

# PROFESSIONAL RESPONSIBILITY AND LIABILITY ISSUES RELATED TO LIMITED LIABILITY LAW PARTNERSHIPS

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## I. INTRODUCTION

“Profit goes with liability.”<sup>1</sup> This concise statement from the Qur’an captures the time-honored tenet of partnership law that per-

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1. S.M. Hasanuzzaman, *Limited Liability of Shareholders: An Islamic Perspective*, 28 ISLAMIC STUD. 353, 353 (1989) (referring to sayings of the Prophet Mohammed as revealed in the Qur’an). For an explanation of the rights and obligations of Islamic joint ventures, see generally Muhammad Nejatullah Siddiqi, *Partnership and Profit-Sharing*, in ISLAMIC LAW (1985).

sons can only claim a profit if they are willing to risk loss.<sup>2</sup> Although history reveals various vehicles used by business people to limit their liability,<sup>3</sup> the general partnership principle of “all for one, one for all” remained intact for most of the twentieth century.<sup>4</sup> Then out of the ashes of the savings and loan debacle rose the limited liability partnership (LLP).

In the eyes of many, the LLP was a “new and improved” form of general partnership.<sup>5</sup> Some commentators downplayed the effect of the LLP legislation by referring to it as a “garden variety general partnership”<sup>6</sup> or a “new-fangled version” of the classic general partnership.<sup>7</sup> Others, including partnership expert Alan R. Bromberg, appreciated that the LLP structure amounted to a radical departure from the principles of general partnership law in allowing partners to limit their liability.<sup>8</sup> Now with the advent of the LLP, partners expect

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2. See Hasanuzzaman, *supra* note 1, at 353 (arguing that the legal maxim, “profits are concomitant to risk,” applies to individual and partnership business, but does not apply to joint stock companies).

3. For a historical discussion of the development of limited liability vehicles beginning with Roman law, see generally Robert W. Hillman, *Limited Liability in Historical Perspective*, 54 WASH. & LEE L. REV. 615 (1997).

4. In defining a partnership as “[a] voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a proportional sharing of the profits and losses between them,” *Black’s Law Dictionary* reflects this traditional view of a partnership as an enterprise in which partners share risks and profits. BLACK’S LAW DICTIONARY 1120 (6th ed. 1990) (citing *Burr v. Greenland*, 356 S.W.2d 370, 376 (Tex. Civ. App.—El Paso 1962, writ ref’d n.r.e.)).

5. See, e.g., Elizabeth G. Hester, *Keeping Liability at Bay*, BUS. L. TODAY, Jan.–Feb. 1996, at 59, 59 (referring to the LLP as a “new form of entity [that] is rapidly gaining acceptance and becoming the form of choice for many accounting and law firms and other professional ventures seeking to insulate their members against liability for debts while preserving their status as partnerships”).

6. John R. Marquis, *Creating a Michigan Limited Liability Partnership*, 74 MICH. B.J. 698, 698 (1995).

7. Allison L. Bergman, *Covering Your Assets: Missouri’s New Limited Liability Partnership Law*, 63 UMKC L. REV. 679, 679 (1995).

8. In his testimony before the Texas House of Representatives, Professor Alan R. Bromberg referred to the first LLP proposal as “‘a radical restructuring’ of partnership law . . . [which was] not needed, and it’s poor public policy.” Walter Borges, *Partners’ Liability Bill Hits Rough House Waters*, TEX. LAW., May 13, 1991, at 7. After the Texas Legislature adopted the first LLP legislation, Professor Bromberg made a similar observation in official comments following the statutory provisions. As stated, “In a dramatic break from two centuries of tradition, Texas in 1991 permitted partnerships to shield partners from any individual liability for most partnership obligations arising from certain of another partner’s (or a representative’s) misconduct.” TEX. REV. CIV. STAT. ANN. art. 6132b, § 15 cmt. (Source and Comments by Alan R. Bromberg—1991 Amendments) (Vernon Supp. 1997).

to share profits without subjecting themselves to personal liability for all partnership losses.<sup>9</sup>

The actual liability shield for LLPs varies from state to state. In 1991, Texas adopted the nation's first LLP legislation limiting partners' vicarious liability for malpractice claims arising out of the acts or omissions of other firm representatives.<sup>10</sup> Most states followed this original Texas model which applies to tort-type claims.<sup>11</sup> Other states, including New York and Minnesota, extend LLP partners a "full shield" to cover all firms' debts and obligations.<sup>12</sup> With statutory amendments effective September 1, 1997, Texas became a full shield state.<sup>13</sup> This full shield protection provides partners liability protec-

