Cal. Prac. Guide Pass--Through Entities Ch. 3-A

California Practice Guide--Pass-Through Entities | August 2024 Update
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Chapter 3. General Partnership

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[3:1] Stated simply, a general partnership is a form of business entity in which two or more persons as co-owners carry on a business for profit. [Corps.C. §§ 16101(a)(9), 16202(a); *Eng v. Brown* (2018) 21 CA5th 675, 694, 230 CR3d 771, 787; see *Corrales v. Corrales* (2011) 198 CA4th 221, 223-224, 227, 129 CR3d 428, 429, 432—one "partner" cannot operate in partnership form after departure of other partner]

1. [3:2] **Governing Law:** The Uniform Partnership Act of 1994 (UPA; Corporations Code Title 2, Ch. 5; Corps.C. § 16100 et seq.), governs all general partnerships, including general partnerships formed prior to the UPA's January 1, 1997 effective date. [Corps.C. § 16111(b)—"On and after January 1, 1999, this chapter governs all partnerships"]

a. [3:3] **Effect of partnership agreement on governing law:** With certain limitations (*see ¶ 3:62 ff.*), the UPA governs general partnerships *except as provided by the partnership agreement*—i.e., the parties' oral or written partnership agreement can prevail over the UPA. [Corps.C. § 16103(a)]

2. [3:4] **Tax Treatment:** A partnership is *not* a tax-paying entity. Whether a general partnership, limited partnership, or limited liability partnership, a partnership is merely a *conduit* for tax purposes: It simply files an information return (IRS Form 1065; FTB Form 565), showing the income and expenses of the partnership business, and each partner's *distributive share* of those items (usually as determined from the partnership agreement). The partners must report their distributive shares on their own individual tax returns. [IRC §§ 702-704, 6031(a); Rev. & Tax.C. § 18633; see *United States v. Woods* (2013) 571 US 31, 38, 134 S.Ct. 557, 562; *SFPP, L.P. v. Public Utilities Comm'n* (2013) 217 CA4th 784, 795, 159 CR3d 10, 17]

3. [3:5] **Individual or Entity as Partner:** Although partnerships are typically composed of individuals (natural persons), any "legal or commercial entity" (corporation, estate, trust, partnership, limited partner, limited liability company) may be a partner. Also, a government or governmental subdivision, agency or instrumentality may be a partner. [Corps.C. §§ 16101(a)(13), 16202(a)]

a. [3:6] **Trust as partner:** Although the Code provides that a trust may be a partner (*¶ 3:5*), courts disagree on whether the partner is the *actual trust* or the *trustee* of the trust. This issue can be significant in a variety of contexts, particularly upon the death of a trustee who is a natural person (*see ¶ 3:461*). [See *Presta v. Tepper* (2009) 179 CA4th 909, 913-914, 102 CR3d 12, 15-16—trust (other than "business" trust such as real estate or investment trust) is not an entity separate from trustee and consequently trustee rather than trust itself is the partner; but see *Han v. Hallberg* (2019) 35 CA5th 621, 624-625, 631-636, 247 CR3d 526, 528, 533-537—trust itself rather than trustee may be partner in a partnership (expressly disagreeing with *Presta*, supra); *Boshernitsan v. Bach* (2021) 61 CA5th 883, 890-891, 276 CR3d 109, 113-114—(confirming, in context of landlord-tenant dispute, that title to rental property held by revocable trust was held by trustees, not by revocable trust as entity)]

(1) [3:6.1] ***Comment:*** The California Supreme Court agreed to resolve the conflict between *Presta*, supra, and *Han*, supra, but subsequently dismissed review "[i]n light of appellants' concession that '[a]n ordinary express trust can be a general partner.'" [*Han v. Hallberg* (2019) 35 CA5th 621, 247 CR3d 526, rev.dism. (2020) 271 CR3d 648]

4. [3:7] **Unlimited Personal Liability:** Each general partner puts their entire personal resources at risk for debts and obligations of the partnership business: Each is *jointly and severally* liable to partnership creditors. [Corps.C. § 16306(a); *see ¶ 3:371*]

5. [3:8] **Partnership as Separate Entity:** A partnership is an entity separate and distinct from its partners. [Corps.C. § 16201]

a. [3:9] **Ownership of property:** Property owned or acquired by a partnership is property of the *partnership* and *not* of the individual partners. Moreover, a partner is not a co-owner of, and has *no* interest in, specific *partnership property*. Hence, the partner has no interest in such property that can be transferred, either voluntarily or involuntarily. [Corps.C. §§ 16203, 16501; see *Tinseltown Video, Inc. v. Transportation Ins. Co.* (1998) 61 CA4th 184, 198-200, 71 CR2d 371, 380-381]

(1) [3:10] **Acquisition of title:** Property is partnership property if acquired:

- in the partnership's name (*¶ 3:11*), or
- by one or more partners with an indication, in the *instrument transferring title*, of either:
  - — the person's capacity as a partner, or
  - — the existence of the partnership (even if *without* an indication of the partnership's name). [Corps.C. § 16204(a)]

(a) [3:11] **Property acquired in partnership's "name":** Property is acquired "in the partnership's name" if acquired by means of a transfer to either:

- the partnership in its *name*, or
- one or more partners in their capacity as partners so long as the partnership is *named* in the instrument transferring title. [Corps.C. § 16204(b)]

Property acquired in one or more partners' names without an indication in the instrument transferring title to the person's capacity as a partner or of the partnership's existence is *presumed* to be *separate* (nonpartnership) property *even if used for partnership purposes*. [Corps.C. § 16204(d)]

(b) [3:12] **Limitation—property purchased with partnership assets:** Property is *presumed* to be partnership property if purchased with partnership *assets*, even if *not* acquired in the partnership's name or by one or more partners with an indication in the instrument transferring title to the person's capacity as a partner or of the existence of the partnership. [Corps.C. § 16204(c)]

6. [3:13] **Suits By and Against Partnership:** A partnership may sue and be sued in its own name. An action may be brought against the partnership *and any or all of the partners* in the same action or in separate actions. [Corps.C. § 16307(a), (b); CCP § 369.5]

➪ [3:14] ***PRACTICE POINTER:*** A person suing the partnership should name the partners whenever possible … because a judgment against the partnership is *not* ipso facto enforceable against the *partners' personal assets*. [See Corps.C. § 16307(c), (d), ¶ *3:410*]

7. [3:15] **Joint Venture Compared:** A joint venture is a general partnership, but is typically a business formed by business entities (corporations, LPs or LLCs) to undertake a *particular transaction or project* rather than one intended to continue indefinitely (*see* ¶ 2:182 ff.). Often, participants in a joint venture will form a limited liability entity, such as an LLC. Joint ventures are commonly used in real estate matters where, e.g., two or more persons or entities form a joint venture to develop a specific parcel of property. [See *Chambers v. Kay* (2002) 29 C4th 142, 151, 126 CR2d 536, 544; *Weiner v. Fleischman* (1991) 54 C3d 476, 482, 286 CR 40, 43; *Cochrum v. Costa Victoria Healthcare, LLC* (2018) 25 CA5th 1034, 1053, 236 CR3d 457, 472]

a. [3:16] **Separate legal entity:** A joint venture is a separate legal entity and is capable of contracting in its own name. [*Victor Valley Transit Auth. v. WCAB* (2000) 83 CA4th 1068, 1076, 100 CR2d 235, 241]

b. [3:17] **Basic elements:** The essential element of a joint venture is an undertaking by two or more persons *to carry out a single business enterprise jointly for profit*. [*Pellegrini v. Weiss* (2008) 165 CA4th 515, 525, 81 CR3d 387, 397]

More specifically, there are three basic components of a joint venture:

- The members must have *joint control* over the venture (though they may delegate control to managers or other persons);
- The members must *share the profits* of the undertaking; and
- The members much each have an *ownership interest* in the enterprise. [*Cochrum v. Costa Victoria Healthcare, LLC* (2018) 25 CA5th 1034, 1053, 236 CR3d 457, 472; *Scottsdale Ins. Co. v. Essex Ins. Co.* (2002) 98 CA4th 86, 91, 119 CR2d 62, 67; *Orosco v. Sun-Diamond Corp.* (1997) 51 CA4th 1659, 1666, 60 CR2d 179, 184; compare *Krantz v. BT Visual Images, L.L.C.* (2001) 89 CA4th 164, 177-178, 107 CR2d 209, 219—joint venture may exist even where members' individual income from venture does not depend upon strict sharing of joint venture profits (one member received commission on sales of other's product that both members marketed)]

c. [3:18] **No formal agreement required:** A joint venture, like a partnership, may be formed by the venturers' oral agreement, or it may even be inferred by the parties' conduct and declarations. [*Pellegrini v. Weiss* (2008) 165 CA4th 515, 525, 81 CR3d 387, 397; *Scottsdale Ins. Co. v. Essex Ins. Co.* (2002) 98 CA4th 86, 91, 119 CR2d 62, 67; *Orosco v. Sun-Diamond Corp.* (1997) 51 CA4th 1659, 1666, 60 CR2d 179, 184]

The existence of a joint venture is a question of *fact* determined by a preponderance of the evidence. [*Weiner v. Fleischman* (1991) 54 C3d 476, 482, 286 CR 40, 42]

(1) [3:19] **Writing not required for real estate joint venture:** Although an agreement for the sale of real property or an interest therein must be in writing (per the "statute of frauds"—Civ.C. § 1624(a)(3)), a joint venture agreement involving the transfer of real property need *not* be in writing. E.g., an oral joint venture requiring one member to contribute a leasehold or title interest in real property is enforceable. [*In re Yan* (BC ND CA 2007) 381 BR 747, 753]

d. [3:20] **Legal aspects same as partnership; liability:** The distinction between joint ventures and partnerships is not regarded as significant, because the incidents of a joint venture are in all important respects the same as those of a general partnership and courts freely apply partnership law to joint ventures. [*Weiner v. Fleischman* (1991) 54 C3d 476, 482, 286 CR

40, 42—"From a legal standpoint, both relationships are virtually the same"; *Myrick v. Mastagni* (2010) 185 CA4th 1082, 1091, 111 CR3d 165, 171; *Milton Kauffman, Inc. v. Sup.Ct. (Thorson)* (1949) 94 CA2d 8, 17, 210 P2d 88, 94—joint venturers have right as partners to accounting and to inspect venture's books and records]

In particular, the liability of joint venturers to one another and to third persons is governed by the same rules that apply to general partnerships (*see ¶ 3:370 ff.*):

• [3:21] Each joint venturer has a fiduciary duty to act with the highest good faith toward each other regarding joint venture affairs. [*Weiner v. Fleischman* (1991) 54 C3d 476, 482, 286 CR 40, 42; *Pellegrini v. Weiss* (2008) 165 CA4th 515, 524, 81 CR3d 387, 397]

• [3:22] Each venturer is jointly liable to creditors for obligations of the enterprise, and a joint venturer may be liable to a third person for the act of the other venturer taken with respect to the venture. This is so even where the venturers agree among themselves that their liability is limited to the amount of their original investment. [*McClung v. Saito* (1970) 4 CA3d 143, 150, 84 CR 44, 48; *Orlopp v. Willardson Co.* (1965) 232 CA2d 750, 754, 43 CR 125, 128]

The liability of a joint venture extends to torts of a venturer acting in furtherance of the enterprise. (But a joint venture sued for the negligence of a venturer is entitled to indemnity from the negligent venturer.) [See *Leming v. Oilfields Trucking Co.* (1955) 44 C2d 343, 350, 282 P2d 23, 27—tortious acts of joint venturer's employee committed in conjunction with joint venture imputed to other joint venturers; *Dixon v. City of Livermore* (2005) 127 CA4th 32, 42, 25 CR3d 50, 58 ("[T]he negligence of one joint venturer or of his employees acting in connection with the joint venture is imputed to the other joint venturers"); *Orosco v. Sun-Diamond Corp.* (1997) 51 CA4th 1659, 1670, 60 CR2d 179, 186; see also *Myrick v. Mastagni* (2010) 185 CA4th 1082, 1091, 111 CR3d 165, 171-172—Civ.C. § 1431.2 limiting tortfeasor's noneconomic damages liability according to fault does not affect venturers' joint and several liability (*see ¶ 3:376*)]

e. [3:23] **"Partnership for definite term or particular undertaking":** The closest California *codification* of a "joint venture-like" entity is a "partnership for a definite term or particular undertaking." It is, as its name implies, limited in duration to a particular time, or in scope to a specific, defined project. In contrast, a "partnership at will" (all other general partnerships) is a partnership in which the partners have *not* agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking. [Corps.C. §§ 16101(a)(11), 16801(2); see *Jacoby v. Feldman* (1978) 81 CA3d 432, 439, 146 CR 334, 339—partnership engaged in long-term leasing activities was not partnership at will]

(1) [3:24] **Dissolution:** A partnership for a definite term or particular undertaking differs from a partnership at will in one important respect: A partnership at will may be dissolved if at least half the partners (other than wrongfully dissociating partners who dissociated within the past 90 days) so desire (*see ¶ 3:550*). [Corps.C. § 16801(1)]

In contrast, a partnership for a definite term or particular undertaking may be dissolved when any of the following occurs:

• *All* the partners opt to wind up the partnership business;

• The partnership term or undertaking expires; or

• 90 days after a partner's death, incapacity, bankruptcy or wrongful dissociation *unless* within that time a majority *in interest* of the partners (including any partners who rightfully dissociated within that time) agree to continue the partnership. [Corps.C. § 16801(2); *see ¶ 3:553*]

(2) [3:25] **Continuation of partnership after expiration or completion:** If the partners continue the business after the expiration of its definite term or completion of its stated undertaking, the partners are presumed to have agreed that the partnership will continue. [Corps.C. § 16406(b)]

If the partnership is continued beyond the definite term or particular undertaking, the partners' rights and duties remain the same as they were at the expiration of the term or completion of the particular undertaking so far as is consistent with a partnership at will. [Corps.C. § 16406(a)]

f. [3:25.1] **"Joint enterprise" (noncommercial undertakings):** *See ¶ 3:372.2*.

8. [3:26] **Securities Law Considerations:** Ordinarily, a general partnership (or joint venture) interest is not "security" because general partners (and joint venturers) normally have control rights and take an active part in management of the business. But

the result may be otherwise if there are *passive* general partners or other factors that effectively transform the general partnership (or joint venture) interest into an "investment contract." *See detailed discussion at ¶ 7:41 ff.*

a. [3:27] **Exemption for partnership composed of professional corporations:** *See ¶ 7:774*.

[3:28 - 3:49] ***Reserved.***

Cal. Prac. Guide Pass--Through Entities Ch. 3-B

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Chapter 3. General Partnership

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1. [3:50] **By Parties' Acts:** A formal written or oral agreement is *not* a prerequisite to formation of a general partnership. Rather, a partnership may be formed by the *actions* of two or more persons (*see* ¶ *3:5*): So long as the parties have jointly agreed to carry on, as co-owners, a business for profit, they are general partners even though they have no specific intent to form a partnership or have not reached agreement on how to share profits or losses. [Corps.C. §§ 16101(a)(9), 16202(a); *Eng v. Brown* (2018) 21 CA5th 675, 694, 701, 230 CR3d 771, 787-788, 793; *Holmes v. Lerner* (1999) 74 CA4th 442, 453-458, 88 CR2d 130, 137-142 (interpreting and applying predecessor to Corps.C. § 16202(a)); *Wurm v. Metz* (1958) 162 CA2d 262, 266-267, 327 P2d 969, 971 (same); compare *Marriage of Geraci* (2006) 144 CA4th 1278, 1292-1293, 51 CR3d 234, 244-246—husband's filing fictitious business statement without wife's knowledge, falsely showing her as partner, did not create partnership]

Whether the parties formed a partnership is a question of *fact*. [*Eng v. Brown*, supra, 21 CA5th at 694, 230 CR3d at 788; *Billups v. Tiernan* (1970) 11 CA3d 372, 379, 90 CR 246, 251; see *Spier v. Lang* (1935) 4 C2d 711, 716, 53 P2d 138, 140]

a. [3:51] **Burden of proof on person asserting partnership:** The party asserting the existence of a partnership has the burden of proving it by a preponderance of the evidence. [*Mercado v. Hoefler* (1961) 190 CA2d 12, 16, 11 CR 787, 790; *Love v. The Mail on Sunday* (CD CA 2006) 489 F.Supp.2d 1100, 1105 (applying Calif. law), aff'd 611 F3d 601; *In re Lona* (BC ND CA 2008) 393 BR 1, 11 (applying Calif. law); see *Weiner v. Fleischman* (1991) 54 C3d 476, 483-486, 286 CR 40, 43-45 (¶ *3:61*)]

Moreover, once shown to exist, a partnership is presumed to continue until the contrary is shown, and the burden of proof is upon the person who asserts its termination. [*Wurm v. Metz* (1958) 162 CA2d 262, 267, 327 P2d 969, 971]

b. [3:52] **Receipt of profits—potential presumption of partnership:** A person who receives a share of the business *profits* is *presumed* to be a partner *unless* the profits were received in payment of:

• Interest or principal on a *debt*, even if the payment varies with the profits of the business;

• Services as an *employee* or *independent contractor*;

• *Rent*;

• A retirement benefit to a beneficiary, representative or designee of a *deceased* or *retired* partner; or

• The *sale of real or personal property* (including goodwill of a business). [Corps.C. § 16202(c)(3); see *Eng v. Brown* (2018) 21 CA5th 675, 694, 230 CR3d 771, 787; *Cochran v. Board of Supervisors of Del Norte County* (1978) 85 CA3d 75, 81, 149 CR 304, 307—unequal sharing of profits does not disprove partnership (overruled on other grounds by *Weiner v. Fleischman* (1991) 54 C3d 476, 485-486, 286 CR 40, 45); *Bank of Calif. v. Connolly* (1973) 36 CA3d 350, 364, 111 CR 468, 478]

(1) [3:53] **Sharing of profits not dispositive—management and control predominate:** Profit-sharing is not considered the most important indicia of partnership. Where the receipt of profits falls into one of the above exceptions set forth in Corps.C. § 16202(c)(3) (¶ 3:52), the existence of a partnership is ordinarily evidenced by some degree of participation by the alleged partners in the *management and control* of the business. "To participate to some extent in the management of a business is a primary element in partnership organization, and it is virtually essential to a determination that such a relationship existed." [*Dickenson v. Samples* (1951) 104 CA2d 311, 315, 231 P2d 530, 533 (sharing of profits paid as rent to landlord did not justify inference of profits); see *Eng v. Brown* (2018) 21 CA5th 675, 694, 230 CR3d 771, 788—"Ordinarily the existence of a partnership is evidenced by the right of the respective parties to participate in the profits and losses and in the management of the business"; *Holmes v. Lerner* (1999) 74 CA4th 442, 453-454, 88 CR2d 130, 138; *In re Utnehmer* (9th Cir. BAP 2013) 499 BR 705, rev'd on other grounds (9th Cir. 2016) 651 Fed.Appx. 634, 635]

(a) [3:54] **Equal participation not essential:** The fact that management duties are not shared equally does not necessarily refute the existence of a partnership, because partners frequently delegate management to one partner or a group of partners. Nor does the unequal apportionment of profits and losses compel a conclusion that no partnership exists. [*Security Pac. Nat'l Bank v. Matek* (1985) 175 CA3d 1071, 1075, 223 CR 288, 291; *Wurm v. Metz* (1958) 162 CA2d 262, 267, 327 P2d 969, 971; *In re Lona* (BC NC CA 2008) 393 BR 1, 14]

Similarly, a partnership may exist where two persons have the *right* to manage the business even though one of them relinquishes day-to-day management to the other partner. [*In re Tsurukawa* (9th Cir. BAP 2002) 287 BR 515, 522]

c. [3:55] **Parties' intent:** Although parties may be deemed general partners even where they have no intent to form a partnership (*see ¶ 3:50*), the intent of the parties is nonetheless significant when determining whether a partnership exists, especially where the partners regarded themselves as partners. Intent is determined by the *objective* terms of their agreement rather than by their *subjective* or *undisclosed* intent. However, intent may be implied from the parties' acts. [*Eng v. Brown* (2018) 21 CA5th 675, 694, 230 CR3d 771, 788; *Security Pac. Nat'l Bank v. Matek* (1985) 175 CA3d 1071, 1075, 223 CR 288, 291; *Cochran v. Board of Supervisors of Del Norte County* (1978) 85 CA3d 75, 81, 149 CR 304, 307-308 (overruled on other grounds by *Weiner v. Fleischman* (1991) 54 C3d 476, 485-486, 286 CR 40, 45)]

d. Compare—factors *not* establishing partnership

(1) [3:56] **Joint ownership of property:** Common ownership of property (e.g., joint tenancy, tenancy in common, tenancy by the entirety) does not by itself establish a partnership, even if the co-owners share profits generated by the property. [Corps.C. § 16202(c)(1); see *Eng v. Brown* (2018) 21 CA5th 675, 694, 230 CR3d 771, 787]

But co-ownership of property, together with sharing of profits, are factors that may properly be considered *evidence* of partnership. [See *Holmes v. Lerner* (1999) 74 CA4th 442, 453-454, 88 CR2d 130, 138; *In re Tsurukawa* (9th Cir. BAP 2002) 287 BR 515, 521]

(2) [3:57] **Sharing of gross returns:** The sharing of gross returns does not itself establish a partnership, even if the persons have a joint or common right or interest in the property from which the returns are derived. [Corps.C. § 16202(c)(2); see *Eng v. Brown* (2018) 21 CA5th 675, 694, 230 CR3d 771, 787; *Blankenship v. Hearst Corp.* (9th Cir. 1975) 519 F2d 418, 425]

[3:58 - 3:59] ***Reserved.***

2. [3:60] **By Agreement:** A partnership may be created and carried on by a written *or oral* agreement. [See Corps.C. § 16101(a)(10); *Eng v. Brown* (2018) 21 CA5th 675, 694, 230 CR3d 771, 788; *Holmes v. Lerner* (1999) 74 CA4th 442, 453-458, 88 CR2d 130, 137-142 (interpreting and applying predecessor to Corps.C. § 16202(a))]

• ***FORM:*** General Partnership Agreement, *see Form 3:A*.

a. [3:61] **Proof of oral agreement by "preponderance of evidence":** The existence and/or terms of an oral partnership agreement are provable under the "preponderance of the evidence" standard rather than under the higher "clear and convincing" standard of proof. [*Weiner v. Fleischman* (1991) 54 C3d 476, 483-486, 286 CR 40, 43-45]

b. [3:62] **No particular terms required; limitations on agreement:** The law does not require the parties' written or oral agreement to include any particular terms, and no particular form of written agreement is required. However, the UPA lists certain statutory provisions that may *not* be varied. This list is critical, for anything that is not on the list *may*—and frequently *is*—varied by the parties' agreement. Thus, the UPA provides that the agreement may *not:*

(1) [3:63] Vary the rights and duties under Corps.C. § 16105 (requiring two partners' signatures for certain partnership documents filed with Secretary of State and single partner's or other authorized person's signature for other partnership documents filed with Secretary of State), but the agreement may eliminate a partner's duty to provide copies of filed statements to all other partners. [Corps.C. § 16103(b)(1)]

(2) [3:64] "Unreasonably restrict" a partner's (or former partner's) right of access to partnership books and records (Corps.C. § 16403(b), ¶ *3:306 ff.*) or a partner's right to be furnished with information regarding the partnership's business and affairs (Corps.C. § 16403(c), ¶ *3:320*). [Corps.C. § 16103(b)(2)]

(3) [3:65] Eliminate a partner's duty of *loyalty* (see Corps.C. §§ 16404(b), 16603(3), ¶ *3:151 ff., 3:476*). However, the agreement may, "if not manifestly unreasonable":

(a) identify specific types or categories of activities that do not violate the duty of loyalty, or

(b) permit all partners or a specific number of percentage or partners to authorize or ratify, after full disclosure of all material facts, a specific act or transaction that would otherwise violate the duty of loyalty. [Corps.C. § 16103(b)(3); see *In re Brobeck, Phleger & Harrison LLP* (BC ND CA 2009) 408 BR 318, 334-336 (reconsideration granted in part on other grounds, 2010 WL 377679)]

(4) [3:66] "Unreasonably reduce" a partner's duty of *care* (Corps.C. §§ 16404(c), 16603(3), ¶ *3:170, 3:476 ff.*). [Corps.C. § 16103(b)(4)]

(5) [3:67] Eliminate a partner's obligation of *good faith and fair dealing* (Corps.C. § 16404(d), ¶ *3:171*). However, the agreement may prescribe the standards by which performance of the obligation is to be measured so long as the standards are not "manifestly unreasonable." [Corps.C. § 16103(b)(5)]

(6) [3:68] Vary a partner's power to *dissociate* (Corps.C. § 16602(a), ¶ *3:470 ff.*). But the agreement may require a partner's notice of dissociation (Corps.C. § 16601(1), ¶ *3:453*) to be in *writing*. [Corps.C. § 16103(b)(6)]

(7) [3:69] Vary the right of a court to *expel* a partner (Corps.C. § 16601(5), ¶ *3:458*). [Corps.C. § 16103(b)(7)]

(8) [3:70] Vary the requirement to wind up the partnership business upon:

(a) an event that renders the partnership's business unlawful (Corps.C. § 16801(4));

(b) a judicial determination that the partnership's economic purpose is likely to be unreasonably frustrated, another partner has engaged in conduct making the partnership business "not reasonably practicable" with that partner, or it is not otherwise reasonably practicable to carry on the partnership business in conformity with the agreement (Corps.C. § 16801(5)); or

(c) a judicial determination, made upon application by a transferee of a partner's transferable interest, that it is equitable to wind up a partnership for a particular term or undertaking where the term has expired or the undertaking has been completed. [Corps.C. § 16103(b)(8); *see* ¶ *3:557*]

(9) [3:71] Restrict the rights of *third parties* under California partnership law. [Corps.C. § 16103(b)(9)]

(10) [3:72] Vary the application of California law to a *registered limited liability partnership* (Corps.C. § 16106(b), ¶ *4:31*). [Corps.C. § 16103(b)(10)]

c. [3:73] **Special concerns re partnership name:** There are no statutory restrictions on the name of a partnership as there are on the names of corporations, LLCs and even limited liability partnerships. Moreover, because a partnership's name appears in the Secretary of State's office only on the optional statement of partnership authority (*¶ 3:100 ff.*), the Secretary of State may not effectively block a partnership from using a name the way the Secretary of State may prevent a corporation, limited partnership or LLC from using a particular name.

