLIPS: And there is no jurisprudence anywhere else in the country on that point?

TUCKER: That's incorrect. There are 3 cases that were cited by the CA that address this issue. Please look at Leigh v. Crescent Square, Gelder Medical v. Webber, and _____. Each of those cases says that a partnership is free to expel persons for whatever reason as long as they, the language is a little different in the cases, but generally they say as long as there is not overreaching, undue advantage or breach of a public policy.

PHILLIPS: This public policy does not?

TUCKER: No, the closest case is cited in one of the amicus briefs, Leonard _____ amicus brief. It's the Weeder(?) case out of the CA in New York. It's a different situation. He was not a partner;

he was an employee. And there the CA of New York fashioned an exception to the at-will doctrine, something I am not asking this court to do, because I know this court won't do that and I don't want this court to do that. So please don't misunderstand me. But the only answer to your question Justice Phillips is that in that instance the New York CA did say that the public policy of New York is that when an employee in a law firm reports a violation as he is required to do by the New York rules, that he has a cause of action when he is fired for doing so.

PHILLIPS: I'm going to change your yes to a no then. I think this is a case of first impression.

OWEN: Let me ask you the way the charge was presented I was kind of curious. You apparently did not object and fashion the charges specifically said: termination of a partner in accordance with the partnership agreement does not constitute a breach of fiduciary duty. So if they had dotted their Is and crossed their Ts in terminating her under the way you submitted it to the jury she would not have a cause of action even if the reason for the termination had been that she had filed a grievance?

TUCKER: I think I should have objected frankly to that charge. Judge _____ had numerous rulings and Judge Brister by the way fashioned that charge. It was not _____ by us. But had already ruled on that and I wasn't going to argue with him anymore. I had been battered enough. Probably I should have made an objection. The fact of the matter is, I did not.

OWEN: But your argument in this defines the duty. If that's the case...

TUCKER: It does define the duty, but the facts of this case are that they didn't do that. They first discharged her on Aug. 23, 1990, when he came to Washington, DC and said: go find another job. They discharged her again in Jan, 1991, when they secretly took away her partnership interests and they discharged her again when they said we are cutting off your money - go find another place.

The stake in this case is whether the practice of law is about money only? is the avoidance of self gain to be the only restraint on law partners' treatment of one another? or are we to continue to be required to behave toward our law partners with honesty, good faith, loyalty and honor?