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9. In other countries, including Belgium, France, Italy, and Japan, the rules of professional conduct prohibit attorneys from limiting their liability. See *LAW WITHOUT FRONTIERS: A COMPARATIVE SURVEY OF THE RULES OF PROFESSIONAL ETHICS APPLICABLE TO THE CROSS-BORDER PRACTICE OF LAW* 34, 76, 99, 222 (Edwin Godfrey ed., 1995) (reporting on a survey conducted by the International Bar Association). Although the United Kingdom does not currently allow for limited liability partnerships, one commentator has predicted that within the next two to three years the United Kingdom will enact some form of limited liability partnership law. See Tony Sacker, *Firms in U.K. Grow More Competitive*, *NAT'L L.J.*, May 26, 1997, at B9, B15.

10. In amending the Texas Uniform Partnership Act, the Texas legislature created the registered limited liability partnership (LLP) as a new type of entity to provide LLP partners protection for debts and obligations of the LLP arising

from "errors, omissions, negligence, incompetence, or malfeasance committed in the course of the partnership business by another partner or representative of the partnership not working under the supervision or direction of the first partner at the time the errors, omissions, negligence, incompetence or malfeasance occurred, unless the first partner . . . was directly involved in the specific activity" or had notice or knowledge of the events that created the liability at the time of their occurrence.

Steven A. Waters & Matthew D. Goetz, *Partnerships*, 45 Sw. L.J. 2011, 2022 (1992) (quoting *TEX. REV. CIV. STAT. ANN.* art. 6132b, § 15 (Vernon Supp. 1992)). For an insider's account tracing the origins of the LLP, see Robert W. Hamilton, *Registered Limited Liability Partnerships: Present at the Birth (Nearly)*, 66 *U. COLO. L. REV.* 1065, 1066-74 (1995).

11. See Michael K. Pierce, *Substantive Partnership Law: Special Problems of General and Limited Partnerships*, SB85 A.L.I.-A.B.A. 1, 24 (1997).

12. Compare *MINN. STAT. ANN.* § 323.14(2) (West 1995) ("A partner of a limited liability partnership is not, merely on account of this status, personally liable for anything chargeable to the partnership under sections 323.12 [wrongful acts] and 323.13 [breach of trust], or for any other debts or obligations of the [LLP] . . ."), with *N.Y. PARTNERSHIP LAW* § 26(b) (McKinney Supp. 1997) ("[N]o partner . . . is liable or accountable, directly or indirectly (including by way of indemnification, contribution or otherwise), for any debts, obligations or liabilities of, or chargeable to, the registered limited liability partnership or each other, whether arising in tort, contract or otherwise, . . . solely by reason of being such a partner . . ."). Notwithstanding the statutory elimination of indemnification and contribution, partnership agreements can still require indemnification and contribution. In that event, the contractual provisions would bind partners.

13. Act of May 13, 1997, 75th Leg., R.S., ch. 375, § 113, 1997 Tex. Sess. Law Serv. 6 (Vernon) (to be codified as an amendment to *TEX. REVISED PARTNERSHIP ACT* § 6132b-3.08) (broadening the LLP shield to cover "debts and obligations of the partnership in-

tion comparable to that enjoyed by shareholders in professional corporations (PCs). Like shareholders in PCs, an LLP partner continues to be liable for the partner's own acts and omissions and may be liable for the acts and omissions of those persons supervised by the partner.<sup>14</sup>

Regardless of a particular state's legislative scheme, many practitioners believe that an LLP provides them the best of both worlds in enabling owners to obtain partnership tax treatment while shielding partners from vicarious liability for certain partnership obligations.<sup>15</sup> The LLP structure appeals to law firm owners who prefer to continue to call themselves "partners"<sup>16</sup> and to function as a general partnership,<sup>17</sup> rather than forming a new entity such as a professional corporation or limited liability company (LLC).<sup>18</sup> Unlike newly created

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curréd while the partnership is a registered limited liability partnership"). "This provision, however, does not apply to the liability of a partnership to pay its debts and obligations out of partnership property, the liability of a partner, if any, imposed by law or contract independently of the partner's status as a partner . . ." Curtis W. Huff, *The New 1997 Legislative Update Business Organizations Laws in U. Houston L. Foundation—Current Issues Affecting Partnerships, Limited Partnerships, and Limited Liability Companies A-i, A-25* (June 12–13, 1997) (unpublished manuscript, on file with the *South Texas Law Review*).