➪ [3:74] ***PRACTICE POINTER:*** Use of a name that is the same or very similar to the name of another business may cause confusion among customers, suppliers and others, and could result in legal action under various legal theories. Filing a fictitious business name statement with a county clerk does not itself authorize use of a name that others have a prior legal right to use (e.g., under trade name, state or federal trademark, or fictitious name laws, or common law). [Bus. & Prof.C. §§ 14417, 14418]

The Secretary of State's website contains a feature known as California Business Search (*businesssearch.sos.ca.gov)*, which permits anyone to obtain basic information about corporations, LLCs and limited partnerships. A crude name search may be performed by inserting a proposed business name. (Unfortunately, California Business Search does not search fictitious business name filings, which are made at the county level; *see ¶ 3:75 ff.*)

(1) [3:75] **Fictitious business name statute:** If the general partnership is conducted under a name that does *not* show the surname of each general partner, or implies the existence of additional owners (e.g., "Company," "& Company," "& Son," "& Associates"), the partnership is required to file the statement and publish the notice provided in Bus. & Prof.C. § 17900 et seq. The purpose of the fictitious business name statute is to provide a public record of the persons behind an enterprise for the benefit of those who deal with it. [Bus. & Prof.C. § 17900(a)(1); see *Hixson v. Boren* (1956) 144 CA2d 547, 553-554, 301 P2d 615, 553]

(a) [3:76] **Filing with county clerk:** The fictitious business name statement must be filed with the County Clerk of the county in which the *principal place of business is located*. Additional statements may be published in other counties. [Bus. & Prof.C. § 17915]

(b) [3:77] **Publication:** Within 45 days of filing the fictitious business name statement, a notice must be published at least once a week for four successive weeks in a newspaper of general circulation in the county where the statement was filed. The newspaper "should" circulate in the area in which the business is conducted. [Bus. & Prof.C. § 17917(a), (b); Gov.C. § 6064]

Within 45 days of completion of publication, an affidavit of publication must be filed with the county clerk where the statement was filed. [Bus. & Prof.C. § 17917(d)]

(c) [3:78] **Penalty for failure to comply—no contract action:** The only consequence of failing to comply with the fictitious business name statute is that the partnership is barred from *maintaining* a legal action to enforce a *contract* made in the fictitious business name until the partnership complies with the statute. Indeed, the partnership is not barred from *filing* a contract action, nor is it barred from filing or maintaining a *tort* action. [Bus. & Prof.C. § 17918; see *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 C3d 988, 1001, 277 CR 517, 525, fn. 8; *American Alternative Energy Partners II v. Windridge, Inc.* (1996) 42 CA4th 551, 561, 49 CR2d 686, 692; *Templeton Action Committee v. County of San Luis Obispo* (2014) 228 CA4th 427, 432, 175 CR3d 346, 350]

(d) [3:79] **Expiration and renewal of statement:** The statement expires five years after the date it was filed, and a new statement must be filed before the old statement expires. The new statement need *not* be published if there is no change in the required information *and* the new statement is filed within 40 days of the expiration of the old statement. [Bus. & Prof.C. §§ 17917(c), 17920 (amended Stats. 2023, Ch. 20, eff. 1/1/24)]

(e) [3:80] **Refiling upon change in statement:** The statement also expires 40 days after a change in the facts set forth in the statement. A corrected statement must be refiled *and republished*. [Bus. & Prof.C. § 17917(c), 17920(b) (amended Stats. 2023, Ch. 20, eff. 1/1/24)]

Withdrawal of a general partner does not cause expiration if a *statement of withdrawal* is filed *and published*. [Bus. & Prof.C. § 17923 (amended Stats. 2023, Ch. 20, eff. 1/1/24)]

(f) [3:81] **Abandonment of name:** When the business ceases to use the fictitious business name, a statement of abandonment must be filed and published in the same manner as the fictitious business name statement. [Bus. & Prof.C. §§ 17920(c), 17922 (amended Stats. 2023, Ch. 20, eff. 1/1/24)]

➪ [3:82] ***PRACTICE POINTER:*** There are commercial services that will provide, file and publish the fictitious business name statement, notice, affidavit of publication and statement of abandonment.

[3:83 - 3:90] ***Reserved.***

3. [3:91] **Formation by Conversion From Other Entity:** A partnership may be formed by the conversion of a California limited partnership, LLC or corporation into a general partnership. A partnership may also be formed by the conversion of a foreign business entity into a partnership if the foreign entity is authorized by the laws under which it is organized to effect the conversion. [Corps.C. § 16908(a)]

a. General provisions governing conversion

(1) [3:92] **Plan of conversion:** An entity that desires to convert into a partnership must approve a plan of conversion or the instrument that is required to be approved to effect the conversion pursuant to the laws under which the entity is organized. [Corps.C. § 16908(b)]

(2) [3:93] **Approval of conversion:** The conversion must be approved by the number or percentage of partners, members, shareholders or holders of interest of the converting entity as is required by the laws under which the entity is organized, or such other percentage (subject to applicable law) as may be set forth in the converting entity's "charter" documents (e.g., limited partnership agreement, articles of organization, operating agreement, articles of incorporation). [Corps.C. § 16908(c)]

(3) [3:94] **Effective date of conversion:** The conversion is effective at the time set forth under the laws under which the converting entity is organized. [Corps.C. § 16908(d)]

(4) [3:95] **Conversion from foreign entity—certificate of cancellation not required:** In the case of a foreign limited partnership or LLC that converts into a California general partnership, the filing of a certificate of conversion, or a statement of partnership authority containing a statement of conversion, has the effect of the filing by the converting foreign limited partnership or LLC of a certificate of cancellation of its registration to do business in California. No separate certificate of cancellation is required. [Corps.C. § 16908(e)]

If a foreign corporation that is qualified to transact business in California converts into a California general partnership, the filing of a certificate of conversion, or a statement of partnership authority containing a statement of conversion, has the effect of an automatic surrender of the foreign corporation's right to transact business in California. (I.e., the foreign corporation's qualification to do business in California terminates.) [Corps.C. § 16908(e)]

b. Provisions specific to converting entity

(1) [3:95.1] **Conversion from limited partnership:** *See ¶ 5:740 ff.*

(2) [3:95.2] **Conversion from LLC:** *See ¶ 6:900.*

(3) [3:95.3] **Conversion from corporation:** See Friedman, Soza & Jann, *Cal. Prac. Guide: Corporations* (TRG), Ch. 8.

c. [3:96] **Partner's liability for converting entity's obligations:** A partner of a partnership that was formed by conversion is liable for any and all obligations of the converting entity to the extent to which the partner was personally liable before the conversion. [Corps.C. § 16909(d)]

[3:97 - 3:99] ***Reserved.***

4. [3:100] **Statement of Partnership Authority:** Unlike creation of a limited partnership, LLC or corporation, no filing with the Secretary of State is necessary to create a general partnership (unless the general partnership is formed by conversion from another entity, in which event the law governing the converting entity may require filing of a document with the Secretary of State; *see ¶ 3:91 ff.*). However, a general partnership may (but need not) file with the Secretary of State a statement of partnership authority, which may specify the authority, or limitations on authority, of some or all partners to act on the partnership's behalf. [Corps.C. §§ 16105(a), 16303(a)]

• ***FORM:*** The Secretary of State's standard form Statement of Partnership Authority (Form GP-1) is available online at the Secretary of State's website (*www.sos.ca.gov*).

a. [3:101] **Required provisions:** The statement *must* include:

(1) The partnership's *name*. [Corps.C. § 16303(a)(1)(A)]

(2) The *street* address of its principal office and of one principal office in California (if there is one). [Corps.C. § 16303(a)(1)(B)]

(3) The *mailing* address of its principal office, if different from the street address. [Corps.C. § 16303(a)(1)(C)]

(4) The *names and mailing addresses of all of the partners* or, alternatively, of an *agent* named in the statement to keep a list of the names and mailing addresses of all partners. The agent must make the list available to *any* person on request "*for good cause shown*." [Corps.C. § 16303(a)(1)(D), (b)]

(5) The *names of the partners authorized to execute an instrument transferring real property* held in the partnership's name. [Corps.C. § 16303(a)(1)(E)]

b. Effect

(1) [3:102] **Transactions other than real property transfers:** A grant of authority contained in a filed statement is conclusive in favor of a person who gives value without knowledge to the contrary (i.e., without knowledge of lack of authority) so long as and to the extent that a limitation on that authority is not then contained in another filed statement. (A filed *cancellation* of a limitation on authority revives the previous grant of authority.) [Corps.C. § 16303(d)(1)]

However, a person not a partner is *not* deemed to know (i.e., no constructive notice) of any limitations on the partner's authority contained in the statement *except* as may be indicated by a statement of dissociation (Corps.C. § 16704, ¶ *3:520 ff.*) or a statement of dissolution (Corps.C. § 16805, ¶ *3:613 ff.*). [Corps.C. § 16303(f)]

(2) [3:103] **Transfers of real property:** A grant of authority to transfer real property held in the partnership's name contained in a *certified* copy of a filed statement *recorded in the office for recording transfers of that real property* is conclusive in favor of a person who gives value without knowledge to the contrary (i.e., without knowledge of lack of authority) so long as and to the extent that a certified copy of a filed statement containing a limitation on that authority is not then of record in the office for recording transfers of that real property. (The recording of a certified copy of a filed *cancellation* of a limitation on authority revives the previous grant of authority). The certified copy also provides constructive notice, to all persons not a partner, of any *limitations* contained in the statement on the authority of a partner to transfer the property. [Corps.C. § 16303(d)(2), (e); see *FDIC v. Sup.Ct. (BMB Properties)* (1997) 54 CA4th 337, 345-346, 62 CR2d 713, 717-718—statement may not be applied *against* bona fide purchaser who relied upon act of person who was deleted from partnership statement by way of subsequent amendment thereto (triable issue whether former partner's act bound partnership)]

(3) [3:104] **Statement of denial:** A person's denial of partnership status as set forth in a filed statement of denial (¶ *3:118*) also acts as a limitation on authority. [Corps.C. § 16304]

c. Optional provisions

(1) [3:105] **Partner authority:** The statement may specify the authority, or limitations on the authority, of some or all of the partners to enter into transactions on behalf of the partnership other than transfer of the partnership's real property (*see* ¶ *3:103*), as well as any other matter. [Corps.C. § 16303(a)(2)]

(2) [3:106] **Agent for service of process:** The statement may set forth an agent for service of process. [Corps.C. § 16309(a)]

(a) [3:107] **Natural person or corporate agent:** The designated agent may be either an individual (natural person) *residing in California* or a corporation *having an office in California*. A corporate agent must file with the Secretary of State a certificate designating its offices within California and its employees who can be served, and must otherwise meet the statutory requirements for acting as an agent for service of process. [Corps.C. § 16309(a); see Corps.C. § 1505]

(b) [3:108] **Address of natural person:** If a natural person is designated as agent, that person's *complete business or residence street address* must be set forth in the statement. If a corporate agent is designated, no address for the corporation should be shown. (A corporate agent's address is already on file in the Secretary of State's office; *see ¶ 3:107*.) [Corps.C. § 16309(a)]

(c) [3:109] **Changing agent for service of process:** If the agent for service of process changes (or if a natural person designated as agent no longer resides in California), the partnership must "promptly" file an amended statement of partnership authority "designating a new agent." (However, because the initial designation of an agent for service of process is optional, the amendment should be able merely to delete the agent without designating a new one, if so desired.) [Corps.C. § 16309(d); *see ¶ 3:106*]

1) [3:110] **Agent's resignation or disclaimer of appointment:** The agent may *resign* by filing a duly signed and acknowledged statement of resignation with the Secretary of State. This effectively terminates the agent's authority. The Secretary of State must immediately advise the partnership of the resignation by written notice directed to the partnership's principal office. [Corps.C. § 16309(b)]

The agent may also *disclaim* having been properly appointed as agent for service of process by filing a disclaimer with the Secretary of State. [Corps.C. § 16309(c); 2 CCR § 21906]

The resignation or disclaimer must be on a form prescribed by the Secretary of State. There is no filing fee. (However, there is the usual $15 special handling fee if the form is delivered in person to the Secretary of State's office.) [Corps.C. § 16309(b), (c); Gov.C. § 12182(a); 2 CCR §§ 21903(c), 21906]

• ***FORM:*** The Secretary of State's standard form Resignation of Agent for Service of Process (RA-100) is available online at the Secretary of State's website (*www.sos.ca.gov*).

➪ [3:111] ***PRACTICE POINTERS:*** Various corporations are in the business of acting as agents for service of process, and usually charge only a modest fee for this service. The advantage of naming a corporate agent for service of process is that it assures continuity and protects against the risk involved where a person designated as agent is no longer with the company or where the company moves its place of business.

As a practical matter, however, most small companies designate one of their own principals as agent for service of process and show the business' address as the address at which such agent may be served. This affords some assurance that the company will receive prompt notice of any action filed against it.

Sometimes, the attorney is asked by the clients to serve as agent for service of process, at least initially. The attorney may certainly do so but should be aware that accepting such agency carries with it the responsibility of exercising reasonable care to notify the client promptly if the attorney is served. Such responsibility may be acceptable if there is an ongoing relationship with the clients, but otherwise may be a source of inconvenience to the attorney, with no assurance of compensation.

d. [3:112] **Execution by two partners required:** The statement must be executed by at least two partners who must personally declare under penalty of perjury that the statement's contents are accurate. [Corps.C. § 16105(c)]

(1) [3:113] **Copy to other partners:** A person who files the statement must "promptly" send a copy of the statement to every nonfiling partner and any other person named as a partner in the statement (but failure to send a copy to a partner or other person does not limit the effectiveness of the statement as to a person who is not a partner). [Corps.C. § 16105(e)]

(2) [3:114] **Caution—partnership agreement power to vary these requirements:** The partnership agreement may not vary the requirement of two partners' signatures on the statement, but it may eliminate the duty to send copies of the statements to the nonfiling partners. [Corps.C. § 16103(b)(1); *see ¶ 3:63*]

e. [3:115] **$70 filing fee:** The fee for filing the statement of partnership authority is $70 (plus a $15 special handling fee if delivered in person to the Secretary of State's office). [See Corps.C. §§ 16105(f), 16113(a); Gov.C. §§ 12182(a), 12187(a); 2 CCR § 21903(c)]

f. [3:116] **Amendment or cancellation of statement:** A person authorized to file a statement may amend or cancel the statement by filing an amendment or cancellation that names the partnership, identifies the statement, and states the substance of the amendment or cancellation. [Corps.C. § 16105(d)]

• ***FORM:*** The Secretary of State's standard form Statement of Amendment/Cancellation (Form GP-7) is available online at the Secretary of State's website (*www.sos.ca.gov*).

(1) [3:117] **$30 filing fee:** The fee for filing the Statement of Amendment/Cancellation is $30 (plus a $15 special handling fee if delivered in person to the Secretary of State's office). [Corps.C. § 16113(b); Gov.C. §§ 12182(a), 12187(c); 2 CCR § 21903(c)]

g. [3:118] **Denial of partner status—statement of denial:** A person named as a partner in a filed statement of partnership authority or in a list maintained by an agent (per Corps.C. § 16303(b), ¶ *3:101*) may file a statement of denial stating the partnership's name as filed with the Secretary of State, any identification number issued by the Secretary of State, and the fact that is being denied, which may include a denial of the person's authority or status as a partner. [Corps.C. § 16304]

• ***FORM:*** The Secretary of State's standard form Statement of Denial (Form GP-2) is available online at the Secretary of State's website (*www.sos.ca.gov*).

(1) [3:119] **$30 filing fee:** The fee for filing a Statement of Denial is $30 (plus a $15 special handling fee if delivered in person to the Secretary of State's office). [Corps.C. § 16113(b); Gov.C. §§ 12182(a), 12187(c); 2 CCR § 21903(c)]

h. [3:120] **Certificate of status ("good standing"):** Anyone may request a certificate of status from the Secretary of State certifying to the partnership's (or other business entity's) current status with the Secretary of State (active/good standing, suspended, dissolved, cancelled, etc.). If the partnership has filed a statement of partnership authority, the certificate of status will state that the partnership "is authorized to exercise all its powers, rights and privileges and is in good legal standing in the State of California."

(1) [3:121] **Fee:** The fee for issuing a certificate of status is $5. [Gov.C. § 12183(b)]

➪ [3:122] ***PRACTICE POINTER:*** A certificate of status is used to provide comfort to lenders and others who do business with the general partnership and who are accustomed to getting such certificates from other types of entities. Counsel rendering closing opinions for the partnership (e.g., the partnership is duly organized and authorized to enter into the transaction) may also obtain a certificate of status as part of the diligence they conduct for their opinions.

[3:123 - 3:129] ***Reserved.***

5. [3:130] **Designation of "Partnership Representative":** Every partnership is required to designate a "partnership representative" (known as the "tax matters partner" prior to 2018) to deal with any IRS challenges or audits. *See detailed discussion at ¶ 8:250 ff.*

[3:131 - 3:149] ***Reserved.***

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Chapter 3. General Partnership

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1. [3:150] **Fiduciary Duties:** Partners are obligated to carry out the enterprise with the highest good faith and fair dealing toward each other and, in particular, assume fiduciary duties of *due care* and *loyalty* to the partnership *and each other* in regard to partnership operations. "Partnership is a fiduciary relationship, and partners are held to the standards and duties of a trustee in their dealings with each other." [Corps.C. § 16404(a); *Agam v. Gavra* (2015) 236 CA4th 91, 112-113, 186 CR3d 295, 312; *Enea v. Sup.Ct. (3-D)* (2005) 132 CA4th 1559, 1564-1568, 34 CR3d 513, 516-519; *Pellegrini v. Weiss* (2008) 165 CA4th 515, 524-525, 81 CR3d 387, 397; see also *Cleveland v. Johnson* (2012) 209 CA4th 1315, 1339, 147 CR3d 772, 791]

"In all proceedings connected with the conduct of the partnership every partner is bound to act in the highest good faith to his copartner and may not obtain any advantage over him in the partnership affairs by the slightest misrepresentation, concealment, threat or adverse pressure of any kind." [*Agam v. Gavra*, supra, 236 CA4th at 113, 186 CR3d at 312; *Enea v. Sup.Ct. (3-D)*, supra, 132 CA4th at 1564, 34 CR3d at 515-517; *BT-I v. Equitable Life Assurance Society of the U.S.* (1999) 75 CA4th 1406, 1410-1411, 89 CR2d 811, 815; *Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 CA3d 1139, 1150, 265 CR 330, 335]

a. [3:151] **Duty of loyalty:** Under the UPA, the partner's duty of loyalty includes (but is not necessarily limited to) the obligation:

- To *account* to the partnership and *hold as trustee* for it any property, profit or benefit derived by the partner in the conduct (and winding up) of the partnership business, or derived from a partner's use of partnership property or information, including the appropriation of a partnership opportunity. [Corps.C. § 16404(b)(1); see *Jones v. Wagner* (2001) 90 CA4th 466, 475-476, 108 CR2d 669, 676]

- To refrain from dealing with the partnership as, or on behalf, of a party having an interest *adverse* to the partnership. [Corps.C. § 16404(b)(2)]

- To refrain from *competing* with the partnership in the conduct of the partnership business before the partnership's dissolution. [Corps.C. § 16404(b)(3); see *Heller Ehrman LLP v. Davis Wright Tremaine LLP* (2018) 4 C5th 467, 475, 480, 229 CR3d

371, 377, 381—"Notably, the duty to refrain from competing with the partnership only pertains to the period *before* dissolution" (emphasis in original)]

(1) [3:151.1] **Partnership agreement may not eliminate duty of loyalty:** *See ¶ 3:65*.

(2) [3:152] **Duty to share business opportunities:** The partners' duty of loyalty includes the duty to offer to the partnership a business opportunity that is so closely related to the business of the partnership that it would be unfair for the partner to take advantage of it personally. This duty is taken from the corporate opportunity doctrine, which requires corporate officers and directors from seizing a corporate opportunity for themselves when the proposed opportunity is "reasonably incident to the corporation's present or prospective business and is one in which the corporation has the capacity to engage." [*Air Purification, Inc. v. Carle* (1950) 99 CA2d 258, 264-265, 221 P2d 700, 704; *MacIsaac v. Pozzo* (1947) 81 CA2d 278, 284-285, 183 P2d 910, 914—partner who optioned lot in his own name and subsequently purchased lot for himself violated fiduciary duty to partnership entered into for purpose of buying that lot; see *Kelegian v. Mgrdichian* (1995) 33 CA4th 982, 988-991, 39 CR2d 390, 394-395]

Cross-refer: For a more detailed discussion of the corporate opportunity doctrine, see Friedman, Soza & Jann, *Cal. Prac. Guide: Corporations* (TRG), Ch. 6.

(3) [3:153] **Duty essentially limited:** Although the partners' fiduciary duties to each other may appear very broad and are not restricted to those set forth in Corps.C. § 16404 (*see ¶ 3:180*), the fiduciary duty of loyalty in essence applies only to situations where a partner takes advantage of their position "to reap personal profit or act to the partnership's detriment." [See *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 CA4th 1509, 1551, 80 CR2d 94, 119 (applying prior law); *Heller v. Pillsbury Madison & Sutro* (1996) 50 CA4th 1367, 1387, 58 CR2d 336, 348 (same)]

(4) [3:154] **Third party's joint and several liability for assisting in breach:** A nonpartner who aids and abets, or conspires with, a partner to breach the partner's duty of loyalty (e.g., third party acts as intermediary in self-dealing transaction between partner and partnership) is jointly and severally liable with the partner for the entire amount of the loss. [*Prince v. Harting* (1960) 177 CA2d 720, 728, 2 CR 545, 549; *Stephenson v. Calpine Conifers II, Ltd.* (9th Cir. 1981) 652 F2d 808, 816 (applying Calif. law) (overruled on other grounds by *In re Washington Public Power Supply System Secur. Litig.* (9th Cir. 1987) 823 F2d 1349, 1350-1352 (en banc)); see *Oakdale Village Group v. Fong* (1996) 43 CA4th 539, 546, 50 CR2d 810, 814—creditor who knowingly accepted payment of partner's personal debt with partnership funds liable for conversion together with partner]

[3:155 - 3:169] ***Reserved.***

b. [3:170] **Duty of care:** The UPA describes the duty of care in the negative: A partner's duty of care "is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or knowing violation of law." [Corps.C. § 16404(c)]

Under this standard, a partner's mere negligence does *not* violate the partner's duty of care. Thus, unless the partnership agreement provides otherwise, the partnership—and the other partners—assume the risk of a partner's ordinary mistakes or errors. (However, where the partner's negligence causes a *third party* to assert a claim *against the partnership*, the partnership may seek indemnity from the negligent partner; *see ¶ 3:391*.)

(1) [3:170.1] **Partnership agreement may not "unreasonably reduce" duty of care:** *See ¶ 3:66*.

c. [3:171] **Good faith and fair dealing:** A partner must discharge the duties to the partnership and the other partners and exercise any rights consistently with the obligation of good faith and fair dealing. [Corps.C. § 16404(d)]

(1) [3:171.1] **May not be eliminated by partnership agreement:** *See ¶ 3:67*.

d. [3:172] **Incidental self-interest permitted:** The fact that a partner's conduct furthers the partner's own self-interest does not itself violate the party's duty or obligation under law or the partnership agreement. [Corps.C. § 16404(e)]

(1) [3:173] **Limitation—no harm to partnership permitted:** The purpose Corps.C. § 16404(e) is to excuse partners from accounting to the partnership for incidental benefits they obtain in the course of partnership activities *without detriment to the partnership*. It does not give a partner carte blanche to deal with partnership property other than for the benefit of the partnership. Nor does it permit a partner to engage in self-dealing with the partnership without the knowledge and consent of the other partners. [*Agam v. Gavra* (2015) 236 CA4th 91, 113, 186 CR3d 295, 312; *Enea v. Sup.Ct. (3-D)* (2005) 132 CA4th 1559, 1564-1568, 34 CR3d 513, 516-519—partners breached fiduciary duty by renting partnership property to themselves at below-market rates; *Bardis v. Oates* (2004) 119 CA4th 1, 12-13, 14 CR3d 89, 97-98; see *Cagnolatti v. Guinn*

(1983) 140 CA3d 42, 48, 189 CR 151, 155-156 (superseded by statute on other grounds as stated in *Corrales v. Corrales* (2011) 198 CA4th 221, 227, 129 CR3d 428, 431)—"A partner has no right to deal with partnership property other than for the sole benefit of the partnership" (internal quotes omitted)]

(2) [3:174] **Purchase of partnership property at foreclosure sale:** A partner may purchase partnership property or a copartner's interest at a foreclosure sale. So long as there is no separate fraud or breach of trust, the partner's act does not constitute a breach of fiduciary duty to the partnership or the other partner. [*Jones v. Wagner* (2001) 90 CA4th 466, 472-473, 108 CR2d 669, 674 (*discussed further at ¶ 3:184*)]

[3:175 - 3:178] ***Reserved.***

e. [3:179] **Burden of proof:** A partner who seeks a business advantage over another partner bears the burden of showing *complete good faith and fairness* to the other partner—i.e., that the advantage was not procured by misrepresentation concealment, threat or adverse pressure (*see ¶ 3:150*). [*Agam v. Gavra* (2015) 236 CA4th 91, 113, 186 CR3d 295, 312]

f. [3:180] **Statutory list not exclusive:** Corps.C. § 16404 is not the exclusive statement of a partner's fiduciary duties to the partnership and other partners, and § 16404(b) is not the exclusive statement of the partner's duty of loyalty. In particular, articulation of the duty of loyalty is left to traditional common law processes. Thus, courts may come up with fiduciary duties other than the duties of care and loyalty, or may categorize additional acts falling within the duty of loyalty other than those listed in § 16404. [*Enea v. Sup.Ct. (3-D)* (2005) 132 CA4th 1559, 1565, 34 CR3d 513, 517-518 (noting that California rejected uniform partnership law attempt to set forth exclusive fiduciary duties)]

(1) [3:181] **Duty of disclosure:** The common law recognizes that partners, and in particular managing partners, have a duty to disclose to copartners matters affecting their business relationship. [See *McCain v. Phoenix Resources, Inc.* (1986) 185 CA3d 575, 579, 230 CR 25, 27; *Estate of Witlin v. Rio Hondo Assocs.* (1978) 83 CA3d 167, 174-175, 147 CR 723, 726-728—disclosure duty applies when exercising right to buyout partner's interest (*discussed further at ¶ 3:505*); *Berg v. King-Cola, Inc.* (1964) 227 CA2d 338, 341-342, 38 CR 655, 657-658]

(2) [3:182] **Partners' limited authority to vitiate fiduciary duties:** While the parameters of the partners' ability to alter their fiduciary duties by the partnership agreement are not entirely clear, courts have provided some guidance by stating that the partnership agreement cannot waive or contract away the fiduciary obligations of a general partner with respect to matters *fundamentally related to the partnership business*. [*Everest Investors 8 v. McNeil Partners* (2003) 114 CA4th 411, 424, 8 CR3d 31, 40; *BT-I v. Equitable Life Assurance Society of the U.S.* (1999) 75 CA4th 1406, 1411-1412, 89 CR2d 811, 815-816]

g. [3:183] **No duty to defend negligent partner against third-party claim:** Neither the partnership nor the other partners breach their fiduciary duty to a partner when the partnership refuses to defend or indemnify the partner against a third-party claim based on the partner's negligence. Indeed, the partnership that is sued based on the partner's negligence may seek indemnity from the partner. [*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 CA4th 1509, 1551, 80 CR2d 94, 119; *Orosco v. Sun-Diamond Corp.* (1997) 51 CA4th 1659, 1670, 60 CR2d 179, 186; *United States Fire Ins. Co. v. National Union Fire Ins. Co.* (1980) 107 CA3d 456, 468, 165 CR 726, 733-734; *see ¶ 3:391*]

h. [3:184] **No duty to make up shortfall in other partner's capital contribution:** A partner has no duty to make another partner's capital contribution in order to avoid foreclosure on a partnership asset. The fact that a partner is entitled to reimbursement from the partnership for using personal funds to preserve partnership property (see Corps.C. § 16401(c), ¶ *3:221*) does not obligate the partner to do so. [*Jones v. Wagner* (2001) 90 CA4th 466, 472-473, 108 CR2d 669, 674 (*discussed further at ¶ 3:174*)]

i. [3:184.1] ***Former partners' fiduciary duties:*** *See ¶ 3:476.*

j. [3:185] **Duties owed to nonvoting partners:** The partners' fiduciary duties are not limited to voting partners, but extend equally to those partners who do not have voting rights in the partnership (e.g., personal representative of deceased partner). [*Jacoby v. Feldman* (1978) 81 CA3d 432, 442, 146 CR 334, 340]

k. [3:186] **Effect of incorporation on fiduciary duties:** Ordinarily, the partners' fiduciary duties to each other as partners cease upon incorporation of the partnership and issuance of stock in exchange for partnership interests. [*Eng v. Brown* (2018) 21 CA5th 675, 695, 702-705, 230 CR3d 771, 788, 794-797; *Persson v. Smart Inventions, Inc.* (2005) 125 CA4th 1141, 1156-1159, 23 CR3d 335, 346-349; *Miles, Inc. v. Scripps Clinic & Research Found.* (SD CA 1993) 810 F.Supp. 1091, 1099]

However, if the corporation is a *mere agency for the purpose of convenience in carrying out the partnership agreement*, the parties may continue to owe fiduciary duties to each other in accordance with general partnership law. The party asserting the continued existence of a partnership relationship has the burden of proof on this issue. [*Eng v. Brown*, supra, 21 CA5th at 695-697, 230 CR3d at 789-790; *Persson v. Smart Inventions, Inc.*, supra, 125 CA4th at 1158-1159, 23 CR3d at 348-349 (but finding no continued partnership relationship on facts of case); *Elsbach v. Mulligan* (1943) 58 CA2d 354, 369, 136 P2d 651, 659-660; *NTD Architects v. Baker* (SD CA 2013) 950 F.Supp.2d 1151, 1156]

[3:187 - 3:199] ***Reserved.***

2. Action for Breach of Partnership Agreement or Duty

a. [3:200] **Action by partnership:** A partnership may maintain an action against a partner who breaches the partnership agreement or violates a duty to the partnership that causes harm to the partnership. [Corps.C. § 16405(a)]

b. [3:201] **Action by partner:** A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to:

• Enforce the partner's rights under the partnership agreement;

• Enforce the partner's rights or the partnership's or other partners' obligations under the UPA; and

• Enforce the partner's rights and otherwise protect the partner's interests, including rights and interests arising *independently* of the partnership relationship. [Corps.C. § 16405(b); see *Navarro v. Perron* (2004) 122 CA4th 797, 802, 19 CR3d 198, 201—partner could elect to sue for either damages or dissolution where other partner repudiated existence of partnership and converted all of its assets; *United States v. Park Place Assocs., Ltd.* (9th Cir. 2009) 563 F3d 907, 922 (applying Calif. law); *Schnabel v. Lui* (9th Cir. 2002) 302 F3d 1023, 1030 (same)]

(1) [3:202] **Predissolution damages action:** Under prior law (*see ¶ 3:2*), courts held that partners ordinarily cannot sue each other for damages based on partnership business until there has been an action for dissolution and accounting. This rule, however, was subject to numerous exceptions that appeared to permit suit more often than not. [See, e.g., *Security Pac. Nat'l Bank v. Lyons* (1994) 25 CA4th 706, 711, 30 CR2d 623, 625-626—exception applied where CCP § 883 permitted partner as judgment debtor to seek contribution from other partner; *Stodd v. Goldberger* (1977) 73 CA3d 827, 838, 141 CR 67, 74—suit permitted where no complex account involving a variety of partnership transactions is involved (but finding exception inapplicable)]

The 1996 adoption of Corps.C. § 16405(b), permitting an action "with *or without* an accounting as to partnership business," was apparently intended to abrogate the above rule, or at least substantially modify it in the broad circumstances permitted by Corps.C. § 16405. However, at least one court has applied that rule notwithstanding § 16405(b). [See *Corrales v. Corrales* (2011) 198 CA4th 221, 228, 129 CR3d 428, 432-433—recognizing but holding inapplicable exception for damages action by partner against another partner for tort "of such a nature that it not only terminates the partnership but wrongfully destroys it, and where the erring partner converts to his own use its entire assets"—suit by one partner against another partner barred absent dissolution and accounting]

The better view is that, with enactment of the Uniform Partnership Act of 1994, and specifically the adoption of Corps.C. § 16405, California eliminated the accounting requirement as a predicate to the right of a partner to maintain an action against another partner for legal or equitable relief. [See *Second Measure, Inc. v. Kim* (ND CA 2015) 143 F.Supp.3d 961, 973—"California eliminated the accounting requirement when it enacted the Revised Uniform Partnership Act … in 1996"]

c. [3:203] **Statute of limitations:** The UPA does not set forth a statute of limitations for bringing an action to enforce partnership or partner rights and obligations. Rather, the accrual of a right of action by the partnership or a partner, and any time limitation on bringing such action, is determined by other law. (A right to an accounting upon partnership dissolution does *not revive* a claim barred by law.) [Corps.C. § 16405(c)]

[3:204 - 3:209] ***Reserved.***

3. [3:210] **Management Rights:** Unless the partnership agreement provides otherwise, each partner has equal rights in the management and conduct of the partnership business. [Corps.C. § 16401(f)]

a. [3:211] **Settlement of differences—majority vote vs. unanimity:** A difference among the partners as to a matter in the *ordinary course of business* may be decided by a *majority* of the partners. An act *outside the ordinary course of business*, as well as an *amendment* to the partnership agreement, requires the consent of *all* partners. (Here again, the partnership agreement may *override* these provisions.) [Corps.C. § 16401(j)]

b. [3:212] **Passive general partner not a limited partner:** A general partner who takes no role in the operation of the partnership does not thereby become a limited partner. A limited partnership may be formed only upon filing of a certificate of limited partnership with the Secretary of State (*see ¶ 5:130*). Moreover, allowing a passive general partner to achieve limited partner status would defeat the rights of third-party creditors and could work an injustice among the partners. [See *Security Pac. Nat'l Bank v. Matek* (1985) 175 CA3d 1071, 1075, 223 CR 288, 291]

[3:213 - 3:219] ***Reserved.***

4. [3:220] **Sharing of Profits/Losses:** Unless the partnership agreement provides otherwise (see Corps.C. § 16103, ¶ *3:62*), each partner is entitled to an equal share of partnership profits and is chargeable with an equal share of partnership losses. (However, this provision does not affect a partner's liability with respect to *third* parties.) [Corps.C. § 16401(b)]

5. [3:221] **Reimbursement/Indemnification Rights:** The partnership must reimburse a partner for payments made, and indemnify a partner for liabilities incurred, in the ordinary course of the partnership business or for the preservation of its property or business. [Corps.C. § 16401(c)]

The partnership must also reimburse a partner for an *advance* to the partnership beyond the amount of capital the partner agreed to contribute. [Corps.C. § 16401(d)]

a. [3:222] **Compare—no entitlement to remuneration for services:** However, a partner is not entitled to remuneration for services performed for the partnership (except for reasonable compensation for services rendered in winding up the partnership business). I.e., a partner has no inherent right under partnership law to a salary or draw. Unless provided otherwise by the partnership agreement or by consent of the other partners, a partner must look solely to his or her allocated share of profits as sole remuneration for any labor and other efforts rendered to the partnership. [Corps.C. § 16401(h); *Bardis v. Oates* (2004) 119 CA4th 1, 14, 14 CR3d 89, 99; *Wilson v. Wilson* (1950) 96 CA2d 589, 594, 216 P2d 104, 108]

This is in keeping with the principle that in managing partnership affairs, the partners are in effect taking care of their own interests and are merely performing their own duties as partners. [*In re Stanton* (9th Cir. BAP 1984) 38 BR 746, 752, citing *Wind v. Herbert* (1960) 186 CA2d 276, 8 CR 817]

(1) [3:223] **Breach of fiduciary duty:** Improper remuneration includes not only direct forms of remuneration (payment of fees or salary), but also indirect forms, such as secret commissions and markups in the guise of administrative expenses or overhead. Additionally, a partner who compensates himself or herself without the knowledge or consent of the other partners breaches his or her fiduciary duty to the partnership. [See *Bardis v. Oates* (2004) 119 CA4th 1, 14, 14 CR3d 89, 99]

(2) [3:224] **Consent may be implied:** The consent of the other partners to a partner's remuneration need not be express. It may be implied or may arise from as course of conduct, as where a partner who unquestionably renders substantial services to the partnership informs the nonworking partners that compensation is expected and the other partners voice no objection. [*Broffman v. Newman* (1989) 213 CA3d 252, 260, 261 CR 532, 538; *Neilsen v. Holmes* (1947) 82 CA2d 315, 323-324, 186 P2d 197, 202; compare *Security-First Nat'l Bank of Los Angeles v. Lutz* (9th Cir. 1963) 322 F2d 348, 351 (applying Calif. law)—partner not entitled to compensation for services where partnership agreement reserved amount to future determination that was never made]

➪ [3:225] ***PRACTICE POINTER:*** A partner's right to compensation should never be left to implication. The partnership agreement should clearly state whether a partner is entitled to compensation, for what services, in what amount, and when payable.

(3) [3:226] **Treatment of partner's salary:** Where a partner is paid a salary or other compensation for services rendered to the partnership, the compensation ordinarily is deducted from partnership income as a partnership expense, and thus borne by all partners (including the recipient partner) pro rata according to their share of partnership expenses. It is not charged against the nonworking partners' share of the partnership profits; to do so would effectively cause the other partners to pay for all of the partner's services. [*Van Ruiten v. Van Ruiten* (1969) 268 CA2d 619, 624, 74 CR 186, 189]

b. [3:227] **Partners' indemnification liability:** A partner who has paid more than his share of partnership obligations (other than by the partner's own breach of duty, *see ¶ 3:391*) is entitled to indemnification from the partnership. If the partnership is unable to indemnify the partner, the other partners must contribute such amounts as may be necessary to satisfy the partnership's liabilities (again, subject to any provision of the partnership agreement to the contrary). [*Kazanjian v. Rancho Estates, Ltd.* (1991) 235 CA3d 1621, 1627, 1 CR2d 534, 537]

(1) [3:228] **Indemnification based on partner's share of profits:** Such indemnification is not made on a per capita basis but, rather, is made in proportion to which the partner shares in partnership *profits and losses*. Stated otherwise, partners do not have an equal share of indemnification liability where they have an unequal share of profits and losses. [*Wall v. Siegel* (1998) 62 CA4th 875, 879, 73 CR2d 102, 104; see *Jans v. Nelson* (2000) 83 CA4th 848, 858-859, 100 CR2d 106, 114 (similar principles applied in action for indemnification among limited partners who guarantied partnership debt), *discussed further at ¶ 5:326*]

(2) [3:229] **Debt extinguished by assignment to partner:** Where a partnership creditor assigns the debt to one of the general partners, the assignment amounts to payment of the debt. "It has long been established in California that the assignment of a joint and several debt to one of the co-obligors extinguishes that debt." Therefore, no action can be maintained on the *original debt*. These principles likewise apply where the assignment is of a *judgment* obtained by the creditor on the debt; hence, the assignee partner may not maintain a charging order on the other partners' partnership interests (see Corps.C. § 16504, *¶ 3:251 ff.*). [*Great Western Bank v. Kong* (2001) 90 CA4th 28, 32-33, 108 CR2d 266, 269]

(a) [3:230] **Compare—liability as guarantor:** The above rule (¶ 3:229) applies where the co-obligors/partners share *primary* liability. A partner who acts as *guarantor or surety* of partnership debt is *secondarily* liable. In those circumstances, assignment of the debt to the partner does *not* extinguish the debt and the partner can maintain an action on the original debt. [*Great Western Bank v. Kong* (2001) 90 CA4th 28, 32-33, 108 CR2d 266, 269]

(b) [3:231] **Compare—contribution action permitted:** Nevertheless, the assignee partner is not without recourse. The other partners remain liable for their proportionate shares of any sum that the assignee partner paid toward the partnership debt, and hence the partner may still maintain an action for contribution against the other partners. [*Great Western Bank v. Kong* (2001) 90 CA4th 28, 33, 108 CR2d 266, 269]

(c) [3:232] **Comment:** Denying an assignee partner the right to sue on the original obligation while permitting the partner to obtain contribution may at first blush appear to accomplish the same objective by a circuitous route. However, there is an important distinction: *Assignment* of the debt can be made for *any* consideration, and permitting a partner who has paid the creditor *less* than the partner's share of the debt to enforce the assigned debt would allow the partner to reap a benefit at the expense of the other partners.