14. "Most LLP statutes . . . make reference to continuing personal liability both for [an attorney's] own acts and for the conduct of others that [the attorney] directly supervises and controls." Jennifer J. Johnson, *Limited Liability for Lawyers: General Partners Need Not Apply*, 51 *BUS. LAW.* 85, 112 (1995) [hereinafter Johnson, *Limited Liability for Lawyers*] (reviewing differing approaches to imposing supervisory responsibility).

15. See, e.g., Jeffrey D. Summa, *Should You Convert Your Practice to a Limited Liability Company*, *L. PRAC. MGMT.*, Sept. 1996, at 26, 26 (commending state legislators for adopting LLC and LLP statutes which give lawyers "access to both single-level taxation and personal liability protection").

16. See Dale A. Oesterle & Wayne M. Gazur, *What's in a Name?: An Argument for a Small Business "Limited Liability Entity" Statute (With Three Subsets of Default Rules)*, 32 *WAKE FOREST L. REV.* 101, 113 (1997) (suggesting that professional firms prefer "the LLP form largely because of client perceptions" of "hot-shot" lawyers in firms as "partners," not "members"). Firm attorneys who want to continue to use the partner designation may prefer the LLP structure because members of LLCs and shareholders of professional corporations risk the "inadvertent assumption of personal liability" if they refer to other equity holders as "partners." Robert R. Keatinge et al., *Limited Liability Partnerships and Other Entities Authorized in Colorado*, 24 *COLO. LAW.* 1525, 1525 (1995) [hereinafter Keatinge et al., *LLPs in Colorado*].

17. One author describes the following three reasons why law firm owners prefer the general partnership: (1) general partnerships usually need not abide by state laws governing corporations, which require formalities such as bylaws and franchise tax returns; (2) general partnerships can allocate profits and losses among partners and establish other rights and obligations through their partnership agreements; and (3) partnership net income enjoys a single level of taxation at the partner level. See John W. Simpson, *L.L.C. and L.L.P. Formats Can Benefit Law Firms*, *NAT'L L.J.*, Apr. 1, 1996, at B11, B11.

18. LLCs must comply with certain formalities, such as adoption of operating agreements, while LLPs can continue to use existing partnership agreements. Professor Dennis S. Karjala warns that extensive informality in operating an LLC can jeopardize the limited

LLCs, LLPs can rely on the established body of partnership rules and laws.<sup>19</sup> This combination of LLP features and advantages proved to be irresistible to attorneys and accountants who lobbied for LLP legislation.<sup>20</sup> Even a prominent Texas plaintiff's attorney who testified against the proposed LLP bill became one of the first to register his firm as an LLP once the legislation passed.<sup>21</sup>

Starting with the adoption of the first LLP statute in Texas in 1991,<sup>22</sup> LLP legislation, like LLC legislation, swept through the country with limited debate and resistance.<sup>23</sup> As described by law firm partnership expert Professor Robert W. Hillman: "Like Diogenes wandering the streets of Athens, lantern in hand, searching for the honest man, anyone seeking evidence of a debate among lawmakers over the wisdom of limited liability or the cost-shifting consequences of LLCs and LLPs is destined for disappointment."<sup>24</sup> By mid-1997,

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liability that the owners sought in forming the LLC. See Dennis S. Karjala, *Planning Problems in the Limited Liability Company*, 73 WASH. U. L.Q. 455, 463 (1995).

19. See Keatinge et al., *LLPs in Colorado*, *supra* note 16, at 1525 ("[T]he LLP may avail itself of the longstanding rules developed for partnerships in many nontax areas, where the rules for LLCs are still evolving.").