[3:233 - 3:239] ***Reserved.***

6. [3:240] **Partner Transacting Business With Partnership:** A partner may lend money to and transact other business with the partnership (e.g., as lessor of property to the partnership), in which event the partner's rights and obligations are the same as any other third party dealing with the partnership. (This assumes, of course, that the relationship is disclosed and done with the consent of the other partners.) [Corps.C. § 16404(f); see *DeMartini v. Industrial Accident Comm'n* (1949) 90 CA2d 139, 150, 202 P2d 828, 835]

7. [3:241] **Limitations on Distributions in Kind:** Unless the partnership agreement provides otherwise (see Corps.C. § 16103, *¶ 3:62*), a partner has no right to receive, and may not be required to accept, a distribution in kind. [Corps.C. § 16402; see *Navarro v. Perron* (2004) 122 CA4th 797, 801-802, 19 CR3d 198, 201—court's denial of partner's request to dissolve partnership and instead award damages where only asset consisted of duplex was tantamount to distributing asset in kind to other partner (*discussed further at ¶ 3:558*)]

8. [3:242] **Transfer of Partnership Interest:** Unless otherwise provided by the partnership agreement (*see ¶ 3:62*), no one can become a member of the partnership without the consent of *all* existing partners. [Corps.C. § 16401(i)]

But a partner may *assign*, in whole *or in part*, the partner's own share of partnership profits and losses and the right to receive distributions ("transferable interest"). [Corps.C. §§ 16502, 16503(a)]

a. [3:243] **Transferable interest as personalty:** A transferable interest is personal property. (As such, it is not a direct interest in any property or assets owned by the partnership.) [Corps.C. §§ 16501, 16502; see *Tinseltown Video, Inc. v. Transportation Ins. Co.* (1998) 61 CA4th 184, 196, 71 CR2d 371, 378; *In re Kuiken* (9th Cir. BAP 2013) 484 BR 766, 769 (applying Calif. law); *see also ¶ 3:9*]

b. [3:244] **Effect of transfer of transferable interest:** A transfer of a transferable interest does not by itself cause the partner's dissociation. Nor does it cause a dissolution of the partnership. [Corps.C. § 16503(a)(1)]

(1) [3:245] **Transferee's rights:** As against the other partners, the transfer does *not* entitle the transferee to participate in the management or conduct of the partnership business. Nor does it entitle the transferee to access information concerning partnership transactions or to inspect or copy partnership books or records. [Corps.C. § 16503(a)(2)]

However, the transferee has the right:

- To receive, to the extent of the transfer, distributions to which the transferor partner would otherwise be entitled;
- To receive, to the extent of the transfer, the net amount otherwise distributable to the transferee partner upon dissolution; and
- To seek a judicial determination that it is equitable to wind up the partnership business (Corps.C. § 16801(6), *¶ 3:554*). [Corps.C. § 16503(b)]

(a) [3:246] **Limited right to accounting upon dissolution:** In a dissolution, the transferee is entitled to an account of partnership transactions only from the date of the latest account agreed to by all of the partners. [Corps.C. § 16503(c)]

(b) [3:247] **Notice to partnership:** A partnership need not give effect to a transferee's rights until it has notice of the transfer. [Corps.C. § 16503(e)]

(2) [3:248] **Transferor's rights:** The transferor retains the rights and duties of a partner other than the interest in distributions so transferred. [Corps.C. § 16503(d)]

(3) [3:249] **Restriction on transfer in agreement:** A transfer of a transferable interest in violation of the partnership agreement is ineffective as to a person having *notice of the restriction at the time of transfer*. [Corps.C. § 16503(f)]

(4) [3:250] **Applicability of Commercial Code provisions restricting transferability:** Comm'l C. §§ 9406(d) and 9408(d) restrict the partners' power to prohibit transfer (including transfer as security for a loan) of a partner's transferable interest, and declare any rule or law, statute or regulation prohibiting the transfer (including grant of a security interest) to be "ineffective." [Comm'l C. §§ 9406(d), 9408(d); see Comm'l C. § 9102(2) ("account" defined), (3) ("account debtor" defined), (28) ("debtor" defined), (42) ("general intangible" defined)]

However, these restrictions apply only if and to the extent the partnership is a *party* to the agreement containing the transfer restrictions. A partnership is rarely (if ever) a party to its partnership agreement, even if the partnership is bound thereby. The Uniform Commercial Code Permanent Editorial Board has revised UCC §§ 9-406 and 9-408 to clarify that these sections do not apply to security interests granted with respect to partnership interests. The revised sections will not become effective in California until adopted by the Legislature. [See C. Bjerre, D. Kleinberger, E. Smith & S. Weise, "LLC and Partnership Transfer Restrictions Excluded from UCC Article 9 Overrides,"*Bus. Law Today* (ABA Bus. Law Section 2/7/19)]

c. [3:251] **Use of transferable interest to satisfy judgment against partner:** A partner's judgment creditor may obtain an order charging the partner's "transferable interest" to satisfy the judgment, and may also obtain any other appropriate orders, including appointment of a receiver of the share of the distributions due or to become due. [Corps.C. § 16504; CCP § 708.310; see *Phillips, Spallas & Angstadt, LLP v. Fotouhi* (2011) 197 CA4th 1132, 1139-1143, 128 CR3d 320, 325-328—"mere continuation" doctrine permitted enforcement of charging order against shareholder's interest in corporation that acquired assets of LLP for purpose of avoiding specific liabilities of partnership and its principal partner who became corporate shareholder; compare *Great Western Bank v. Kong* (2001) 90 CA4th 28, 32-33, 108 CR2d 266, 269—partner who paid

creditor for assignment of partnership debt may not enforce debt against other partners by way of charging order (*discussed further at ¶ 3:229 ff.*)]

Corps.C. § 16504 provides the *exclusive remedy* by which a judgment creditor may satisfy a judgment out of a transferable interest. [Corps.C. § 16504(e)]

(1) [3:252] **Foreclosure; interest acquired by creditor:** A charging order constitutes a *lien* on the judgment debtor partner's transferable interest. Foreclosure on the lien may be obtained by court order. The purchaser at the foreclosure sale (usually the foreclosing judgment creditor) acquires only the debtor partner's *interest in the partnership*—i.e., the debtor partner's *share of partnership profits and surplus*. The creditor, like any other transferee (*see ¶ 3:245*), obtains *no* right to specific partnership property or to participate in managing partnership business. [Corps.C. § 16504; *Hellman v. Anderson* (1991) 233 CA3d 840, 846, 852, 284 CR 830, 834, 838]

(2) [3:253] **Redemption prior to foreclosure:** The judgment debtor partner may redeem his or her transferable interest any time before foreclosure. [Corps.C. § 16504(c)(1)]

More importantly, one or more of the other partners may block foreclosure by redeeming the transferable interest with *nonpartnership* property. Partnership property may also be used, but only with the consent of *all* partners whose transferable interests are not charged. [Corps.C. § 16504(c)(2), (3)]

(3) [3:254] **Comment re partner-imposed transfer restrictions:** Sales pursuant to Corps.C. § 16504 may be complicated by partnership agreements containing rights of first refusal or restrictions on the transfer of partnership interests. Dictum in one case suggested that such agreements may not divest the court of power to order an execution sale; but the case did not decide the issue because the sale did not violate the agreement in question. [*Crocker Nat'l Bank v. Perroton* (1989) 208 CA3d 1, 10, 255 CR 794, 799 (decided under prior law)]

[3:255 - 3:297] ***Reserved.***

9. [3:298] **Application of Duties to Last Surviving Partner's Representative Upon Dissolution:** *See ¶ 3:583*.

10. [3:299] **Partnership for Definite Term or Particular Undertaking—Partnership Continuation:** *See ¶ 3:25*.

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Chapter 3. General Partnership

D. Partnership Accounts and Records

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[3:300] The partnership must keep its books and records, *if any*, in writing or in other form capable of being converted into clearly legible and tangible form (i.e., electronic records). Any such books and records must be kept at the partnership's *principal office*. [Corps.C. § 16403(a)]

1. [3:301] **Individual Partners' Accounts:** Each partner has (or is deemed to have) a partnership account. [Corps.C. § 16401(a)]

a. [3:302] **Credits:** The partner's account is credited with any money and the value of any other property (net of any liabilities) that the partner contributed to the partnership. The account is also credited with the partner's share of profits. [Corps.C. § 16401(a)(1)]

b. [3:303] **Charges:** The partner's account is charged with any money plus the value of any other property (net of any liabilities) that the partnership distributed to the partner. The account is also charged with the partner's share of partnership losses. [Corps.C. § 16401(a)(2)]

c. [3:304] **Capital accounts:** For the IRC requirements applicable to the maintenance of the partners' capital accounts, *see ¶ 8:274 ff.*

2. [3:305] **Partnership Books and Records:** The UPA does not require a partnership to keep books and records. But any books and records it maintains must be in writing (or in any other form capable of being converted into clearly legible tangible form) and kept at its principal office. [Corps.C. § 16403(a)]

(Under the IRC, however, a partnership is required to maintain capital accounts in accordance with regulations promulgated under IRC § 704; *see ¶ 8:275 ff.*)

a. [3:306] **Accessible by partners:** The partnership must permit partners (and their agents and attorneys) access to the books and records during ordinary business hours. [Corps.C. § 16403(b)]

Caution: The partnership agreement may not "unreasonably restrict" this right; *see ¶ 3:64*.

(1) [3:307] **Compare—former partners:** Former partners (and their agents and attorneys) are entitled to access to the partnership books and records *pertaining to the period during which they were partners*. [Corps.C. § 16403(b)]

➪ [3:308] ***PRACTICE POINTER:*** The partnership agreement may not "unreasonably restrict" a former (or current) partner's right to partnership books and records (see Corps.C. § 16103(b)(2), *¶ 3:64*). But the agreement may certainly

expand the right to encompass a *postassociation* time period. Such an expanded right may be valuable where the partner's services, e.g., generated income after the partner departed or where the partner's distributable share upon dissociation was otherwise significantly affected by postdissociation events.

(2) [3:309] **Right to copy:** The right of access provides the opportunity to inspect *and copy* books and records. A reasonable charge covering the costs of labor and material may be imposed for copying documents. [Corps.C. § 16403(b)]

Caution: The partnership agreement may not "unreasonably restrict" the right to copy and inspect books and records; *see* ¶ *3:64*.

[3:310 - 3:319] ***Reserved.***

3. [3:320] **Partnership Information Furnished to Partners:** The partnership must furnish each partner (and the legal representative of a deceased partner or partner under legal disability) with any information concerning the partnership's business and affairs required for the proper exercise of the partner's rights and duties. [Corps.C. § 16403(c)(1)]

The partnership must also furnish any other information concerning the partnership's business and affairs that a partner (or the partner's legal representative) *demands*, except to the extent the demand is unreasonable "or otherwise improper under the circumstances." [Corps.C. § 16403(c)(2)]

Any information furnished to the partners may be transmitted electronically. [Corps.C. § 16403(c)]

Caution: The partnership agreement may not "unreasonably restrict" the partners' rights to partnership information; *see* ¶ *3:64*.

[3:321 - 3:349] ***Reserved.***

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Chapter 3. General Partnership

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1. [3:350] **Partner as Agent of Partnership:** Each partner is an agent of the partnership for the purpose of its business. [Corps.C. § 16301]

a. [3:351] **Acts in ordinary course of business:** A partner's act, including execution of an instrument in the partnership's name, for "apparently" carrying on the ordinary course the partnership business (or business of the kind carried on by the partnership) binds the partnership *unless* (1) the partner had *no authority* to act for the partnership in the particular matter *and* (2) the person with whom the partner dealt *knew or had received a notification* that the partner lacked authority. [Corps.C. § 16301(1); see Corps.C. § 16102 re notification and personal knowledge]

(1) [3:352] **Includes fraudulent acts:** Although fraudulent acts are not within the scope of a partner's authority, a fraud committed by partner in the ordinary course of business upon an *innocent third party* still binds the partnership. This is so even where the other partners were unaware of the fraudulent acts. [*Zemelman v. Boston Ins. Co.* (1970) 4 CA3d 15, 18, 84 CR 206, 207]

(2) [3:353] **Partnership's burden to inform third persons of limitation on partner's apparent authority:** Where a partner acts with known third persons in the ordinary course of partnership business, it is incumbent upon the partnership to inform the third persons of any restrictions on the partner's power to act in the ordinary course of business. "A person dealing with a partnership usually is in no position to know of special agreements between the partners and thus cannot be charged with knowledge of such agreements absent specific notice." [*Blackmon v. Hale* (1970) 1 C3d 548, 558, 83 CR 194, 199—law firm partner liable for other partner's misappropriation of client funds because client was never informed that he was client only of other partner and not of firm]

(3) [3:354] **Partnership bound where partner signs as individual:** A partnership may be bound by a promissory note or other contract signed by a partner as an *individual* where the contract was entered into for the benefit of the partnership, or where the partnership accepted the benefits of the contract, or where the other party to the contract knew that the contract was entered into for the benefit of the partnership. [See *Wall v. Siegel* (1998) 62 CA4th 875, 879-880, 73 CR2d 102, 104; *Security Pac. Nat'l Bank v. Matek* (1985) 175 CA3d 1071, 1076-1077, 223 CR 288, 292; *Wurm v. Metz* (1958) 162 CA2d 262, 269, 327 P2d 969, 973]

b. [3:355] **Acts not in ordinary course of business:** A partner's act that is not "apparently" for carrying on the ordinary course of the partnership business (or business of the kind carried on by the partnership) binds the partnership only if the act was authorized by the other partners. [Corps.C. § 16301(2); see *Milazo v. Gulf Ins. Co.* (1990) 224 CA3d 1528, 1538-1539, 274 CR 632, 638-639]

(1) [3:356] **Sale of partnership realty:** Ordinarily, a sale of real property owned by the partnership is not within the ordinary course of the partnership's business unless the partnership is in the business of buying and selling real estate. This is so even where the partnership's business concerns the operation of a particular piece of property, such as a motel. A sale of the motel would *not* be in the ordinary course of business because such a sale *would make it impossible for the partnership to carry on its business*. [*Patel v. Patel* (1989) 212 CA3d 6, 9-10, 260 CR 255, 257]

(a) [3:357] **Compliance with statute of frauds:** Where real property owned by the partnership is not sold in the ordinary course of the partnership's business, the sale must comply with the statute of frauds (Civ.C. § 1624(a)(3))—i.e., the authorization of the other partners must be in *writing*. [*Ellis v. Mihelis* (1963) 60 C2d 206, 217-218, 32 CR 415, 421-422; *Elias Real Estate LLC v. Tseng* (2007) 156 CA4th 425, 433, 67 CR3d 360, 365]

But where the real property sale is within the partnership's ordinary course of business (e.g., partnership's business is to buy and sell real property), a partner may bind the partnership. No written or other approval of the other partners is necessary. [*Owens v. Palos Verdes Monaco* (1983) 142 CA3d 855, 865-866, 191 CR 381, 387-388 (disapproved on other grounds by *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C4th 503, 510, 28 CR2d 475, 478 & fn. 10)]

(2) [3:358] **Guaranties:** A guaranty of the obligations of another entity is generally considered to be outside the ordinary course of business, and thus a general partner ordinarily lacks authority to bind the partnership to a guaranty. [See *Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd.* (1993) 12 CA4th 74, 93-94, 15 CR2d 585, 594-594, *discussed further at ¶ 5:211* (decided under law applicable to limited partnerships, but same principles should apply to general partnership)]

[3:358.1 - 3:358.3] ***Reserved.***

c. [3:358.4] **Partner as "partnership representative" for federal tax purposes:** *See ¶ 8:250 ff.*

d. [3:358.5] **Ostensible partnership:** *See ¶ 3:413*.

e. [3:359] **Limitation—statement of partnership authority:** A partner's authority to bind the partnership is limited as set forth in any currently effective statement of partnership authority. [Corps.C. § 16301; *see ¶ 3:100 ff.*]

f. [3:360] **Partner not agent of other partner for service of process:** Where a partnership and its partners are named as defendants in a lawsuit, service of process on one partner is not necessarily effective as to the other partners individually. Moreover, one partner has no implied authority to enter an appearance for a copartner (tantamount to service on the copartner). Absent authorization or ratification by the copartner, service is not effective as to the partner, and any resulting judgment cannot be enforced against the copartner individually. [*Promotus Enterprises, Inc. v. Jiminez* (1971) 21 CA3d 560, 565-567, 98 CR 571, 574-575]

[3:361 - 3:369] ***Reserved.***

2. [3:370] **Partnership's Vicarious Liability for Partners' Acts:** A partnership is liable for loss or injury caused to a third party, or for a penalty incurred, as a result of a partner's *wrongful act or omission* or other actionable conduct in the ordinary course of partnership business or with authority of the partnership. The partnership is likewise liable for money or property *received from a nonpartner* in the course of the partnership's business or while acting within authority of the partnership and *misapplied* by the partner. [Corps.C. § 16305; see *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 CA4th 384, 391, 58 CR3d 516, 521]

This is so even where the third party dealing with partner did not know of the existence of the partnership. [*Gardiner v. Gaither* (1958) 162 CA2d 607, 618-619, 329 P2d 22, 29-30]

a. [3:371] **Partners' joint liability for partnership obligations:** All partners are jointly and severally liable for all partnership obligations unless otherwise agreed by the claimant or provided by law. Such obligations include liability for contractual obligations, as well as for torts committed by the partnership, its employees or partners acting in the course of the partnership's business. [Corps.C. § 16306(a); see *Great Western Bank v. Kong* (2001) 90 CA4th 28, 31, 108 CR2d 266, 268; *Black v. Sullivan* (1975) 48 CA3d 557, 569, 122 CR 119, 127; *In re Safren* (BC CD CA 1986) 65 BR 566, 571 (applying Calif. law)]

(1) [3:372] **Former partner's liability:** A former partner remains jointly and severally liable for partnership obligations incurred while a partner. "[L]iability is not discharged simply because one leaves the partnership." [*Alioto v. United States* (ND CA 1984) 593 F.Supp. 1402, 1413 (applying Calif. law)]

(2) [3:372.1] **Formal partnership not required—joint control and commercial undertaking sufficient:** There may be liability even where the defendants do not necessarily hold themselves out as conducting a business in partnership form. Prima facie liability on a partnership theory requires only proof of an agreement (written or oral) between the principals establishing a community of interest in a common business undertaking, including an understanding as to sharing of profits and losses, and a *right of joint control*. The agreement, however, need not rise to the level of a formal partnership agreement. [See *Connor v. Great Western Sav. & Loan Ass'n* (1968) 69 C2d 850, 863, 73 CR 369, 375; *Simmons v. Ware* (2013) 213 CA4th 1035, 1051-1056, 153 CR3d 178, 192-195; *Orosco v. Sun-Diamond Corp.* (1997) 51 CA4th 1659, 1665-1666, 60

CR2d 179, 183-184—failure to demonstrate joint control and sharing of profits/losses negated liability on partnership/joint venture theory]

Evidence of the requisite agreement is subject to the normal "preponderance of the evidence" standard of proof. [*Weiner v. Fleischman* (1991) 54 C3d 476, 490, 286 CR 40, 48]

(a) [3:372.2] **Compare—"joint enterprise" liability (noncommercial undertakings):** Tort liability may similarly be imputed on a "joint enterprise" theory when the participants' undertaking is of a noncommercial nature (no sharing of profits/losses). But, as in joint ventures (¶ 3:17), the participants must have a right of joint control or "equal voice" in directing conduct of the enterprise. [See *County of Riverside v. Loma Linda Univ.* (1981) 118 CA3d 300, 313, 173 CR 371, 376, fn. 4 (noting no significant legal distinction between joint venture and joint enterprise); *Jackson v. East Bay Hosp.* (9th Cir. 2001) 246 F3d 1248, 1261-1262 (applying Calif. law)—no joint enterprise liability imputed against party who did not have equal voice in directing control of enterprise; and *Ramirez v. Long Beach Unified School Dist.* (2002) 105 CA4th 182, 188-192, 129 CR2d 128, 133-136—school district that lacked control over nonprofit recreational camp where student drowned had no joint enterprise liability]

(3) [3:373] **Partner's liability for converted entity's obligations:** A partner of a partnership that was formed by conversion is also liable for any and all obligations of the converting entity to the extent to which the partner was personally liable before the conversion. [Corps.C. § 16909(d)]

(4) [3:374] **Third parties not affected by partners' contrary agreement:** Joint and several liability applies notwithstanding a provision in the partnership agreement that no partner is liable for obligations incurred by another partner. "Whatever effect such provision may have had as between the partners themselves, it can have no effect on the partner's liability to third persons." [*Gardiner v. Gaither* (1958) 162 CA2d 607, 617, 329 P2d 22, 28]

(5) [3:375] **Limitation—no liability for preexisting obligations:** A partner is not personally liable for any partnership obligation incurred before admission to the partnership. [Corps.C. § 16306(b)]

(6) [3:376] **No Prop. 51 "fault" apportionment:** Proposition 51 (Civ.C. §§ 1431-1431.5), which applies in personal injury, property damage and wrongful death actions that are based on principles of comparative fault, abolishes joint and several liability with respect to "noneconomic damages" ("pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation"). In cases governed by Proposition 51, each defendant's liability for noneconomic damages must be apportioned according to the respective defendant's percentage of "fault." [Civ.C. § 1431.2(a), (b)(2)]

As stated above (¶ 3:371), all partners (or joint venturers) are ipso facto *jointly and severally* liable for the obligations of their partnership. Consequently, Proposition 51 does *not* determine the relative liability of partners for noneconomic damages … because the partners' liability is not based on "fault." [*Myrick v. Mastagni* (2010) 185 CA4th 1082, 1091-1092, 111 CR3d 165, 171-173]

(7) Tax liabilities

(a) [3:377] **Federal employment withholding taxes:** Joint and several liability extends to federal employment withholding tax obligations, including FICA and FUTA (unemployment) taxes, and a general partner may be held liable for the entire amount of the taxes owed to the federal government. [*In re Pitts* (DC CD CA 2014) 515 BR 317, 321-323, *discussed further at ¶ 3:410*; *In re Crockett* (ND CA 1957) 150 F.Supp. 352, 354]

1) [3:378] **Tax assessment against partnership:** An assessment against a partnership by the IRS for unpaid employment taxes is also deemed a sufficient assessment against the general partners. No additional, independent assessment against the partners is required. [*United States v. Galletti* (2004) 541 US 114, 116, 124 S.Ct. 1548, 1550; *In re Pitts* (DC CD CA 2014) 515 BR 317, 323-326]

(b) [3:379] **State sales taxes:** Likewise, all general partners are jointly and severally liable for the partnership's unpaid sales taxes. This is so notwithstanding Rev. & Tax.C. § 6829, which generally limits liability to those persons specifically responsible for filing returns and paying taxes. [*In re Leal* (9th Cir. BAP 2007) 366 BR 77, 80-81]

(c) [3:380] **Local transient occupancy taxes:** All general partners are jointly and severally liable for the partnership's obligations to pay transient occupancy (e.g., hotel) taxes. The liability is not limited to the partner who is the *operator* of the hotel. [See *City of San Diego v. DeLeeuw* (1993) 12 CA4th 10, 13-14, 15 CR2d 98, 99-100 (also holding liability under local ordinance extended to taxes owed before transfer to partnership)]

[3:381 - 3:389] ***Reserved.***

(8) [3:390] **Postbankruptcy petition debts:** Because a Chapter 11 filing on behalf of a partnership does not effect a dissolution of the partnership (*see ¶ 3:570*), the partners continue to incur individual joint and several liability for the partnership's post-petition debts. [*In re Safren* (BC CD CA 1986) 65 BR 566, 572]

b. [3:391] **Partner's liability to partnership:** When a partnership is held liable to a third party based on a partner's (or former partner's) negligence, the partnership is entitled to seek indemnity from the partner. The partnership is not required to defend and indemnify the partner against the third party's claim. [*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 CA4th 1509, 1551, 80 CR2d 94, 119; *Orosco v. Sun-Diamond Corp*. (1997) 51 CA4th 1659, 1670, 60 CR2d 179, 186; *United States Fire Ins. Co. v. National Union Fire Ins. Co*. (1980) 107 CA3d 456, 468, 165 CR 726, 733-734]

(1) [3:392] **Comment:** In view of the Corps.C. § 16404(c) "default" standard of a partner's duty of care—i.e., to refrain "from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law" (*see ¶ 3:170*)—a more proper view is that a partnership should not be entitled to seek indemnity from a partner for *mere negligence* (unless the partnership agreement provides otherwise). Moreover, partnership agreements typically do address the *partnership's* indemnity obligations to its *partners* by making clear that the *partnership* is obligated to indemnify the *partners* for any damages or expenses a partner incurs by reason of actions that partner has taken in the course of the partnership's business, including actions that may constitute *negligence* (but typically excluding actions or conduct constituting gross negligence, breach of the duty of loyalty, or intentional misconduct).

[3:393 - 3:398] ***Reserved.***

c. [3:399] **Statement of partnership authority:** *See ¶ 3:100 ff.*

3. [3:400] **Transfer of Partnership Property:** The UPA contains specific provisions regarding execution of an instrument transferring partnership property.

Caution: The transfer may be invalid notwithstanding proper execution if the signatories lacked the requisite authority to make the transfer (see Corps.C. § 16301, ¶ *3:403, 3:406*).

[3:401] ***Reserved.***

a. [3:402] **Property held in partnership name:** Subject to a current statement of partnership authority (*see ¶ 3:100 ff.*), the signature of any partner, executed in the partnership name, suffices to transfer property held in the partnership's name. [Corps.C. § 16302(a)(1)]

(1) Recovery of property wrongfully transferred

(a) [3:403] **Recovery from initial transferee:** A partnership may recover the partnership property from the transferee only if it proves the partner executing the transfer lacked authority and, in the case of property transferred in the ordinary course of business, that the transferee knew or was notified of the lack of authority (*see ¶ 3:351*). [Corps.C. §§ 16301, 16302(b)]

(b) [3:404] **Recovery from subsequent transferee:** Where the partnership seeks recovery of the property from a subsequent transferee who gave value for the property, the partnership must also prove that the subsequent transferee knew or had received a notification that the partner who executed the instrument of *initial* transfer lacked authority to bind the partnership. Additionally, the partnership may not recover the property if the partnership would not have been entitled to recover the property from *any earlier transferee*. [Corps.C. § 16302(b)(1), (c)]

b. [3:405] **Property held in partner's name with indication of partnership:** Partnership property held in the name of one or more partners with an indication in the instrument transferring the property to them of either their capacity as partners or the existence of a partnership, but without an indication of the partnership's name, may be transferred by an instrument executed by the persons in whose name the property is held. [Corps.C. § 16302(a)(2)]

(1) Recovery of property wrongfully transferred

(a) [3:406] **Recovery from initial transferee:** Here again, the partnership may recover the partnership property from the transferee only if it proves the partner executing the transfer lacked authority and, in the case of property transferred in the ordinary course of business, that the transferee knew or was notified of the lack of authority (*see* ¶ *3:351, 3:403*). [Corps.C. §§ 16301, 16302(b)]

(b) [3:407] **Recovery from subsequent transferee:** Where the partnership seeks recovery of the property from a subsequent transferee who gave value for the property, the partnership must also prove that the subsequent transferee knew or had received a notification that the partner who executed the instrument of *initial* transfer lacked authority to bind the partnership. Additionally, the partnership may not recover the property if the partnership would not have been entitled to recover the property from *any earlier transferee*. [Corps.C. § 16302(b)(1), (c)]

c. [3:408] **Property held in partner's name without indication of partnership:** Similarly, partnership property held in the name of one or more partners with *no indication* in the instrument transferring the property to them of either their capacity as partners or the existence of a partnership, may likewise be transferred by an instrument executed by the persons in whose name the property is held. [Corps.C. § 16302(a)(3)]

(1) [3:409] **Recovery of property wrongfully transferred:** The partnership may recover the partnership property from a transferee who gave value only if it proves that the partner executing the transfer lacked authority and the transferee knew or had received a notification that the partner lacked authority to bind the partnership. [Corps.C. §§ 16301, 16302(b)(2); see *Patel v. Patel* (1989) 212 CA3d 6, 10-11, 260 CR 255, 257-258—property recoverable where sale was not in ordinary course of partnership business (decided under prior law)]

This is so whether the transferee is the *initial* or a *subsequent* transferee. However, in the case of a subsequent transferee, the partnership must also prove that it would be entitled to recover the property from any earlier transferee. [Corps.C. § 16302(c)]

4. [3:410] **Effect of Judgment Against Partnership—No Ipso Facto Judgment Against Partner:** A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may *not* be satisfied from a partner's personal assets *unless there is also a judgment against the partner*. [Corps.C. § 16307(c); CCP § 369.5(b); see *Fazzi v. Peters* (1968) 68 C2d 590, 594-595, 68 CR 170, 173-174; *Promotus Enterprises, Inc. v. Jiminez* (1971) 21 CA3d 560, 565-567, 98 CR 571, 574-575, *discussed at* ¶ *3:360*; *In re Hoover WSCR Assocs. Ltd.* (BC CD CA 2001) 268 BR 227, 234-235, aff'd (9th Cir. BAP 2005) 329 BR 358 (case involving general partner of limited partnership)]

5. [3:411] **Judgment Against Partner Arising From Claim Against Partnership:** A judgment creditor of a *partner* may not execute against the *partner's* assets to satisfy a judgment based on a claim against the *partnership* unless:

- A judgment based on the same claim was obtained against the partnership *and* a writ of execution on the judgment was returned unsatisfied in whole or in part; *or*
- The partnership is a *debtor in bankruptcy* (see Corps.C. § 16101(a)(2)); *or*
- The debtor partner agreed that the creditor need not exhaust partnership assets; *or*
- A court permits the judgment creditor to execute against the partner's assets based on a finding that partnership assets subject to execution are "clearly insufficient" to satisfy the judgment, or that exhaustion or partnership assets is "excessively burdensome," or that the grant of permission "is an appropriate exercise of the court's equitable powers"; *or*
- Liability is imposed on the partner by law or contract *independent of the partnership's existence*. [Corps.C. § 16307(d); see *United States v. Park Place Assocs., Ltd.* (9th Cir. 2009) 563 F3d 907, 922-923 (applying Calif. law)—§ 16307(d) not applicable where recovery is sought by a partner directly rather than by the partner's creditor]

6. [3:412] **Liability of "Purported" Partners:** If a person, by words or conduct, represents to a third person that he or she is a partner in a partnership with one or more persons who are not actual partners, or if a person consents to another's representation that the person is a partner in such a partnership, the purported partner is liable to the third person to whom the representation was

made if the third person relies on the representation in entering into a transaction with the partnership. Where a representation of partnership is made "in a public manner," liability may lie even if the purported partner is *not aware* of being held out as a partner. [Corps.C. § 16308(a)]

Such purported partners may be deemed agents of one another and hence may bind one another to the same extent as if they were actual partners. [Corps.C. § 16308(b)]

a. [3:413] **Ostensible partnership (partnership by estoppel):** Corps.C. § 16308 is essentially a codification of the common law doctrine of ostensible partnership, sometimes referred to as partnership by estoppel. Under this doctrine, a person may be liable for the acts of another where their representations or acts have led third persons to believe they were in fact copartners. "The representations or acts need not be actuated by the actual intent to deceive; it is sufficient if the course of conduct is such as to induce a reasonable and prudent person to believe that which the conduct would imply." Whether an ostensible partnership exists is a question of fact to be determined from all the facts and circumstances. [*Armato v. Baden* (1999) 71 CA4th 885, 898, 84 CR2d 294, 302; *Redman v. Walters* (1979) 88 CA3d 448, 452, 152 CR 42, 44; *J & J Builders Supply v. Caffin* (1967) 248 CA2d 292, 297, 56 CR 365, 370]

• [3:414] A partner whose name appeared in the name of the law firm of which he was a member could be liable to a client represented by a copartner in the firm where the representation was in the firm's name. The partner could be liable for malpractice committed by the copartner even where the partner had left the firm if the client had no knowledge that the partner had withdrawn. [*Redman v. Walters* (1979) 88 CA3d 448, 453-456, 152 CR 42, 44-46]

Caution: Redman predated the advent of limited liability partnerships in California. The outcome in *Redman* would have been different if the law firm was a limited liability partnership.

• [3:415] However, the listing of physicians' names on the door of their office did *not* create an ostensible partnership, and hence the other physicians could not be liable for malpractice committed by one of them. [*Armato v. Baden* (1999) 71 CA4th 885, 898, 84 CR2d 294, 302]

• [3:416] A limited partner was *not* an ostensible general partner merely because a partnership certificate listed his name without designating him as a limited partner. [*J.C. Wattenbarger & Sons v. Sanders* (1963) 216 CA2d 495, 501, 30 CR 910, 914]

[3:417 - 3:419] ***Reserved.***

b. [3:420] **Limitation re person named in statement of partnership authority:** A person is not liable as a partner merely because the person is named by another in a statement of partnership authority (¶ *3:100 ff.*). [Corps.C. § 16308(c)]

c. [3:421] **Not applicable to limited liability partnerships:** Corps.C. § 16308 does not apply to limited liability partnerships (*see* ¶ *4:12*). [Corps.C. § 16308, preamble]

[3:422 - 3:449] ***Reserved.***

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Chapter 3. General Partnership

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[3:450] "Dissociation" is the termination of a partner's status as a partner. This may occur, e.g., by a partner's death, voluntary withdrawal from the partnership, or expulsion from the partnership.

1. [3:451] **Background:** The concept of dissociation in California partnership law did not exist until adoption of the UPA in 1994 (*see ¶ 3:2*). Under former law, a partner's death, withdrawal or expulsion automatically dissolved the partnership and the partnership had to be reconstituted, unless the partnership agreement specifically provided otherwise. "Dissociation permits the remaining partners to carry on partnership business without the withdrawing partner and without having to start from scratch." [*Corrales v. Corrales* (2011) 198 CA4th 221, 227, 129 CR3d 428, 431-432]

2. [3:452] **Events Causing Dissociation:** Dissociation of a partner occurs upon any of the events set forth below (¶ 3:453 ff.). No additional showing of damages to the partnership or the other partners is required. [*Mission West Properties, L.P. v. Republic Properties Corp.* (2011) 197 CA4th 707, 716, 129 CR3d 14, 21]

a. [3:453] **Partner's withdrawal:** The partnership has notice of the partner's express will to withdraw as a partner (or on a later date specified by the partner). [Corps.C. § 16601(1); see Corps.C. § 16102 re "notice"]

b. [3:454] **Occurrence of event set forth in partnership agreement:** An event agreed to in the partnership agreement occurs that causes dissociation. [Corps.C. § 16601(2)]

c. [3:455] **Expulsion pursuant to partnership agreement:** The partner is expelled pursuant to the partnership agreement. [Corps.C. § 16601(3); see *Heller v. Pillsbury Madison & Sutro* (1996) 50 CA4th 1367, 1386-1388, 58 CR2d 336, 347-348—expulsion pursuant to partnership agreement not a breach of fiduciary duty to expelled partner (*discussed further at ¶ 3:501*)]

(1) [3:456] **Limitation—bad faith expulsion:** An expulsion in bad faith for the self-gain of the other partners (i.e., to enrich the other partners at the expense of the expelled partner) may violate the partners' duty to the expelled partner (*¶ 3:478*). [See *Heller v. Pillsbury Madison & Sutro* (1996) 50 CA4th 1367, 1387, 58 CR2d 336, 348 (but finding expulsion was not in bad faith)]

d. [3:457] **Expulsion by unanimous vote:** The partner is expelled by the unanimous vote of the other partners if any of the following apply:

- It is unlawful to carry on the partnership business with that partner (e.g., partner loses professional license required of all partners of the partnership);

• All or substantially all of the partner's "transferable interest" (¶ *3:242*) (other than a transfer for security purposes) is transferred, or a court order charges the partner's interest;

• Within 90 days after the partnership notifies a *corporate* partner that it will be expelled because it filed a certificate of dissolution (or "the equivalent," e.g., under foreign law), its charter has been revoked, or its right to conduct business has been suspended by its jurisdiction of incorporation, and during that time there is no revocation of the certificate of dissolution or no reinstatement of its charter or right to conduct business; or

• The partner is a partnership, limited partnership or limited liability company that has been dissolved or its business is being would up. [Corps.C. § 16601(4)]

e. [3:458] **Expulsion by judicial determination:** The partner has been expelled by a judicial determination upon application of the partnership or another partner because:

• The partner engaged in wrongful conduct that adversely and materially affected the partnership business;

• The partner willfully or persistently committed a material breach of the partnership agreement or of a fiduciary duty owed to the partnership or the other partners (Corps.C. § 16404, ¶ *3:150 ff.*); or

• The partner engaged in misconduct relating to the partnership business "that makes it not reasonably practicable" to carry on the business in partnership with the partner. [Corps.C. § 16601(5)]

Caution: The partnership agreement may not vary the right of a court to expel a partner. [Corps.C. § 16103(b)(7), ¶ *3:69*]

f. [3:459] **Bankruptcy or similar events:** The partner acted, or failed to act, by:

• Becoming a debtor in bankruptcy (see Corps.C. § 16101(a)(2));

• Executing an assignment for the benefit of the partner's creditors;

• Seeking, consenting to, or acquiescing in the appointment of a trustee, receiver or liquidator of that partner or of all or substantially all of that partner's property;

• Failing to vacate or stay the appointment of a trustee, receiver or liquidator within 90 days after the appointment where the appointment was obtained *without* the partner's consent or acquiescence, or failing to vacate the appointment within 90 days after expiration of a stay. [Corps.C. § 16601(6); see *Fotouhi v. Mansdorf* (ND CA 2010) 427 BR 798, 802—bankruptcy court could properly treat bankrupt partner as not dissociated where partner continued to work and be paid as partner following filing of bankruptcy petition (*discussed further at* ¶ *3:502*); *In re Safren* (BC CD CA 1986) 65 BR 566, 570—filing of Chapter 11 petition by or against partner does not dissolve general partnership (*discussed further at* ¶ *3:570*)]

g. [3:460] **Death or incapacity:** In the case of a partner who is an individual, the partner dies, or a guardian or general conservator is appointed for the partner, or a court has determined that the partner is incapable of performing the partner's duties under the partnership agreement. [Corps.C. § 16601(7)]

(1) [3:461] **Trust as partner:** Where an individual is a partner in his or her capacity as trustee of a trust, the law is unsettled whether the trustee's death or incapacity may cause the dissociation of the trust as a partner:

• One case held that a trust (other than a "business" trust, such as a real estate investment trust) is not an entity separate from its trustee and is not capable of entering into a business relationship such as a partnership (*see* ¶ *3:6*). Consequently, unless the partnership agreement provides otherwise, neither the trust nor a successor trustee may continue as partner upon the trustee's death or incapacity. [See *Presta v. Tepper* (2009) 179 CA4th 909, 913-919, 102 CR3d 12, 15-19—provision of partnership agreement requiring mandatory partnership buyout of deceased partner's share was triggered by partner/trustee's death where partnership consisted of two individuals each of whom entered into partnership in capacity of trustee of family trust]

• But a later case expressly disagreed with the reasoning of *Presta*, supra, and held that the trust itself, rather than the trustee, can be a partner in a partnership (¶ *3:6*). Consequently, unless the partnership agreement provides otherwise, the

death of an individual trustee (or the substitution of a new trustee) does not cause a dissociation of the trust as a partner. [*Han v. Hallberg* (2019) 35 CA5th 621, 624-625, 631-636, 247 CR3d 526, 527-528, 533-537—death of individual partner who with other partners' consent had previously transferred his partnership interest to family trust did not trigger partnership agreement's buyout-on-death provision] The California Supreme Court had agreed to resolve the dispute between *Presta* and *Han*, but subsequently dismissed the appeal. [*Han v. Hallberg* (2019) 35 CA5th 621, 247 CR3d 526, rev.dism. (2020) 271 CR3d 648; *see* ¶ *3:6 ff.*]

h. [3:462] **Distribution of trust:** In the case of a partner that is a trust or is acting as a partner by virtue of being a trustee of a trust, the trust's entire transferable interest in the partnership is distributed (other than by reason of substitution of a successor trustee). [Corps.C. § 16601(8)]

i. [3:463] **Distribution of estate:** In the case of a partner that is an estate or is acting as a partner by virtue of being a personal representative of an estate, the estate's entire transferable interest in the partnership is distributed (other than by reason of substitution of a successor personal representative). [Corps.C. § 16601(9)]

j. [3:464] **Other termination:** A partner who is not an individual, partnership, corporation, trust or estate is terminated. [Corps.C. § 16601(10)]

[3:465 - 3:469] ***Reserved.***

3. Partner's Voluntary Dissociation

a. [3:470] **Power to dissociate:** A partner has the power to dissociate at any time. However, a wrongful dissociation may result in the partner's liability to the partnership or the other partners. [Corps.C. § 16602(a), (c)]

(1) [3:471] **Caution—no contrary provision permitted in partnership agreement:** The partnership agreement may not vary the partner's power to dissociate (except to require any notice of dissociation to be in writing). [Corps.C. § 16103(b)(6); *see* ¶ *3:68*]

(2) [3:472] **Wrongful dissociation:** A partner's dissociation is wrongful if it violates an express provision of the partnership agreement. [Corps.C. § 16602(b)(1)]

A partner's dissociation from a partnership for a definite term or particular undertaking (*see* ¶ *3:23*) is wrongful if it occurs before the expiration of the term or the completion of the undertaking and:

- The partner withdraws by express will, unless the withdrawal follows within 90 days after another partner's dissociation due to bankruptcy or similar events (Corps.C. § 16601(6), ¶ 3:459), death or incapacity (Corps.C. § 16601(7), ¶ 3:460), distribution of trust or estate (Corps.C. § 16601(8)-(9), ¶ *3:462 ff.*), or other termination (Corps.C. § 16601(10), ¶ *3:464*); or

- The partner is expelled by judicial determination (Corps.C. § 16601(5), ¶ *3:458*); or

- The partner is dissociated by becoming a debtor in bankruptcy (Corps.C. § 16101(a)(2)); or

- In the case of a partner who is not an individual, trust (other than business trust) or estate, the partner is expelled or otherwise dissociated because it willfully dissolved or terminated. [Corps.C. § 16602(b)]

(3) [3:473] **Potential liability:** A partner who wrongfully dissociates is liable to the partnership and the other partners for damages caused by the dissociation. This liability is in addition to any other obligation of the partner to the partnership or other partners. [Corps.C. § 16602(c); see *O'Flaherty v. Belgum* (2004) 115 CA4th 1044, 1057-1061, 9 CR3d 286, 296-300—no forfeiture of partner's account upon partnership dissolution as penalty for wrongful dissociation]

[3:474] ***Reserved.***

4. Dissociated Partner's Rights and Duties

a. [3:475] **Management rights end:** Upon dissociation, the partner's right to participate in the management and conduct of the partnership business terminates. [Corps.C. § 16603(1)]

b. [3:476] **Fiduciary duties:** The partner's duties to account to the partnership for all benefits derived in the conduct of the partnership's business (Corps.C. § 16404(b)(1)) and to refrain from having interests adverse to the partnership (Corps.C. § 16404(b)(2), ¶ *3:151*) continue only with regard to *predissociation* events and matters. The partner's duty of care also continues only with regard to *predissociation* events and matters. [Corps.C. § 16603(3)]

(1) [3:477] **Duty not to compete:** The partner's fiduciary duty to refrain from competing with the partnership (Corps.C. § 16404(b)(3), ¶ *3:151*) likewise terminates. [Corps.C. § 16603(2)]

However, a former partner may not compete with the partnership with respect to a business opportunity that the partnership was *actively pursuing* at the time of the partner's dissociation where the partner voluntarily dissociated for the sole purpose of *seizing the business opportunity* or is *exploiting relevant information* known only to the partners. [*Leff v. Gunter* (1983) 33 C3d 508, 514-515, 189 CR 377, 381-382; see *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 CA4th 1509, 1551, 80 CR2d 94, 119]

(2) [3:478] **Limitation—no dissociation to avoid fiduciary duties:** A partner may not use dissociation as a tool to achieve an improper purpose. In this sense, fiduciary duties may continue past dissociation, especially where they arguably relate to predissociation duties.

Thus, partners may not "freeze out" a copartner for the purpose of appropriating the business to their own use. Nor may partners dissolve the partnership to gain the benefits of the business for themselves. [*Page v. Page* (1961) 55 C2d 192, 197, 10 CR 643, 646; *Rosenfeld, Meyer & Susman v. Cohen* (1983) 146 CA3d 200, 217-218, 194 CR 180, 190 (disapproved on other grounds by *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C4th 503, 510, 28 CR2d 475, 478)]

(3) [3:479] **Caution re partnership agreement limitations:** The partnership agreement may not eliminate a former partner's duties of loyalty and care with respect to predissociation matters, but it may vary those duties to the extent "not manifestly unreasonable." [Corps.C. § 16103(b)(3); *see* ¶ *3:65*]

➪ [3:480] ***PRACTICE POINTER—NONCOMPETE COVENANTS AND DISSOCIATED PARTNER*:** The partnership agreement may bar the former partner from competing with the partnership. [See Bus. & Prof.C. § 16602] However, any such provision must comply with the requirements of Bus. & Prof.C. §§ 16601 and 16602—i.e., the noncompete provision must be limited in geographical area and duration. [See Bus. & Prof.C. §§ 16601, 16602]

Cross-refer: For a more detailed discussion of noncompete covenants, see Friedman, Soza & Jann, *Cal. Prac. Guide: Corporations* (TRG), Chs. 6 and 8.

c. [3:481] **Partner's postdissociation acts potentially binding on partnership:** Where a dissociated partner purports to act on behalf of the partnership, the partnership may be bound by the dissociated partner's act for two years following dissociation to the same extent as if the partner had not been dissociated, but only if, at the time of entering into the transaction:

- The other party reasonably believed the dissociated partner was then a partner and did not have notice of the partner's dissociation; and

- No statement of dissociation was on file for at least 90 days with respect to that partner (Corps.C. § 16704(c)) and, with regard to real property transfers, no statement of partnership authority was on file in the office for recording transfers of that real property that would have indicated the dissociated partner was without authority to perform the act (Corps.C. § 16303(e), ¶ *3:103*). [Corps.C. § 16702(a); see Corps.C. § 16102 re notice]

(1) [3:482] **Dissociated partner liable to partnership:** A dissociated partner is liable for any damage to the partnership arising from a postdissociation act that binds the partnership. [Corps.C. § 16702(b)]

d. [3:483] **Dissociated partner's continued liability to third parties:** A dissociated partner remains liable for partnership obligations incurred before dissociation. However, except in limited circumstances, the dissociated partner is *not* liable for postdissociation partnership obligations. [Corps.C. § 16703]

(1) [3:484] **Potential liability for postdissociation transactions:** A partner who dissociates is liable as a partner of the partnership to a third party in a transaction entered into by the partnership (or a surviving partnership pursuant to a

conversion or merger of the partnership), within two years after the partner's dissociation, only if, at the time the party enters into the transaction, all of the following apply to the party:

- The party reasonably believed the dissociated partner was then a partner and did not have notice of the partner's dissociation; and

- No statement of dissociation was on file for at least 90 days with respect to that partner (Corps.C. § 16704(c)) and, with regard to real property transfers, no statement of partnership authority was on file in the office for recording transfers of that real property that would have indicated the dissociated partner was without authority to perform the act (Corps.C. § 16303(e), ¶ *3:103*). [Corps.C. § 16703(b); see Corps.C. § 16102 re notice]

(a) [3:485] **Not applicable to limited liability partnership:** Corps.C. § 16703(b) does not apply to a limited liability partnership. [Corps.C. § 16703(b)]

(2) [3:486] **Agreement between creditor and remaining partners:** A creditor and the remaining partners may agree that a dissociated partner is released from liability for a partnership obligation. [Corps.C. § 16703(c)]

(3) [3:487] **Release arising from creditor's alteration of partnership obligation:** A dissociated partner is released from liability for a partnership obligation if the creditor, with *notice* of the partner's dissociation but without the partner's *consent*, agrees to a material alteration in the nature or time of payment of the partnership obligation. [Corps.C. § 16703(d); see Corps.C. § 16102 re notice]

(4) [3:488] **No per se liability from continued use of partnership name:** Continued use of a partnership name, or a dissociated partner's name as part of the partnership name, does not itself render the dissociated partner liable for an obligation of the partners or the partnership continuing the business. [Corps.C. § 16705]

[3:489 - 3:499] ***Reserved.***

5. [3:500] **Mandatory Buyout of Dissociated Partner's Interest:** Dissociation triggers a mandatory buyout of the dissociated partner's partnership interest. [Corps.C. § 16701(a)]

a. [3:501] **Agreement may deny mandatory buyout; no right to accounting:** The Corps.C. § 16701(a) mandatory buyout provision is not among the provisions that cannot be varied by the partners. Therefore, the partnership agreement may specify that a dissociated partner does not have a right to mandatory buyout of his or her partnership interest. [See Corps.C. § 16103]

Where the dissociation does not violate any duty to the dissociated partner, the dissociated partner does not have a statutory right to an accounting. [See *Heller v. Pillsbury Madison & Sutro* (1996) 50 CA4th 1367, 1391, 58 CR2d 336, 350-351 (partner expelled pursuant to partnership agreement, ¶ *3:455*)]

b. [3:502] **Buyout price:** Unless the partnership agreement provides otherwise (Corps.C. § 16103, ¶ *3:62*), the buyout price is the amount that would have been distributable to the partner if the partnership were dissolved and its assets sold for the *greater* of (1) "liquidation value" (¶ *3:503*) or (2) the value based on a sale of the entire business as a going concern, without the dissociated partner, as of the date of dissociation. (The buyout price is subject to offset for any damages resulting from a wrongful dissociation, ¶ *3:473*.) [Corps.C. § 16701(b),(c); see *Rappaport v. Gelfand* (2011) 197 CA4th 1213, 1224-1229, 129 CR3d 670, 677-681; *Fotouhi v. Mansdorf* (ND CA 2010) 427 BR 798, 803-804 (calculation of buyout price where partner continued to work for and be paid by partnership despite his technical "dissociation" upon filing of bankruptcy petition; *see* ¶ *3:459*)]

Interest on the buyout amount is payable from the date of association to the date of payment. [Corps.C. § 16701(b)]

(1) [3:503] **"Liquidation value":** The term "liquidation value" may vary depending on the type of business and the particular buyout situation. However, "liquidation value" generally does *not* refer to a distress sale—i.e., an urgency sale for immediate cash. Rather, it refers to the sale price of the assets based upon their market value as determined by a willing and knowledgeable buyer and a willing and knowledgeable seller, *neither of which is under any compulsion to buy or sell*. [*Rappaport v. Gelfand* (2011) 197 CA4th 1213, 1224-1229, 129 CR3d 670, 677-681 (buyout of attorney's interest in law firm LLP)]

The buyout price is the liquidation value, discounted to present value as of the date the partner dissociated. [*Rappaport v. Gelfand*, supra, 197 CA4th at 1228, 129 CR3d at 680]

(2) [3:503.1] **Compare—corporations and LLCs:** A buyout for "liquidation" or "going concern" value is similar to a buyout for "fair value" of the shares of a shareholder who seeks dissolution of the corporation. Hence, cases decided in the context of corporations may be helpful in determining the buyout price in the context of partnerships. [See Corps.C. § 2000(a)—"The fair value shall be determined on the basis of the liquidation value as of the valuation date but taking into account the possibility, if any, of sale of the entire business as a going concern in a liquidation"; see also Friedman, Soza & Jann, *Cal. Prac. Guide: Corporations* (TRG), Ch. 8]

In contrast, a buyout of the membership interest of an LLC member who seeks dissolution of the LLC is for "fair *market* value," which is not necessarily the same as "fair value" or "liquidation/going concern" value. [See Corps.C. § 17707.03(c)(1), ¶ 6:790 ff.]