20. See Louis A. Mezzullo et al., *Choice of Entity*, C980 A.L.I.-A.B.A. 1121, 1181 (1995) (noting that the "impetus behind the adoption of LLP Acts has come mainly from professionals, particularly from the larger multi-state accounting firms"). The first LLP bill applied only to professional partnerships. After critics argued that the bill was discriminatory and unfair to non professionals, Professor Alan R. Bromberg revised the bill to extend the liability limitation to all partnerships. See ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS AND THE REVISED UNIFORM PARTNERSHIP ACT § 1.01(a), at 4 (1997). The accounting profession, led by the Accountants' Coalition, pushed for adoption of LLP legislation because LLCs "are not particularly well-suited for accounting firms with multi-state practices." Dan L. Goldwasser, *As the Dust Settles, in ACCOUNTANTS' LIABILITY 1995*, at 21 (PLI Litig. & Admin. Practice Course Handbook Series No. 526, 1995).

21. Joe Longley, a successful Austin litigator, and other trial attorneys criticized the LLP form because they felt that it would "severely restrict the ability of plaintiffs to recover damages in malpractice suits against doctors, lawyers, accountants and other professionals." Walter Borges, *Liability Shield Catches On: Firms Rush to Have New "LLP" Protection*, TEX. LAW., Oct. 21, 1991, at 1.

22. The LLP was "exceptionally popular," with more than 1200 Texas firms, including virtually all the state's largest firms, registering as LLPs within one year after enactment of the Texas LLP legislation. See Hamilton, *supra* note 10, at 1065-66.

23. Although the plaintiffs' bar in some states opposed the LLP and LLC legislation, "the dominant trend has been toward permitting limited liability with few conditions." Wayne M. Gazur, *The Limited Liability Company Experiment: Unlimited Flexibility, Uncertain Role*, 58 LAW & CONTEMP. PROBS. 135, 177-78 (1995) (identifying the various constituencies supporting the LLC movement). Reportedly, the Connecticut bill faced "no opposition," and the Minnesota bill passed with little debate, causing one Minnesota legislator to describe the LLC legislative process as a "bipartisan love fest." *Id.* at 178 n.249 (quoting from newspaper accounts).

24. Robert W. Hillman, *New Forms and New Balances: Organizing the External Relations of the Unincorporated Firm*, 54 WASH. & LEE L. REV. 613, 613 (1997). For a law and

forty-nine states and the District of Columbia permitted the LLP form.<sup>25</sup>

As the LLC and LLP evolved, legal scholars and practitioners devoted countless hours and pages to analyzing the new liability structures.<sup>26</sup> Tax and business attorneys have compared the features of different unincorporated associations with pass-through partnership taxation.<sup>27</sup> Some authors have written survey articles<sup>28</sup> while others have focused on the limited liability legislation in a particular state.<sup>29</sup> Academicians, including law and economics scholars, have debated the wisdom and efficiency of limited liability and the effects of altering the traditional partnership rules.<sup>30</sup> In these discussions, the ethical as-

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economics analysis of the reasons why the LLC structure gained widespread and rapid legislative approval, see William W. Bratton & Joseph A. McCahery, *An Inquiry into the Efficiency of the Limited Liability Company: Of Theory of the Firm and Regulatory Competition*, 54 WASH. & LEE L. REV. 629, 657-86 (1997).

25. See Lorna S. Wassdorf, State Filing Issues, in U. Houston L. Foundation—Current Issues Affecting Partnerships, Limited Partnerships, and Limited Liability Companies 1 (June 12-13, 1997) (unpublished manuscript, on file with the *South Texas Law Review*). Wyoming is the only state which has not adopted an LLP statute. See *id.* California, Nevada, Oregon, and New York permit only professionals to operate as LLPs. See BROMBERG & RIBSTEIN, *supra* note 20, § 1.01(d), at 16.

26. See, e.g., Symposium, *The Future of the Unincorporated Firm*, 54 WASH. & LEE L. REV. 389 (1997); Symposium, *The Revolution of the Limited Liability Entity*, 32 WAKE FOREST L. REV. 1 (1997); Symposium, *LLCs, LLPs and the Evolving Corporate Form*, 66 U. COLO. L. REV. 855 (1995). The Practising Law Institute has devoted entire courses to studying the new liability structures. See, e.g., FORMING AND USING LIMITED LIABILITY COMPANIES AND LIMITED LIABILITY PARTNERSHIPS: 1994 (PLI Corp. L. and Practice Course Handbook Series No. B-869, 1994).

27. See Stuart Levine, *Tax Aspects of Limited Liability Companies, Limited Liability Partnerships, Limited Liability Limited Partnerships, and Other Novel Entities*, Q249 ALI-ABA 45, 49-55 (1996); Prentiss Willson, Jr., *State Taxation of Limited Liability Companies and Partnerships*, in TAX PLANNING FOR JOINT VENTURES, PARTNERSHIPS AND OTHER STRATEGIC ALLIANCES 383 (PLI Tax Law & Estate Planning Practice Course Handbook Series No. 383, 1996).

28. See, e.g., Larry E. Ribstein, *Possible Futures For Unincorporated Firms*, 64 U. CIN. L. REV. 319, 321 (1996) (discussing new forms of unincorporated business associations); Allan G. Donn, *Limited Liability Entities for Law Firms*, in THE BEST ENTITY FOR DOING THE DEAL: ISSUES AND ANSWERS 239, 239-61 (PLI Corp. L. and Practice Course Handbook Series No. B-937, 1996); Johnson, *Limited Liability for Lawyers*, *supra* note 14, at 85-91.

29. See, e.g., John W. Larson, *Florida's New Partnership Law: The Revised Uniform Partnership Act and Limited Liability Partnerships*, 23 FLA. ST. U. L. REV. 201, 202-03 (1995); Louis F. Lobenhofer, *Limited Liability Entities in Ohio: A Primer on the Limited Liability Company and Partnership with Limited Liability, Their Substantive and Tax Aspects*, 21 OHIO N.U. L. REV. 39, 39 (1994).

30. See, e.g., Bratton & McCahery, *supra* note 24, at 629-33; Robert W. Hillman, *Limited Liability and Externalization of Risk: A Comment on the Death of Partnership*, 70 WASH. U. L.Q. 477, 477-78 (1992); Mark Rosencrantz, Comment, *You Wanna Do What? Attorneys Organizing as Limited Liability Partnerships and Companies: An Economic Analysis*, 19 SEATTLE U. L. REV. 349, 351 (1996); Thomas A. Denker, Note, *Lawyers and*

pects of attorneys practicing in limited liability entities have largely been glossed over or ignored.<sup>31</sup> Before this symposium, few articles had focused on the professional responsibility issues related to attorneys practicing in limited liability firms.<sup>32</sup> I hope to contribute to the discussion by surveying the professional responsibility and liability issues related to attorneys practicing in limited liability law firms.

Part I tackles the 1996 ethics opinion on limited liability partnerships rendered by the American Bar Association Standing Committee on Ethics and Professional Responsibility (ABA Ethics Committee). In criticizing the ABA opinion, I first examine the conclusions and reasoning articulated in the opinion, identify disciplinary rules that the opinion did not address, and consider the possible effects of the ABA ethics opinion. Part II focuses on some professional liability issues raised by attorneys practicing in LLPs. The conclusion calls for reexamination of the ABA opinion on LLPs, as well as the manner in which ethics opinions are rendered. Finally, I challenge the newly created ABA Special Committee on Evaluation of the Rules of Professional Conduct, called "Ethics 2000," to revisit professionalism and quality issues as they relate to attorneys practicing in limited liability law firms.

## II. CRITICISM OF THE ABA ETHICS OPINION ON LIMITED LIABILITY PARTNERSHIPS

### A. Overview of the ABA Ethics Opinion

Five years after the passage of the first LLP legislation in 1991, the ABA Ethics Committee<sup>33</sup> issued Formal Opinion 96-401 (ABA

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*Limited Liability for Arizona's Professionals: Deliverance or Damnation?*, 37 ARIZ. L. REV. 355, 356-57 (1995).

31. Most authors who cover the use of limited liability entities by professionals note that particular statutes authorize use of the vehicles by attorneys. See, e.g., Dirk G. Christensen & Scott F. Bertschi, *LLC Statutes: Use by Attorneys*, 29 GA. L. REV. 693, 695 (1995) ("[M]ost states either expressly or implicitly authorize a limited liability company to render professional services."). Some authors explain that the highest court in the state must approve attorneys practicing in limited liability entities. See, e.g., Hester, *supra* note 5, at 61.

32. See Allan W. Vestal, *Special Ethical and Fiduciary Challenges for Law Firms Under the New and Revised Unincorporated Business Forms*, 39 S. TEX. L. REV. 445, 446-47 & n.2 (1998). For a review of liability theories and ethics issues related to the new limited liability entities, see Robert R. Keatinge & George W. Coleman, *Practice of Law by Limited Liability Partnerships and Limited Liability Companies*, PROF. LAW., 1995 Symposium Issue, at 5.