(3) [3:504] **Special rule for LLPs—ordinarily, no partner liability for buyout price:** In a limited liability partnership, the partnership is liable for the buyout price. No partner is individually liable unless that partner previously agreed to the imposition of personal liability for all or the specific partnership debts, obligations or liability. [Corps.C. § 16306(c), (d); *Rappaport v. Gelfand* (2011) 197 CA4th 1213, 1230-1231, 129 CR3d 670, 682-683]

(4) [3:505] **Fiduciary duties apply:** The partners' fiduciary duties to each other apply when buying out a partner's interest. [See *Estate of Witlin v. Rio Hondo Assocs.* (1978) 83 CA3d 167, 174-175, 147 CR 723, 726-728—partnership buying out deceased partner's interest did not act in good faith in fixing fair market value based on book value that ignored proposed sale of partnership's sole asset to third party at price considerably higher than that reflected in buyout amount; *In re Haddad* (9th Cir. BAP 1982) 21 BR 421, 423-424, aff'd without opn. (9th Cir. 1983) 703 F2d 575—partner had duty to disclose to deceased partner's widow proceeds of insurance policy available to effect buyout (applying Calif. law)]

(5) [3:506] **Wrongful dissociation from partnership for definite term or particular undertaking—deferred payment of buyout:** A partner who wrongfully dissociates from a partnership having a definite term or particular undertaking is not entitled to payment until expiration of the term or completion of the undertaking (unless the partner can show to the court that earlier payment will not cause undue hardship to the partnership business). A deferred buyout must be adequately secured and bear interest. [Corps.C. § 16701(h)]

(a) [3:507] **Partnership's buyout offer:** If payment of the buyout is deferred, the partnership may tender a written offer to pay the amount it estimates to be the buyout price (plus accrued interest and less any damages for wrongful dissociation), stating the time of payment, the amount and type of security for payment, and any other terms and conditions of the offer. [Corps.C. § 16701(f)]

1) [3:508] **Financial statements to accompany buyout offer:** The buyout offer must include a statement of partnership assets and liabilities as of the date of dissociation, the latest available partnership balance sheet and income statement (if any), and an explanation of how the estimated amount of the payment was calculated. [Corps.C. § 16701(g)]

(6) [3:509] **Payment where no agreement as to price:** If the parties cannot agree to a buyout price within 120 days after a written demand for payment, the partnership must pay the dissociated partner the amount the partnership estimates to be the buyout price (plus accrued interest but less any offset for any damages resulting from a wrongful dissociation). [Corps.C. § 16701(e)]

c. [3:510] **Indemnification against partnership liabilities:** The dissociated partner is entitled to indemnification from the partnership from all partnership liabilities, whether incurred before or after dissociation (except for a dissociated partner's postdissolution act that binds the partnership; *see ¶ 3:481*). [Corps.C. § 16701(d)]

d. [3:511] **Action by dissociated partner:** A dissociated partner may bring an action against the partnership to determine the buyout price or other terms of the buyout obligation. [Corps.C. § 16701(i); but see *Sass v. Cohen* (2020) 10 C5th 861, 863-864, 887-888, 272 CR3d 836, 838-839, 857-858 (holding mere fact that plaintiff alleges an accounting does not relieve plaintiff from obligation to plead specific dollar amount to support default money judgment, disapproving prior authority to contrary)]

➪ [3:511.1] ***PRACTICE POINTER:*** Given the holding in *Sass*, supra, prudence dictates that a complaint filed pursuant to Corps.C. § 16701(i) include a specific dollar amount of damages to support a judgment upon defendant's default. If specificity is not possible, requesting a sum according to proof up to a maximum amount (e.g., "an amount not to exceed $50,000 according to proof during trial") would put defendant on notice that as much as the maximum amount requested may be awarded. [See *Sass v. Cohen* (2020) 10 C5th 861, 879-880, 272 CR3d 836, 850-852]

(1) [3:512] **120-day deadline:** The action must be brought within 120 days after the partnership tenders payment or an offer to pay, or within one year after written demand for payment if no payment or offer is tendered. [Corps.C. § 16701(i)]
(2) [3:513] **Court determination:** The court must determine the buyout price, less any offset for wrongful dissociation plus accrued interest. If a deferred payment is authorized (*see ¶ 3:506*), the court must also determine the security for payment and other terms of the purchase obligation. [Corps.C. § 16701(i)]
(3) [3:514] **Attorney fees and expert fees potentially recoverable:** The court "may" (discretionary) assess reasonable attorney's fees and the fees and expenses of appraisers or other experts, "in amounts the court finds equitable," against a party that acted arbitrarily, vexatiously or not in good faith. The court may make such a finding with respect to the partnership if the partnership fails to tender payment or make an offer or fails to comply with its obligations with respect to any buyout offer. [Corps.C. § 16701(i)]

e. [3:515] **Enforcement of buyout right by partner's trustee in bankruptcy:** Where a partnership fails to buy out a dissociated partner, the partner's trustee in bankruptcy may enforce the partner's buyout right. [Corps.C. §§ 16701(i), 16405(b)(2)(B); see *Fotouhi v. Mansdorf* (ND CA 2010) 427 BR 798, 802]

f. [3:516] **Exception—dissociation within 90 days prior to dissolution:** Mandatory buyout of a dissociated partner's partnership interest does *not* apply to any dissociation that occurs within 90 days prior to the partnership's dissolution. In such event, all partners who dissociated within the 90-day period shall be treated as partners for the purpose of winding up the partnership and settlement of partnership accounts. Any wrongful dissociation damages are taken into account in determining the amount distributable to the dissociated partner. [Corps.C. § 16701.5]

[3:517 - 3:519] ***Reserved.***

6. [3:520] **Statement of Dissociation:** A dissociated partner or the partnership may file a statement of dissociation stating the name of the partnership (as filed with the Secretary of State), any identification number issued by the Secretary of State, and that the partner is dissociated from the partnership. [Corps.C. § 16704(a)]

• ***FORM:*** The Secretary of State's standard form Statement of Dissociation (Form GP-3) is available online at the Secretary of State's website (*www.sos.ca.gov*).

a. [3:521] **$30 filing fee:** The fee for filing the statement of dissociation is $30 (plus a $15 special handling fee if delivered in person to the Secretary of State's office). [Gov.C. §§ 12182(a), 12187(c); 2 CCR § 21903(c)]

b. [3:522] **Effect:** The statement of dissociation acts as a limitation on the authority of the dissociated partner to the same extent as a statement of partnership authority. Third persons who deal with the dissociated partner are deemed to have notice of the dissociation 90 days after the statement of dissociation is filed. [Corps.C. § 16704(b), (c); see Corps.C. § 16303(f), ¶ *3:102*]

[3:523 - 3:549] ***Reserved.***

Cal. Prac. Guide Pass--Through Entities Ch. 3-G

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Chapter 3. General Partnership

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1. Events Causing Dissolution

a. [3:550] **Partnership at will:** A partnership at will is dissolved by the "express will to dissolve" of *at least half* of the partners, including partners (other than wrongfully dissociating partners) who dissociated within the preceding 90 days. [Corps.C. § 16801(1)]

(1) [3:551] **Automatic dissolution of two-person partnership:** A partnership composed of two persons automatically dissolves upon one partner's withdrawal. The remaining partner cannot operate in partnership form after the other partner departs. [*Corrales v. Corrales* (2011) 198 CA4th 221, 223-224, 227, 129 CR3d 428, 429, 432]

(a) [3:552] **No mandatory buyout:** When one partner in a two-person partnership withdraws, the partnership's assets are liquidated to pay creditors, with the remainder going to the partners. There is no statutory right to buyout as there is in the case of a partner who dissociates (*see ¶ 3:500 ff.*). [*Corrales v. Corrales* (2011) 198 CA4th 221, 227, 129 CR3d 428, 431-432]

b. [3:553] **Partnership for definite term or particular undertaking:** A partnership for a definite term or particular undertaking is dissolved (1) upon expiration of the term or completion of the undertaking, (2) by the express will of *all* partners or (3) after 90 days following a partner's death, incapacity, bankruptcy or wrongful dissociation *unless* within that time a majority *in interest* of the partners (including any partners who rightfully dissociated within that time) agree to continue the partnership. [Corps.C. § 16801(2); *see ¶ 3:24*]

(1) [3:554] **Application by transferee:** On application by a transferee of a partner's "transferable interest," a partnership for a definite term or particular undertaking may also be dissolved after expiration of the term or completion of the undertaking upon a judicial determination that it is "equitable" to wind up the partnership business. [Corps.C. § 16801(6)]

c. [3:555] **Event set forth in partnership agreement:** Any partnership also dissolves upon the occurrence of an event set forth in the partnership agreement that results in the winding up of the partnership business. [Corps.C. § 16801(3)]

d. [3:556] **Event rendering partnership continuation unlawful:** Any partnership also dissolves upon the occurrence of an event that makes continuation of all or substantially all of the business of the partnership unlawful. (But a cure of the illegality within 90 days after notice of the event to the partnership is effective retroactively to the date of the event.) [Corps.C. § 16801(4)]

Caution: The partnership agreement may not vary this provision. [Corps.C. § 16103(b)(8), *¶ 3:70*]

e. [3:557] **Judicial decree:** On a partner's application, any partnership also dissolves upon a judicial determination that:

- The economic purpose of the partnership is likely to "unreasonably frustrated";
- Another partner has engaged in conduct relating to the partnership business that makes it "not reasonably practicable" to carry on the business in partnership with that partner; or
- It is otherwise not "reasonably practicable" to carry on the partnership business in conformity with the partnership agreement. [Corps.C. § 16801(5); see *Jacoby v. Feldman* (1978) 81 CA3d 432, 440-442, 146 CR 334, 338-340—personal representative of deceased partner could seek judicial decree of dissolution even though he had no partnership voting rights]

Caution: The partnership agreement may not vary the requirement to dissolve upon judicial decree. [Corps.C. § 16103(b)(8); *see ¶ 3:70*]

(1) [3:558] **Court discretion:** A court has considerable discretion in determining whether the statutory grounds for judicial dissolution exist. [*Jacoby v. Feldman* (1978) 81 CA3d 432, 443, 146 CR 334, 340]

However, where the court determines that a statutory ground exists (e.g., it is not reasonably practical to carry on the partnership), it has no discretion to deny a partner's application to dissolve the partnership. I.e., it cannot impose an alternative remedy, such as monetary damages. [*Navarro v. Perron* (2004) 122 CA4th 797, 801-802, 19 CR3d 198, 201]

(2) [3:559] **Examples:** Dissolution by judicial decree is deemed appropriate where:

• [3:560] Improper accounting procedures subjected the partners to potential federal and state tax liability. [*Jacoby v. Feldman* (1978) 81 CA3d 432, 442-443, 146 CR 334, 340]

• [3:561] The personal relationship between the partners who owned a duplex had so deteriorated that their common ownership of the duplex was no longer possible. [*Navarro v. Perron* (2004) 122 CA4th 797, 801-802, 19 CR3d 198, 201; see *Owen v. Cohen* (1941) 19 C2d 147, 152, 119 P2d 713, 716—"very bitter, antagonistic feeling" between partners undermined "cooperation, coordination and harmony" required to operate partnership]

• [3:562] One partner usurped all management responsibilities and refused to let the other partners participate in management. [*Vangel v. Vangel* (1953) 116 CA2d 615, 620, 254 P2d 919, 922]

• [3:563] Several partners failed to make their promised capital contribution without which the partnership could not set up its intended business. [*Wood v. Apodaca* (ND CA 2005) 375 F.Supp.2d 942, 948 (applying Calif. law); see *Cobin v. Rice* (ND IN 1993) 823 F.Supp. 1419, 1425-1426 (applying Calif. law)—partner refused to respond to additional cash calls required in partnership agreement]

• [3:564] There was a misappropriation of partnership funds. [*Wind v. Herbert* (1960) 186 CA2d 276, 286-287, 8 CR 817, 822-823]

• [3:565] A partner took secret profits. [*Thomson v. Langton* (1921) 51 CA 142, 146-147, 196 P 103, 104-105]

[3:566] ***Reserved.***

• [3:567] One partner sold all of the partnership assets without the consent of the other. [*McAtee v. McAtee* (1930) 105 CA 555, 558-559, 288 P 114, 116]

• [3:568] One partner practiced a fraud upon another. [*Cottle v. Leitch* (1868) 35 C 434, 339-440]

(3) [3:569] **No statutory buyout right by other partner(s) to avoid dissolution:** When a partner or a member brings an action seeking a judicial decree to dissolve a *limited partnership* or *LLC*, California law allows the other partners or members to avoid the dissolution by buying out the interests owned by the party seeking dissolution. [Corps.C. §§ 15908.02(b) (LP, ¶ *5:645 ff.*), 17707.03(c)(1) (LLC, ¶ *6:790 ff.*)]

There are no comparable statutory provisions to allow the other partners in a *general* partnership to avoid a judicial dissolution decree by buying out the interest of the partner seeking dissolution (unless, of course, the partnership agreement provides otherwise). [*Boschetti v. Pacific Bay Investments Inc.* (2019) 32 CA5th 1059, 1062, 244 CR3d 480, 481-482]

f. [3:570] **Compare—no dissolution upon filing of bankruptcy petition:** The filing of a Chapter 11 case by or against a partnership does not dissolve the partnership.

Reasons: If a partnership is to be reorganized and to continue in business, state law should not be permitted to dissolve it. Upon confirmation of a plan of reorganization, the assets of the bankruptcy estate, which was created by the filing of the case, are revested in the partnership, and unpaid partnership liabilities are discharged. The partnership then emerges from Chapter 11 to continue in business. In addition, the dissolution of a partnership upon the filing of a Chapter 11 case may have substantial tax consequences that could render its reorganization difficult or impossible. [*In re Safren* (BC CD CA 1986) 65 BR 566, 569-570]

g. [3:571] **"Bad faith" dissolution:** Despite any rights given to the partners by law or the partnership agreement, the partners must exercise their rights in good faith. They may not dissolve the partnership for an improper purpose, such as expropriating partnership business opportunities to themselves to the exclusion of other partners. This is so even where the partnership is "at will" (*see* ¶ *3:23*). [See *Page v. Page* (1961) 55 C2d 192, 197, 10 CR 643, 646; *Laux v. Freed* (1960) 53 C2d 512, 522, 2 CR 265, 271; *Everest Investors 8 v. McNeil Partners* (2003) 114 CA4th 411, 424-425, 8 CR3d 31, 40-41; *Rosenfeld, Meyer & Susman v. Cohen* (1983) 146 CA3d 200, 212-218, 194 CR 180, 187-190 (disapproved on other grounds by *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C4th 503, 510, 28 CR2d 475, 478); *and* ¶ *3:171*]

[3:572 - 3:579] ***Reserved.***

2. [3:580] **Winding Up of Partnership Business:** Upon dissolution, the partnership business must be wound up, and its business continues only for the purpose of winding up. Winding up is the process of completing all of the partnership's uncompleted transactions, reducing all assets to cash, and distributing any remaining proceeds to the partners. [Corps.C. §§ 16801, first sent., 16802(a), 16803; *Heller Ehrman LLP v. Davis Wright Tremaine LLP* (2018) 4 C5th 467, 481, 229 CR3d 371, 382]

When the winding up is completed, the partnership is *terminated*. [Corps.C. § 16802(a)]

a. [3:581] **Who may wind up:** A partner who has not dissociated may participate in winding up the partnership's business. [Corps.C. § 16803(a)]

(1) [3:582] **Judicial supervision on partner's request:** On application of *any* partner (including a partner's legal representative or transferee), a court, upon a showing of *good cause*, may order judicial supervision of the winding up. [Corps.C. § 16803(a)]

(2) [3:583] **Winding up by last surviving partner's legal representative:** The legal representative of the last surviving partner may wind up the partnership's business. [Corps.C. § 16803(b)] The duties of loyalty and due care, and the obligation to act in good faith and fair dealing, applicable to partners (*see ¶ 3:150 ff.*), apply to a person winding up the partnership business as the last surviving partner's legal (or personal) representative. [Corps.C. § 16404(g)]

(3) [3:584] **Partner's entitlement to remuneration:** The general rule that a partner is not entitled to remuneration for services performed for the partnership (*¶ 3:222*) does not apply to a partner's services in winding up the partnership business. In this situation, the partner is entitled to "reasonable compensation." [Corps.C. § 16401(h)]

b. [3:585] **Partner's duty to wind up:** Each partner of a dissolved partnership has the duty to wind up and complete the partnership's unfinished business existing prior to the dissolution. This includes completing all executory contracts that remain in force. Moreover, the partner may not take any action with respect to unfinished business that leads to purely personal gain at the expense of the partnership. [*Smith v. Bull* (1958) 50 C2d 294, 301-304, 325 P2d 463, 467-469; *Grossman v. Davis* (1994) 28 CA4th 1833, 1836, 34 CR2d 355, 356-357; *Rosenfeld, Meyer & Susman v. Cohen* (1983) 146 CA3d 200, 217, 194 CR 180, 190 (disapproved on other grounds by *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C4th 503, 510, 28 CR2d 475, 478 & fn. 10)]

c. [3:586] **Powers of person winding up partnership:** A person winding up the business has power to perform all acts necessary to wind up the business, including preserving the partnership business or property as a going concern for a reasonable time; prosecuting, defending and settling actions and proceedings to which the partnership is a party; settling and closing the partnership's business; transferring or otherwise disposing of partnership property; discharging liabilities; and distributing the partnership's assets. [Corps.C. § 16803(c); see *Heller Ehrman LLP v. Davis Wright Tremaine LLP* (2018) 4 C5th 467, 481, 229 CR3d 371, 382; *Principal Mutual Life Ins. Co. v. Vars, Pave, McCord & Freedman* (1998) 65 CA4th 1469, 1489-1490, 77 CR2d 479, 491; *Metzenbaum v. Metzenbaum* (1953) 115 CA2d 395, 399-401, 252 P2d 31, 34-35—partner entitled to reimbursement of attorney fees incurred in successfully defending against adverse claims to partnership assets]

The partnership is bound by a partner's postdissolution act that is appropriate for winding up the business or, alternatively, that would have bound the partnership before dissolution if the other party to the transaction did not have notice of the dissolution. [Corps.C. § 16804; see *Principal Mutual Life Ins. Co. v. Vars, Pave, McCord & Freedman*, supra]

(1) [3:587] **Partner's liability to other partners for postdissolution acts:** A partner is liable to the other partners for the partner's share of any partnership liability properly incurred in winding up the partnership. A partner who, with knowledge of the dissolution, incurs an *inappropriate* postdissolution partnership liability is liable to the partnership for any resulting damage. [Corps.C. § 16806; see *Principal Mutual Life Ins. Co. v. Vars, Pave, McCord & Freedman* (1998) 65 CA4th 1469, 1489-1490, 77 CR2d 479, 491; compare *King v. Stoddard* (1972) 28 CA3d 708, 712-713, 104 CR 903, 906—partners not liable for accounting bills run up by copartner who continued to operate business instead of winding it down]

(a) [3:588] **Not applicable to limited liability partnership:** Corps.C. § 16806 does not apply to a limited liability partnership. [Corps.C. § 16806]

d. [3:589] **Discharge of debts:** In winding up the partnership, the partnership's assets are applied first to discharge the partnership's debts (including, to the extent permitted by law, *partners* who are creditors). [Corps.C. § 16807(a)]

e. [3:590] **Payment of remainder to partners:** After payment of the partnership's debts (*¶ 3:589*), any surplus is applied to pay the net amount distributable to partners in accordance with their right to distributions. [Corps.C. § 16807(b)]

(1) [3:591] **Settlement of partnership accounts:** Each partner is entitled to a settlement of all partnership accounts. In settling accounts, the profits and losses resulting from liquidation of partnership assets are credited and charged to the partners' accounts. Any excess of the credits over the charges in each partner's account are then distributed to the partner. [Corps.C. § 16807(a), (b); see *O'Flaherty v. Belgum* (2004) 115 CA4th 1044, 1057-1061, 9 CR3d 286, 296-300—no forfeiture of partner's account as penalty for wrongdoing]

(a) [3:592] **Partner's contribution to cover shortfall:** In the event that charges exceed credits, a partner must contribute the shortfall to the partnership. [Corps.C. § 16807(b); see *In re Fineberg* (BC ED PA 1996) 202 BR 206, 222-223 (applying prior version of Calif. law)]

1) [3:593] **Other partners' liability for shortfall:** If a partner fails to contribute the full amount of the shortfall, all other partners must contribute, in the proportions in which those partners share partnership losses, the additional amount necessary to satisfy partnership obligations. A partner (or partner's legal representative) may recover from the other partners any contribution the partner makes to the extent the contribution exceeds that partner's share of the partnership obligations. [Corps.C. § 16807(c)]

2) [3:594] **Not applicable to limited liability partnership:** A partner's obligation to make a contribution to the partnership in the amount of the shortfall in the partner's capital account does not apply to a limited liability partnership. [Corps.C. § 16807(b)]

(b) [3:595] **Law firm partnership dissolution—treatment of unfinished business (matters in progress):** Whether partners of a dissolved law firm must account to the firm for profits derived from client matters that are ongoing at the time of dissolution depends on whether the matters are billed on an *hourly or contingency fee* basis.