33. The ABA Standing Committee on Ethics and Professional Responsibility ("ABA Ethics Committee"), previously called the Standing Committee on Professional Ethics, consists of ten members. See ABA CONSTITUTION AND BY-LAWS art. 31.7 (1997-98). By the concurrence of a majority of its members, the committee may "express its opinion on

Ethics Opinion) relating to lawyers practicing in limited liability partnerships.<sup>34</sup> In this opinion, the ABA Ethics Committee answers the question of whether, consistent with the *Model Rules of Professional Conduct* (Model Rules), lawyers may practice in limited liability firms.<sup>35</sup> After mentioning “potentially applicable rules” and other committee opinions, the ABA Ethics Committee opines that the limitation on liability provided by the LLP structure does not violate the Model Rules.<sup>36</sup> In explaining its conclusion, the ABA Ethics Committee states that it found no requirement in the Model Rules that lawyers be vicariously liable for the malpractice of their partners.<sup>37</sup> The opinion then discusses the possible applicability of the Model Rules relating to prospective limits on liability, communications with clients, and supervisory responsibilities.<sup>38</sup>

### B. *Prospective Limits on Liability*

The reference to specific rules starts with Model Rule 1.8(h), which prohibits an attorney from making an agreement prospectively limiting a lawyer’s malpractice liability, unless certain conditions are met.<sup>39</sup> The ABA Ethics Committee disposes of this rule on two

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proper professional or judicial conduct, either on its own initiative or when requested to do so by a member of the bar or the judiciary.” *Id.* For a discussion of the evolution of the ABA Ethics Committee and the availability of ethics opinions, see Jorge L. Carro, *The Ethics Opinions of the Bar: A Valuable Contribution or an Exercise in Futility?*, 26 *IND. L. REV.* 1, 9–15 (1992).

34. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-401 (1996) [hereinafter ABA Ethics Opinion]. The ABA Ethics Committee may issue either Formal or Informal Opinions. “Formal Opinions are those upon subjects the [ABA Ethics] Committee determines to be of widespread interest or unusual importance . . . [and] [o]ther opinions are Informal Opinions.” ABA Standing Comm. on Ethics and Professional Responsibility, Rules of Procedure, reprinted in THOMAS D. MORGAN & RONALD D. ROUNTON, 1998 SELECTED STATUTES ON PROFESSIONAL RESPONSIBILITY 635–36 (1998) [hereinafter Rules of Procedure].

35. ABA Ethics Opinion, *supra* note 34, at 1.

36. *See id.*

37. *See id.* at 2.

38. *See id.*

39. According to Model Rule 1.8(h):

A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (1997). Rule 1.8(h) recognizes the inherent conflict of interest created when attorneys attempt to prospectively limit their malpractice liability. “It is difficult to think of a situation more clearly involving a conflict between the client’s and the lawyer’s interests than one in which the lawyer attempts prospectively to limit his liability to a client or attempts to settle a client’s malpractice claim

grounds. First, the committee states that the Model Rule 1.8(h) limitation does not apply because attorneys in LLPs remain liable for their own malpractice.<sup>40</sup> Second, the ABA Ethics Committee indicates that the provisions of Model Rule 1.8(h) do not apply because the “limitation on vicarious liability created by LLPs derives solely from state law, not from an agreement between a lawyer and his client.”<sup>41</sup>

The ABA does not cite any independent authority for its position that the LLP limit on vicarious liability does not violate Model Rule 1.8(h) because attorneys remain liable for their own malpractice. Rather, the opinion refers to a similar conclusion reached in an earlier ethics opinion dealing with practice in PCs.<sup>42</sup> The earlier opinion interpreted the original ABA Canons of Ethics, including Canon 35, which stated that “a lawyer’s relationship to his client should be personal, and the responsibility should be direct to the client.”<sup>43</sup> The ABA Canons of Ethics, however, did not expressly prohibit attorneys from attempting to limit their liability.<sup>44</sup>

The prohibition on attorneys prospectively limiting their liability first appeared in the *Model Code of Professional Responsibility* (Model Code).<sup>45</sup> Interestingly, the Preliminary Draft of the Model Code only used an ethical consideration to cover prospective limits of liability. As first proposed, the ethical consideration stated, “A lawyer should not seek to limit his liability to his client for malpractice by contract, limitation of corporate liability, or otherwise. With respect to clients, the *liability of lawyers who are stockholders in a professional legal corporation should be the same as if they were practicing as part-*

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directly.” ROBERT P. SCHUWERK & JOHN F. SUTTON, JR., *A GUIDE TO THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT* 139 (1990).