1) [3:596] **No duty to account for ongoing hourly matters:** A dissolved law firm, whether formed as a general partnership or limited liability partnership, has no property interest in the fees or profits associated with unfinished *hourly* fee matters. Client matters belong to the client, not the law firm, and a law firm may not assert an ongoing interest in the matters once the firm has been discharged. Hence, partners of a dissolved firm do not have a duty to account to the dissolved firm and their partners for profits earned on client matters billed on an hourly basis after they leave the dissolved firm and the client has transferred its business to the departed partner or law firm. [*Heller Ehrman LLP v. Davis Wright Tremaine LLP* (2018) 4 C5th 467, 471, 479, 229 CR3d 371, 374, 380]

a) [3:596.1] **Compensation limited to work expended in transferring matters:** Corps.C. § 16803(c) authorizes the performance of all acts necessary to wind up the partnership business (*see ¶ 3:586*). But winding up a law partnership's *hourly* fee matters extends no further than to acts necessary to (i) preserve legal matters for transfer to the client's new counsel or the client itself, (ii) effectuate such a transfer, and (iii) collect on pretransfer work. [*Heller Ehrman LLP v. Davis Wright Tremaine LLP* (2018) 4 C5th 467, 481-483, 229 CR3d 371, 382-383]

a) [3:596.1] **Compensation limited to work expended in transferring matters:** Thus, the firm is entitled to payment for, e.g., the time its lawyers spent filing motions for continuances, noticing parties and courts that it was withdrawing as counsel, packing up and shipping client files back to the clients or to new counsel, and getting new counsel up to speed on pending matters. In the same vein, any effort to collect on *unbilled* work that the firm *performed up to the time of dissolution* falls within the category of winding up the business (per Corps.C. § 16803(c), *¶ 3:586*), and hence a partner has the duty (per Corps.C. § 16404(b)(1), *¶ 3:151, 3:476*) to account to the firm for any profits derived from such work. "But the duty extends no further." [*Heller Ehrman LLP v. Davis Wright Tremaine LLP*, supra, 4 C5th at 482, 229 CR3d at 382-383]

2) [3:597] **Duty to account for contingency fee matters:** In a case predating the California Supreme Court's decision in *Heller Ehrman*, supra, a court held that, absent a contrary provision in the partnership agreement, law firm partners continue to have a duty to account to the dissolved firm and its partners for profits earned on *contingency fee* matters pending at the time of dissolution. Thus, contingency fees received on cases in progress at the time of dissolution are shared by the partners *according to their right to fees in the partnership* rather than on a quantum meruit or other basis. This is so regardless of which partner provides post-dissolution legal services in the case, and applies even where the client substitutes one of the partners as attorney of record in place of the partnership. [*Jewel v. Boxer* (1984) 156 CA3d 171, 174, 203 CR 13, 15 (decided under prior law)]

a) [3:597.1] **Validity?** The Supreme Court in *Heller Ehrman*, supra, expressly declined to address the issue of contingency fees, but acknowledged a distinction between contingency and hourly fees. "The situation might be

different in the context of contingency fee matters, where what constitutes 'a going concern' preserved for a 'reasonable time' [per Corps.C. § 16803(c), ¶ *3:586*)] is considered against a backdrop in which the dissolved firm had yet to be paid for the work it performed and will not be paid until the matter is resolved." [*Heller Ehrman LLP v. Davis Wright Tremaine LLP* (2018) 4 C5th 467, 480, 483, 229 CR3d 371, 381, 383]

b) [3:598] **Waiver by partners:** The partnership agreement may provide for a different allocation of attorney fees received from contingency fee cases in progress during the winding up process. The partners may enter into what is sometimes referred to as a "*Jewel* waiver," whereby they agree that they do not have a duty to account back to the firm or the other partners with respect to the firm's unfinished business that the partners worked on following dissolution (*see ¶ 3:599*). Such an agreement is a permissible modification of the partners' duty of loyalty (see Corps.C. § 16103(b)(3)). Indeed, such agreements are encouraged, because they aid in the timely and organized winding up of the partnership's affairs. [*In re Brobeck, Phleger & Harrison LLP* (BC ND CA 2009) 408 BR 318, 334-336]

➪ [3:599] ***PRACTICE POINTER:*** Law firms now routinely include "*Jewel* waivers" in their partnership agreements (*see ¶ 3:597*). For example:

> "Unfinished Business Waiver. Neither the Partners nor the Partnership shall have any claim or entitlement to clients, cases or matters ongoing at the time of the dissolution of the Partnership other than the entitlement for collection of amounts due for work performed by the Partners and other Partnership personnel prior to their departure from the Partnership. The provisions of this [section] are intended to expressly waive, opt out of and be in lieu of any rights any Partner or the Partnership may have to 'unfinished business' of the Partnership, as the term is defined in *Jewel v. Boxer*, 151 Cal.App.3d 1148, 199 Cal.Rptr. 273 (1st Dist. 1984), or as otherwise might be provided in the absence of this provision through the interpretation or application of the California Uniform Partnership Act of 1994, as amended." [See *In re Thelen LLP* (NY 2014) 20 NE3d 264, 267]

[3:600 - 3:609] ***Reserved.***

f. [3:610] **Partners' postsettlement contributions to cover additional obligations:** If, after the settlement of accounts, additional partnership obligations arise that were not previously known, each partner (or the estate of a deceased partner) must cover the obligations in the proportion in which the partners shared partnership losses. [Corps.C. § 16807(d), (e)]

g. [3:611] **Enforcement by legal action:** A partner's obligation to contribute to the partnership may be enforced by an assignee for the benefit of creditors of the partnership or a partner, or by a person appointed by a court to represent creditors of a partnership or a partner. [Corps.C. § 16807(f)]

3. [3:612] **"Responsible Person" Liability for Unpaid Sales Taxes:** Upon dissolution, any partner or other person who had control or supervision of, or responsibility for, paying the partnership's sales and use taxes may be personally liable for any unpaid taxes (and interest and penalties) that the partner or other person *willfully* (i.e., "intentionally," irrespective of motive) failed to pay during the period they had such control, supervision or responsibility. (But personal liability attaches only if the partnership included sales tax reimbursement in the selling price of its products.) [Rev. & Tax.C. § 6829 (applies also to LLPs); 18 CCR § 1702.5]

4. [3:613] **Statement of Dissolution:** After dissolution, any partner who did not wrongfully dissociate may file a Statement of Dissolution stating the partnership's name (as filed with the Secretary of State), any identification number issued by the Secretary of State, and that the partnership has dissolved and is winding up its business. [Corps.C. § 16805(a)]

• ***FORM:*** The Secretary of State's standard form Statement of Dissolution (Form GP-4) is available online at the Secretary of State's website (*www.sos.ca.gov*).

a. [3:614] **Effect:** The statement of dissolution cancels any statements of partnership authority that supplemented the authority of a partner to enter into partnership transactions (Corps.C. § 16303(d), ¶ *3:100 ff.*). It also provides constructive notice to third persons of the limitation on the partners' authority as a result of the dissolution; nonpartners are deemed to have notice of the dissolution and the corresponding limitation on the partners' authority 90 days after the statement of dissolution is filed. [Corps.C. § 16805(b), (c)]

b. [3:615] **No filing fee:** There is no fee for filing the statement of dissolution. (However, there is the usual $15 special handling fee if the statement is delivered in person to the Secretary of State's office.) [Corps.C. § 16113(c); Gov.C. §§ 12182(a), 12187(b); 2 CCR § 21903(c)]

5. [3:616] **Use of Statement of Partnership Authority:** A dissolved partnership may also file and, if appropriate, record a statement of partnership authority to limit *or supplement* a partner's authority to enter into transactions (Corps.C. § 16303(d) & (e), ¶ *3:100 ff.*), whether or not the transaction is appropriate for winding up the partnership business. [Corps.C. § 16805(d)]

6. [3:617] **Partners' Revocation of Dissolution:** Any time after dissolution but before winding up is completed, *all* partners (including any dissociating partner other than a wrongfully dissociating partner) may "waive" the right to wind up the partnership business and terminate the partnership. In that event, the partnership resumes its business as if dissolution had never occurred. [Corps.C. § 16802(b)]

7. [3:618] **Compare—Termination for Tax Purposes:** For tax purposes, a partnership terminates if no part of its business or financial operation is carried on by any of its partners in a partnership. (E.g., where two partners in a three-person partnership sell out to the remaining partner, the partnership terminates for tax purposes because the business is no longer operated as a partnership.) [IRC § 708(b)(1); Treas.Reg. § 1.708-1(b)(1); *see further discussion at* ¶ *8:550 ff.*]

[3:619 - 3:649] ***Reserved.***

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Chapter 3. General Partnership

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[3:650] There are circumstances in which a general partnership may desire to change its *form* of organization. For example, it may wish to admit passive partners, and hence convert into a limited partnership. In some cases, a partnership may even wish to convert into a corporation for several reasons:

• There is a concern over potential liability, and the corporate form provides greater protection against unlimited liability;

• The business has become profitable and the owners do not want the tax liabilities resulting from a pass-through of profits; or

• Third-party investors prefer the corporate form for making equity investments.

1. [3:651] **Entities Into Which General Partnership May Convert:** A California general partnership may convert into an "other business entity"—i.e., a California or foreign *limited partnership*, *limited liability company (LLC)*, *corporation*, *business trust*, *real estate investment trust* or *for-profit unincorporated association*. (A limited liability partnership is not among the entities into which a general partnership may convert.) [Corps.C. §§ 16901(12), 16902]

Of course, in the case of conversion into a foreign entity, the conversion must be expressly permitted by the law of the foreign entity, and the partnership must comply with both California law and the laws of the foreign entity with respect to conversion. [Corps.C. §§ 16902(b), 16905(b)]

a. [3:652] **Not applicable to limited liability partnership:** A limited liability partnership may not convert into another business entity. [Corps.C. § 16902(a)]

Nor may a general partnership convert into a limited liability partnership. A general partnership desiring to be a limited liability partnership becomes an LLP upon the affirmative vote of its partners and by registering as an LLP; *see ¶ 4:55*.

[3:653] ***Reserved.***

b. Conditions for conversion

(1) [3:654] **Conversion into limited partnership or LLC:** Conversion into a limited partnership or LLC is permitted only if each of the partners would receive a percentage interest in the profits and capital of the limited partnership or LLC equal to the partner's percentage interest in the partnership's profits and capital as of the effective time of conversion. [Corps.C. § 16902(a)]

(a) [3:655] **Comment:** The UPA conversion provisions (Corps.C. §§ 16901-16917) may be varied by the partners in their partnership agreement (see Corps.C. § 16103, *¶ 3:62*). Thus, there would appear to be no reason why the conversion of a general partnership into a limited partnership or LLC would not be permissible even if the general partnership's partners would *not* receive the percentage interest in the limited partnership's or LLC's profits and capital equal to their percentage interest in the general partnership's profits and capital, so long as the partners who do not receive an equal interest approve the conversion and any modification of their interest in profits or capital pursuant to an explicit provision of the partnership agreement providing for such approval.

(2) [3:656] **Conversion into other entity:** Conversion into an entity other than a limited partnership or LLC is permitted only if each of the partnership interests of the same class is treated *equally* with respect to any distribution of cash, property, rights, interests or securities of the new entity. But this limitation does not apply if *all* partners of the same class consent. [Corps.C. § 16902(a)]

(a) [3:657] **Comment:** Corps.C. § 16902 is not among the provisions that cannot be varied by the partners in their partnership agreement (Corps.C. § 16103, ¶ *3:62 ff.*); hence, it would appear that the partnership agreement can vary the Corps.C. § 16902(a) "default" rule of equal treatment of partnership interests. One such variation, for example, could permit unequal treatment of partnership interests so long as the holders of such interests (not *all* partners) consent to this aspect of the conversion.

2. [3:658] **Plan of Conversion:** The partnership must prepare a plan of conversion, which must state or identify:

• The terms and conditions of the conversion;

• The state of organization of the partnership and the converted entity, and the name of the converted entity if different from the partnership's name;

• The manner of converting each partner's partnership interests into interests (LP interests, LLC interests, etc.) of the converted entity;

• The converted entity's governing documents (e.g., limited partnership agreement, articles of incorporation, or LLC articles of organization *and* operating agreement) to which the holders of interests in the converted entity are to be bound;

• Any provisions required by the converted entity's governing laws; and

• Any other provisions that are desired (e.g., an effective date of conversion; *see* ¶ *3:684*). [Corps.C. § 16903(a)]

a. [3:659] **Approval by partners:** The plan of conversion must be approved by the number or percentage of partners required by the partnership agreement to approve a conversion. [Corps.C. § 16903(b)]

If the partnership agreement does not specify the required partner approval, the plan of conversion must be approved by the number or percentage of partners required by the partnership agreement to approve an *amendment* to the partnership agreement … *unless* the conversion effects a change for which the partnership agreement requires a greater number or percentage of partners than required to amend the partnership agreement. In that event, the plan must be approved by that greater number or percentage. [Corps.C. § 16903(b)]

If the partnership agreement does not specify the vote require to amend the partnership agreement, the plan must be approved by *all* partners. [Corps.C. § 16903(b)]

(1) [3:660] **Additional approval requirement when converting into limited partnership:** In a conversion to a limited partnership, the plan of conversion must be also approved by all partners who will become *general* partners. [Corps.C. § 16903(c)]

(2) [3:661] **"Dissenters' rights":** A partner who does not vote in favor of conversion has the right to dissociate and be bought out prior to conversion. *See discussion at ¶ 3:667 ff.*

b. [3:662] **Amendment of plan:** A plan of conversion that has been duly approved may be amended before the conversion takes effect if the amendment is approved by the partners in the same manner and by the same number or percentage of partners as was required for approval of the original plan. [Corps.C. § 16903(e)]

c. [3:663] **Abandonment of plan:** At any time before the conversion is effective, the partners may abandon the plan in the same manner and by the same number or percentage of partners as was required for approval of the original plan. Abandonment is subject to any contractual rights of third parties. [Corps.C. § 16903(f)]

d. [3:664] **Retention of plan:** If the converted entity is a *corporation* or a *foreign entity*, the plan must be kept at the converted entity's principal place of business. [Corps.C. § 16903(g)]

If the converted entity is a *California limited partnership* or a *California LLC*, the plan must be kept at its designated office in California. [Corps.C. § 16903(g); see Corps.C. § 15901.14(a) (limited partnership must "designate and continuously

maintain" an office in California); Corps.C. § 17701.13(a) (LLC must "designate and continuously maintain" an office in California)]

(1) [3:665] **Copies upon request:** A copy of the plan must be given at no charge to any partner of the converting partnership at the request of the partner. A partner's waiver of this requirement is unenforceable. [Corps.C. § 16903(g)]

[3:666] ***Reserved.***

3. [3:667] **Dissenters' Rights:** A partner who does not vote in favor of conversion "and does not agree to become a partner, member, shareholder, or holder of interest" in the converted entity has the right to dissociate as of the date the conversion takes effect. [Corps.C. § 16909(e)]

The dissenting partner probably need not specifically refuse to become an interest holder in the new entity. Under the dissenters' rights procedure set forth below (¶ 3:668 ff.), the dissenting partners' buyout right is triggered by written notice of dissociation, which does not require specific refusal to become an interest holder in the new entity. The notice of dissociation itself should be adequate indication of the partner's refusal to become an interest holder in the new entity. However, cautious counsel may want to include in the notice a statement that the dissociating partner "does not agree to become" a partner, member, shareholder or interest holder, as the case may be.

a. Procedure

(1) [3:668] **Partnership's notice to nonapproving partners:** Within 10 days after approval of the plan of conversion, the partnership must send notice of the approval to each partner who did not approve the conversion. The notice must include a copy of Corps.C. § 16701 (buyout of dissociated partner's interest; *see* ¶ *3:500 ff.*) and a "brief description" of the procedure to be followed under that section if the partner wishes to dissociate. [Corps.C. § 16909(e)]

(2) [3:669] **Dissenting partner's notice of dissociation:** Within 30 days after the date of the notice of approval (¶ *3:668*), the dissenting partner must send written notice of dissociation. [Corps.C. § 16909(e)]

(3) [3:670] **Buyout:** The partnership must then buy out the dissenting partner's partnership interest in accordance with the UPA's buyout provisions (Corps.C. § 16701 et seq., ¶ *3:500 ff.*). [Corps.C. § 16909(e)]

4. [3:671] **Statement or Certificate of Conversion (Conversion to California Limited Partnership, LLC or Corporation):** A *statement* of conversion is a statement setting forth the conversion and is contained in another document, such as a certificate of limited partnership, articles of incorporation or articles of organization. A *certificate* of conversion is a document pertaining only to the conversion and is comprised basically of the statement of conversion.

[3:672] ***Reserved.***

a. ***Statement*** **of conversion for conversion to California limited partnership, LLC or corporation**

(1) [3:673] **Statement of conversion optional when no current statement of partnership authority on file:** If the partnership has *not* filed a statement of partnership authority that is in effect at the time of conversion, then upon conversion to a California limited partnership, LLC or corporation, the new entity *may* include a statement of conversion on its certificate of limited partnership, articles of organization or articles of incorporation. [Corps.C. § 16906(a)]

(a) [3:674] **Compare—statement of conversion required when current statement of partnership authority on file:** If the partnership has filed a statement of partnership authority (Corps.C. § 16303, ¶ *3:100 ff.*) that is in effect at the time of conversion, then upon conversion to a California limited partnership, LLC or corporation, the new entity's certificate of limited partnership, articles of organization or articles of incorporation *must* contain a statement of conversion "in that form as may be prescribed by the Secretary of State." [Corps.C. § 16906(a)]

(2) [3:675] **Contents:** The statement of conversion is very simple and need contain only three things:

- The converting partnership's name and the Secretary of State's file number (if any);

• A statement that the principal terms of the plan of conversion were approved by a vote of the partners, which equaled or exceeded the vote required under Corps.C. § 16903 (¶ *3:659*); and

• The name, mailing address and street address of the converted entity's agent for service of process (but the address should *not* be set forth if the agent is a corporation that meets the statutory requirements for acting as an agent for service of process under Corps.C. § 1505). [Corps.C. § 16906(a)]

(3) [3:676] **Two partners' signatures required:** The document containing the statement of conversion must be signed by at least two general partners. [Corps.C. § 16105(c)]

Caution: The partnership agreement may not vary this requirement; *see ¶ 3:114*.

(4) Forms and additional statutory requirements

(a) [3:677] **Conversion to limited partnership:** A general partnership that converts to a limited partnership must also follow relevant provisions of the Uniform Limited Partnership Act of 2008; *see ¶ 5:170 ff.*

• ***FORM:*** The Secretary of State's standard form Certificate of Limited Partnership—Conversion (Form LP-1A) is available online at the Secretary of State's website (*www.sos.ca.gov*).

(b) [3:678] **Conversion to LLC:** A general partnership that converts to an LLC must also follow relevant provisions of the California Revised Uniform Limited Liability Company Act; *see ¶ 6:160 ff.*

• ***FORM:*** The Secretary of State's standard form Limited Liability Company Articles of Organization—Conversion (Form LLC-1A) is available online at the Secretary of State's website (*www.sos.ca.gov*).

(c) [3:678.1] **Conversion to corporation:** A general partnership that converts to a corporation must also follow relevant provisions of the General Corporation Law; see Friedman, Soza & Jann, *Cal. Prac. Guide: Corporations* (TRG), Ch. 8.

• ***FORM:*** The Secretary of State's optional standard form Articles of Incorporation with Statement of Conversion—California General Partnership to a California Stock Corporation (Form GP-GS) is available online at the Secretary of State's website (*www.sos.ca.gov*).

b. [3:679] **Certificate of conversion for conversion of California partnership into foreign entity:** A partnership converting to a foreign entity "may" file a certificate of conversion if the partnership has a current statement of partnership authority on file. [Corps.C. § 16906(b)]

(1) [3:680] **Contents:** The certificate must contain:

• The partnership's and the converted entity's names;

• The street address of the converted entity's principal office and any California principal office;

• The converted entity's form of organization; and

• The name, street address and mailing address of the converted entity's agent for service of process (but the address of the agent for service of process should *not* be set forth if the agent is a corporation that meets the statutory requirements for acting as an agent for service of process under Corps.C. § 1505). [Corps.C. § 16906(b)]

FORM: The Secretary of State's standard form Certificate of Conversion (CONV-1A) is available online at the Secretary of State's website (*www.sos.ca.gov)*.

(a) [3:680.1] **$30 filing fee:** The fee for filing the certificate of conversion is $30 (plus a $15 special handling fee if delivered in person to the Secretary of State's office). [Gov.C. §§ 12182(a), 12187(c); 2 CCR § 21903(c)]

(2) [3:681] **Failure to file certificate of conversion—notice to Secretary of State of agent for service of process:** Unless a certificate of conversion has been filed with the Secretary of State, the converted entity must "promptly" notify the Secretary of State of the mailing address of its agent for service of process and its principal office. (If the agent cannot be located, a court may order service upon the Secretary of State in any action to enforce an obligation of the converted partnership.) [Corps.C. § 16905(c)]

c. [3:682] **Automatic cancellation of statement of partnership authority:** The filing of a certificate of conversion or a document containing a statement of conversion has the effect of the filing of a cancellation of any statement of partnership authority. [Corps.C. § 16906(c)]

[3:683] ***Reserved.***

5. Effective Date of Conversion

a. [3:684] **Conversion into California entity:** A conversion into a California entity becomes effective upon the *earliest* date that all of the following occur:

• The plan of conversion is duly approved by the partners (Corps.C. § 16903, ¶ *3:659*);

• All required filings are made; and

• Any effective date set forth in the plan of conversion occurs. [Corps.C. § 16904(a)]

(1) [3:685] **Certified copy of new organic documents as proof of conversion:** The Secretary of State's certified copy of the converted entity's certificate of limited partnership, articles of organization or articles of incorporation is conclusive evidence of the conversion of the partnership. [Corps.C. § 16904(b)]

(2) [3:686] **New entity's organic document effective upon conversion:** Any partnership or operating agreement, articles or certificate of incorporation, or other organic document of the converted entity adopted as part of the plan of conversion is likewise effective at the effective time or date of the conversion. [Corps.C. § 16903(d)]

b. [3:687] **Conversion into foreign entity:** A conversion into a foreign entity becomes effective in accordance with the law of the entity's jurisdiction of organization. [Corps.C. § 16905(b)]

6. [3:688] **Nondissenting Partner Deemed Party to New Entity's Governing Documents:** All partners who did not exercise dissenters' rights (¶ *3:667 ff.*) are deemed parties to any agreements constituting the governing documents for the converted entity that were adopted as part of the plan of conversion (regardless of whether the partner has executed the plan of conversion or such documents). [Corps.C. § 16903(d)]

7. [3:689] **Effect of Conversion:** The converted entity is for all purposes the same entity that existed before the conversion. Upon conversion, all partnership property and rights vest in the converted entity, and all partnership debts, liabilities and obligations continue as such of the converted entity. Any action or proceeding pending by or against the partnership may be continued against the converted entity as if the conversion had not occurred. [Corps.C. § 16909(a), (b)]

a. [3:690] **Partner's liability following conversion:** Following conversion, a partner remains liable for all partnership obligations for which the partner was personally liable *before* the conversion. [Corps.C. § 16909(c)(1)]

Any liability of the partner for the converted entity's obligations incurred *after* the conversion takes effect may be satisfied only out of property of the entity where:

• The converted entity is a *limited partnership* and the partner becomes a *limited* partner;

• The entity is an *LLC* and the partner becomes a *member* (*unless* the articles of organization or operating agreement provide otherwise); or

• The entity is a *corporation* and the partner becomes a *shareholder*. [Corps.C. § 16909(c)(2)]

b. [3:691] **Recording statement or certificate of conversion:** The converted entity may file a certified copy of the certificate of conversion, or document containing a statement of conversion, in the county recorder's office of any county in which the converting partnership holds real property. Doing so shows record ownership in the converted entity of the converted partnership's interest in the property and is conclusive evidence, in favor of bona fide purchasers or encumbrancers for value, that the conversion was validly completed. [Corps.C. § 16907]

8. [3:692] **Tax Treatment:** *See ¶ 8:580 ff.*

9. [3:693] **Securities Law Considerations:** *See ¶ 7:1500 ff.*

[3:694 - 3:699] ***Reserved.***

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[3:700] A general partnership may merge with one or more other California general partnerships. It may also merge with other California business entities (limited partnerships, LLCs, corporations, business trusts, real estate investment trusts, or for-profit unincorporated associations) so long as the merger is permitted under the laws governing the other entity. [Corps.C. §§ 16901(12), 16910(a), (b)]

1. [3:701] **Merger With Foreign Entity:** A partnership may merge with one or more *foreign* partnerships or other business entities. If the California partnership is the survivor, the foreign entities must not be prohibited from merging by the laws under which they are organized. If a foreign partnership or other business entity is the survivor, the laws of the jurisdiction under which the survivor is organized must authorize the merger. [Corps.C. §§ 16910(b), 16913(a)]

If the survivor is a California business entity, the merger proceedings must be in accordance with the California general partnership law. If the survivor is a foreign entity, the merger may be in accordance with the laws of the survivor's place of organization. [Corps.C. § 16913(b)]

2. [3:702] **Limitation re LLPs—No Merger With Other Business Entity:** A limited liability partnership may *not* merge with another business entity that is a partnership (but it may merge into another business entity). [Corps.C. §§ 16901(12), 16910(a)(2), (3); *see* ¶ *4:270*]

3. [3:703] **Agreement of Merger:** The parties to the merger must approve an agreement of merger. Persons other than the merging entities may be parties to the agreement. [Corps.C. § 16911(a)]

[3:704] ***Reserved.***

a. Approval of agreement

(1) [3:705] **By partnership:** If the partnership agreement specifies the number or percentage of partners required to approve a merger, the agreement must be approved by that number or percentage. [Corps.C. § 16911(a)]

If the partnership agreement does *not* specify the required approval for merger, the agreement must be approved by the number or percentage or partnership specified by the partnership agreement to approve an *amendment* to the partnership agreement. But if the merger effects a change for which the partnership agreement requires a *greater* number or percentage of partners than that required to amend the partnership agreement, the merger must be approved by that greater number or percentage. [Corps.C. § 16911(a)]

If the partnership agreement contains no provision specifying the vote required to amend the partnership agreement, the merger agreement must be approved by *all* partners. [Corps.C. § 16911(a)]

(a) [3:706] **Merger into limited partnership:** If the survivor is a limited partnership, the agreement of merger must, in addition to the approval of the partners as set forth in Corps.C. § 16911(a) (¶ *3:705*), be approved by *all* partners who will become *general* partners of the limited partnership. [Corps.C. § 16911(b)]

(2) [3:707] **By other entity:** The agreement must be approved by each other constituent entity by those persons required to approve the merger by the laws under which it is organized. [Corps.C. § 16911(a)]

b. [3:708] **Contents:** The merger agreement must contain all the following:

(1) [3:709] **Terms and conditions:** The merger agreement must state the terms and conditions of the merger. [Corps.C. § 16911(a)(1)]

(2) [3:710] **Name and place of organization:** The merger agreement must state the name and place of organization of all constituent entities, and which is to be the surviving entity. [Corps.C. § 16911(a)(2)]

(a) [3:711] **Change of name:** The agreement may change the name of the surviving partnership, which may be the same as or similar to the name of a disappearing partnership. [Corps.C. § 16911(a)(2)]

(3) [3:712] **Conversion of partnership interests:** The agreement must state the manner of converting the partnership interests into interests or other securities of the surviving partnership or other entity. If partnership interests are not to be converted solely into interests or other securities of the surviving entity, the agreement must set forth the cash, property, rights, interests or securities which the partners are to receive in exchange for their interests. [Corps.C. § 16911(a)(3)]

Alternatively, the agreement may state that the partner's partnership interests are canceled without consideration. [Corps.C. § 16911(a)(3)]

(4) [3:713] **Other provisions:** The agreement may also contain any other provisions required by the laws under which any other constituent business entity is organized, as well as any other provisions that are desired (including a provision for the treatment of fractional partnership interests). [Corps.C. § 16911(a)(4), (5)]

c. [3:714] **Amendment of agreement:** A merger agreement that has been approved may be amended before the merger takes effect if the amendment is approved (1) by the partners in the same manner and by the same number or percentage of partners as was required for approval of the original merger agreement and (2) by each of the other constituent business entities. [Corps.C. § 16911(c)]

d. [3:715] **Abandonment of merger:** At any time before the merger is effective, the partners may abandon the merger in the same manner and by the same number or percentage of partners as was required for approval of the original merger agreement. Abandonment is subject to any contractual rights of other parties to the merger and third parties. [Corps.C. § 16911(d)]

e. [3:716] **Amendment or adoption of partnership agreement:** A merger agreement may effect any *amendment* to the partnership agreement of any *California* constituent partnership. It may also effect the adoption of a *new* partnership agreement for the *surviving California* partnership. Any such amendment, or adoption of a new partnership agreement, is effective at the effective time or date of the merger. [Corps.C. § 16911(e)]

f. [3:717] **Retention of merger agreement:** If the survivor is a *partnership* or a *foreign entity*, the merger agreement must be kept at its principal place of business. [Corps.C. § 16911(f)]

If the survivor is a *California corporation*, the agreement must be kept at the corporation's principal office or the office of its transfer agent or registrar. [Corps.C. § 16911(f); see Corps.C. § 1500]

If the survivor is a *California limited partnership* or a *California LLC*, the agreement must be kept at its designated office in California. [Corps.C. § 16911(f); see Corps.C. § 15901.14(a) (limited partnership must "designate and continuously maintain" an office in California); Corps.C. § 17701.13(a) (LLC must "designate and continuously maintain" an office in California)]

(1) [3:718] **Copies upon request:** A copy of the merger agreement must be given at no charge to any partner of a constituent partnership (and any holder of interests or other securities of another constituent entity) at the request of the partner or holder. A partner's or holder's waiver of this requirement is unenforceable. [Corps.C. § 16911(f)]

4. [3:719] **Dissenters' Rights:** A partner of a disappearing California partnership who does not vote in favor of the merger "and does not agree to become a partner, member, shareholder, or holder of interest or equity securities" of the survivor has the right to dissociate as of the date the merger takes effect. [Corps.C. § 16914(e)]

The dissenting partner probably need not specifically refuse to become an interest holder in the survivor. Under the dissenters' rights procedure set forth below (¶ 3:720 ff.), the dissenting partners' buyout right is triggered by written notice of dissociation,

which does not require specific refusal to become an interest holder in the new entity. The notice of dissociation itself should be adequate indication of the partner's refusal to become an interest holder in the survivor. However, cautious counsel may want to include in the notice a statement that the dissociating partner "does not agree to become" a partner, member, shareholder or interest holder, as the case may be.

a. Procedure

(1) [3:720] **Partnership's notice to nonapproving partners:** Within 10 days after the partners' approval of the merger, the partnership must send notice of the approval to each partner who did not approve the merger. The notice must include a copy of Corps.C. § 16701 (buyout of dissociated partner's interest; *see ¶ 3:500 ff.*) and a "brief description" of the procedure to be followed under that section if the partner wishes to dissociate. [Corps.C. § 16914(e)]
(2) [3:721] **Dissenting partner's notice of dissociation:** Within 30 days after the date of the notice of approval (¶ 3:720), the dissenting partner must send written notice of dissociation. [Corps.C. § 16914(e)]
(3) [3:722] **Buyout:** The partnership must then buyout the dissenting partner's partnership interest in accordance with the UPA's buyout provisions (Corps.C. § 16701 et seq., *¶ 3:500 ff.*). [Corps.C. § 16914(e)]

5. Filings With Secretary of State

a. [3:723] **Certificate of merger:** A *certificate* of merger *must* be filed on the form prescribed by the Secretary of State in a merger involving a California partnership and a *California other business entity* in which the partnership or other business entity (other than a corporation) is the *survivor*. If a California or foreign *corporation* is the *survivor*, a copy of the *agreement of merger* must be filed instead of a certificate of merger. [Corps.C. § 16915(b)]

FORM: The Secretary of State's standard form Certificate of Merger (OBE MERGER-1) is available online at the Secretary of State's website (*www.sos.ca.gov)*.

(1) [3:724] **Contents:** The certificate of merger must set the following information:

(a) [3:725] **Names and any file numbers:** The certificate must contain the names and the Secretary of State's file numbers (if any) of each of the constituent entities, separately identifying the surviving entity and the disappearing entity or entities. [Corps.C. § 16915(b)(1)]

(b) [3:726] **Partnership approval:** If a vote of the partners was required (Corps.C. § 16911, *¶ 3:705*), the certificate must contain a statement that the principal terms of the agreement of merger were approved by a vote of the partners, which equaled or exceeded the vote required. [Corps.C. § 16915(b)(2)]

(c) [3:727] **Changes to statement of partnership authority:** Where a California partnership is the survivor, the certificate must set forth any change in any filed statement of partnership authority (*see ¶ 3:100 ff.*) of the survivor resulting from the merger, including any change in the survivor's name. (The filing of a certificate of merger setting forth any changes to a filed statement of partnership authority has the effect of the filing of a certificate of amendment of the statement, and no separate certificate of amendment need be filed.) [Corps.C. § 16915(b)(3)]

(d) [3:728] **Effective date:** Where the certificate is not to be effective upon filing, the certificate must set forth the future effective date or time, which must be a specified date or time *not more than 90 days* after the filing. [Corps.C. § 16915(b)(4)]

(e) [3:729] **Survivor's name and other information:** Where the survivor is a foreign partnership or a business entity other than a partnership, the certificate of merger must set forth the survivor's name, type of entity, jurisdiction in which the entity was organized, and the entity's principal place of business. [Corps.C. § 16915(b)(5)]

(f) [3:730] **Other information:** The certificate must also contain any other information required by the laws under which each other constituent entity is organized. [Corps.C. § 16915(b)(6)]

(2) [3:731] **Execution:** The certificate of merger must be executed and acknowledged by:

- Each California partnership by two partners (unless a lesser number is provided in the partnership agreement);

- Each foreign partnership by at least one partner; and

• Each other business entity by those persons required to execute the certificate by the laws under which the entity is organized. [Corps.C. § 16915(b)]

(3) [3:732] **$150 filing fee:** The fee for filing the certificate of merger is $150 (plus a $15 special handling fee if delivered in person to the Secretary of State's office). [Gov.C. §§ 12182(a), 12186(*l*) (merger with corporation), 12188(j) (merger with limited partnership), 12190(j) (merger with LLC); 2 CCR § 21903(c)]

(4) [3:733] **Effect—cancellation of statement of partnership authority:** The filing of the statement or certificate of merger has the effect of filing a cancellation for each disappearing partnership of any filed statement of partnership authority. (It also has the effect of filing a notice of cessation for any limited liability partnership that is a party to the merger; *see ¶ 4:290 ff.*) [Corps.C. § 16915(c)]

b. [3:734] **Statement of merger:** A statement of merger may, but need not, be filed when a partnership merges with another *California partnership* or with a *foreign other business entity*. The statement of merger may *not* be used if a California other business entity (i.e., a business entity that is *not* a California partnership) is a party. [Corps.C. § 16915(a)]

(1) [3:735] **Comment:** The permissive nature of a statement of merger for mergers involving a California partnership with another California partnership or with a foreign other business entity is undoubtedly due to the fact that there are no mandatory filings required of California partnerships; the filing of a partnership statement itself is discretionary. [See Corps.C. § 16303]

(2) [3:736] **Contents:** If filed, the statement of merger must contain:

• The name of each partnership or foreign entity that is a party to the merger;

• The name of the survivor;

• The street address of the survivor's principal office and of an office in California; and

• Whether the survivor is a partnership or a foreign entity, specifying the type of the entity. [Corps.C. § 16915(a)]

(3) [3:737] **Execution:** If the statement is filed by the surviving California partnership, it must be signed by at least two partners. (*Caution:* The partnership agreement may not vary this requirement; *see ¶ 3:63.*) A statement filed by a surviving foreign business entity must be signed in accordance with the laws under which the entity is organized. [Corps.C. §§ 16105(c), 16101(a)(17), 16915(a)]

(4) [3:738] **Filing fee:** The fee for filing the statement of merger is $30 (plus a $15 special handling fee if delivered in person to the Secretary of State's office). [Gov.C. §§ 12182(a), 12187(c); 2 CCR § 21903(c)]

FORM: The Secretary of State's standard form Statement of Merger (Form GP-6) is available online at the Secretary of State's website (*www.sos.ca.gov)*.

c. [3:739] **Notice to Secretary of State of survivor's agent for service of process:** In a merger in which a foreign entity is the survivor and no certificate of merger has been filed with the Secretary of State, the survivor must "promptly" notify the Secretary of State of the mailing address of its agent for service of process and its principal office. (If the agent cannot be located, a court may order service upon the Secretary of State in any action to enforce an obligation of the disappearing partnership.) [Corps.C. § 16914(b)]

(1) [3:740] **Comment:** Although Corps.C. § 16914(b) refers to a "certificate of merger," this notification requirement would appear to be satisfied if a statement of merger involving a California partnership and a foreign other entity (Form GP-6, ¶ 3:738) is filed with the Secretary of State, because that form requires disclosure of the name of the surviving entity, the street address of its chief executive office and the street address of the California office of the surviving entity (if any). Form GP-6 does *not* require identification of the surviving entity's agent for service of process in California. To provide that information and thus assure compliance with § 16914(b), the surviving entity should identify the agent for service of process under Item 11 ("Additional Information") of Form GP-6.

[3:741] ***Reserved.***

6. Effective Date of Merger

a. [3:742] **Partnership as only California party:** A merger in which the partnership is the only California constituent entity that is a party to the merger is effective upon the *later* of:

• Approval of the merger agreement by all parties to the merger;

• The filing of all documents required by law to be filed as a condition to effectiveness of the merger; *OR*

• Any effective date specified in the merger agreement. [Corps.C. § 16912(a)(1)]

b. [3:743] **Partnership as *one California party:*** A merger in which a California other business entity is a constituent party is effective upon filing of the certificate of merger with the Secretary of State (*see ¶ 3:723*) … unless the certificate specifies a later effective date, in which event the merger is effective upon the later date. [Corps.C. §§ 16912(a)(2), 16913(c)]

c. [3:744] **Additional provision where foreign entity is survivor:** Where the survivor is a foreign entity, the merger is effective in accordance with the law of the jurisdiction in which the survivor is organized, but is effective as to any California disappearing partnership as of the time of effectiveness in the foreign jurisdiction in accordance with Corps.C. § 16912 (¶ 3:742). [Corps.C. § 16913(d)]

7. [3:745] **Effect of Merger:** When the merger becomes effective, the separate existence of the disappearing entities cease and the surviving entity automatically succeeds to all of the disappearing entity or entities' property, rights, debts and liabilities. [Corps.C. § 16914(a); see *Jenks v. DLA Piper Rudnick Gray Cary US LLP* (2015) 243 CA4th 1, 12-14, 196 CR3d 237, 246-247—arbitration provision in premerger agreement between LLP and employee enforceable by surviving LLP in employee's postmerger suit against surviving LLP]

a. [3:746] **Lawsuits or proceedings:** Any action or proceeding pending by or against any disappearing entity may proceed against that entity to judgment, and the judgment is binding upon the survivor. [Corps.C. § 16914(a)(3)]

Alternatively, the action or proceeding may be brought against the survivor, or the survivor may be substituted in place of the disappearing entity. [Corps.C. § 16914(a)(3)]

b. [3:747] **Partner's (and other persons') liability:** Following merger, a partner of the surviving partnership or surviving limited partnership, a shareholder of the surviving corporation, or a holder of equity securities of a surviving other business entity, is liable for:

• All obligations of a party to the merger for which the partner, shareholder or other interest holder was personally liable *before* the merger;

• All other obligations of the surviving entity incurred before the merger by a party to the merger, but those obligations may be satisfied only out of property of the entity; and

• All of the surviving entity's obligations incurred after the merger takes effect, but those obligations may be satisfied only out of the entity's property where the person is a limited partner, a shareholder in a corporation, an LLC member (unless the articles of organization provide otherwise), or a holder of equity securities in a surviving other business entity (unless the entity's constituent documents provide otherwise). [Corps.C. § 16914(c)]

If the obligations incurred before the merger by the partnership (or a limited partnership) are not satisfied out of the survivor's property, the general partners immediately before the effective date of the merger must contribute any amount necessary to satisfy the partnership's obligations *to the survivor* in the same manner as if the partnership were wound up and dissolved. [Corps.C. § 16914(d); see Corps.C. § 16807, *¶ 3:589 ff.*]

c. [3:748] **California taxes and returns:** Upon a merger, the survivor automatically assumes any obligation to prepare returns and pay taxes owed on behalf of each disappearing entity under the Revenue and Taxation Code. [Corps.C. § 16915.5(a)]

d. [3:749] **Recording of certificate or agreement of merger:** The filing of a certified copy of the statement of merger, agreement of merger or certificate of merger in the county recorder's office of any county in which a disappearing entity holds real property evidences record ownership in the survivor of the disappearing entity's interest in the property and is

conclusive evidence, in favor of bona fide purchasers or encumbrancers for value, that the merger was validly completed. [Corps.C. § 16916]

8. [3:750] **Tax Treatment:** *See ¶ 8:580 ff.*

9. [3:751] **Securities Law Considerations:** *See ¶ 7:1500 ff.*

[3:752 - 3:779] ***Reserved.***

Cal. Prac. Guide Pass--Through Entities Ch. 3-J

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Current Edition Authors: Jeffrey C. Soza and Matthew Jann; Original Authors: James F. Fotenos and Edward C. Rybka

Chapter 3. General Partnership

J. Foreign General Partnerships Operating in California

1. [3:781] No Registration Requirement
a. [3:782] Secretary of State filing permitted
2. [3:783] Partners Subject to California Taxation
a. [3:784] "Doing business" defined
b. [3:785] California tax returns and reporting requirements
3. [3:786] Governing Law

[3:780] There are few provisions of the UPA that pertain specifically to foreign general partnerships.

1. [3:781] **No Registration Requirement:** There is no requirement that a foreign general partnership operating or doing business in California register with the Secretary of State's office.

a. [3:782] **Secretary of State filing permitted:** However, a foreign general partnership may file any statement that a domestic general partnership may file with the Secretary of State, including a statement of partnership authority specifying or limiting the authority of one or more partners to act on the partnership's behalf (*¶ 3:100 ff.*). A certified copy of a statement filed in another state may be filed with the Secretary of State's office. Either filing has the effect provided under the UPA with respect to partnership property located, or transactions that occur, in California. [Corps.C. § 16105(a); see Corps.C. § 16101(a)(17) ("statement" defined)]

2. [3:783] **Partners Subject to California Taxation:** Partners of a foreign partnership (general, limited or limited liability) that is "doing business" in California may be subject to California state income (franchise) taxation.

a. [3:784] **"Doing business" defined:** For franchise tax purposes, "doing business" means "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." There need not be a regular course of business or transactions to constitute "doing business"; any activity in California that meets this definition suffices. Moreover, a transaction need not result in actual profit so long as the transaction was motivated by financial or pecuniary gain or profit. [Rev. & Tax.C. § 23101(a); FTB Legal Ruling 2014-01, as modified by FTB Legal Ruling 2018-10; see *Swart Enterprises, Inc. v. Franchise Tax Bd.* (2017) 7 CA5th 497, 503-504, 212 CR3d 670, 674; and *Hise v. McColgan* (1944) 24 C2d 147, 150-151, 148 P2d 616, 618; *Golden State Theater & Realty Corp. v. Johnson* (1943) 21 C2d 493, 496, 133 P2d 395, 396-397]

Additionally, a foreign partnership does business in California for any year in which it meets any of the following conditions (dollar amounts are adjusted annually by the FTB):

- It is "organized or commercially domiciled" in California;
- California sales exceed the *lesser* of $637,252 (for 2021) or 25% of the partnership's total sales;
- Real and tangible personal property located in California exceeds the *lesser* of $63,726 (for 2021) or 25% of the partnership's total real and tangible personal property; *or*

- Employee compensation paid in California exceeds the *lesser* of $63,726 (for 2021) or 25% of total employee compensation. [Rev. & Tax.C. § 23101(b), (c); see 18 CCR § 23101; *www.ftb.ca.gov/file/business/doing-business-in-california.html*]

b. [3:785] **California tax returns and reporting requirements:** *See ¶ 8:209 ff.*

3. [3:786] **Governing Law:** The law of the jurisdiction in which a general partnership has its *principal office* governs relations (a) among the partners and (b) between the partners and the partnership. [Corps.C. § 16106(a)]

Cal. Prac. Guide Pass--Through Entities Form 3:A

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Chapter 3. General Partnership

Forms

[Form 3:A] General Partnership Agreement

Image 1 within document in PDF format.

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