40. See ABA Ethics Opinion, *supra* note 34, at 1. In addition to noting that state and local bar association opinions had reached a similar conclusion, the ABA Ethics Committee referred to its Formal Opinion 303 dealing with law practice in professional corporations. See *id.* Formal Opinion 303 concluded that attorneys could practice in professional corporations if specific criteria are met. See ABA Comm. on Professional Ethics, Formal Op. 303 (1961). The first criterion requires that attorneys remain personally responsible to the client. See *id.* In the case of an LLP, the ABA Ethics Committee believes that this criterion could be satisfied because attorneys in an LLP remain liable for their own negligence. See ABA Ethics Opinion, *supra* note 34, at 1.

41. ABA Ethics Opinion, *supra* note 34, at 1.

42. See *id.*

43. ABA Comm. on Professional Ethics, Formal Op. 303 (1961).

44. According to the Formal Opinion 303 “it is possible [to] . . . impose[] limited liability without violating any of the Canons of Ethics”. *Id.*

45. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(c) (1983).

ners.”<sup>46</sup> The final version of the Model Code included both a disciplinary rule and an ethical consideration relating to prospective limits on liability. Disciplinary Rule 6-102(a) states that “[a] lawyer shall not attempt to exonerate himself from or limit his liability to his client for *his personal malpractice*.”<sup>47</sup> If the language of this rule is ambiguous, canons of construction could provide interpretative guidance.<sup>48</sup> Applying commonly used canons of construction, the words “personal malpractice” should be given effect<sup>49</sup> and the disciplinary rule should be interpreted in conjunction with the related Ethical Considerations under Canon 6.<sup>50</sup> As explained in Ethical Consideration 6-6, “A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his liability for malpractice of his associates in the corporation, but only to the extent permitted by law.”<sup>51</sup> Both the reference in Disciplinary Rule 6-102(a) to “personal malpractice” and the Ethical Consideration 6-6 indicate that the prohibition in Disciplinary Rule 6-102 does not apply to attorneys’ efforts to

46. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-6 (Preliminary Draft 1969) (emphasis added).

47. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-102(A) (1983) (emphasis added). The comparable New York rule also qualifies the reference to liability by stating that: “A lawyer shall not seek, by contract or other means, to limit prospectively the lawyer’s *individual liability* to a client for malpractice . . . .” NEW YORK DISCIPLINARY RULE 6-102(A) (1992) (emphasis added). In considering this rule within the context of LLP and LLC statutes, the Ethics Committee for the Association of the Bar of the City of New York states that the New York Disciplinary Rule 6-102 does not apply because the LLC and LLP “statutes clearly do not absolve the lawyer from liability for his or her own ‘individual’ malpractice nor for that of anyone supervised by the lawyer.” Ass’n of the Bar of the City of N.Y. Comm. on Professional and Judicial Ethics, Formal Op. 1995-7 (1995). Compare New York County Lawyers Ass’n Comm. on Professional Ethics, Op. 703 (1994) (concluding that attorneys practicing in LLPs and LLCs do not violate New York Disciplinary Rule 6-102).

48. Canons of statutory construction can be applied in construing court rules like the ABA Model Rules. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) (dissent of Ralph G. Elliot).

49. See ROBERT J. MARTINEAU, DRAFTING LEGISLATION AND RULES IN PLAIN ENGLISH 29 (1991).

50. In construction, “statutes in *pari materia* (on the same subject matter) should be read together.” HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 64 (2d ed. 1991). Applying this canon to interpret the *Model Code of Professional Responsibility* (Model Code), the ethical considerations and disciplinary rules under the Model Code should be interpreted consistently to allow attorneys in professional corporations to limit their vicarious liability for acts and omissions of “associates.”

51. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-6 (1983). The term “associates” appears to refer to employed firm attorneys rather than firm principals holding equity interests. Although the definition section of the Model Code does not define “associates,” other sections of the Model Code use the terms “partner” and “associate.” See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D)(4)(b) (1983).

limit their vicarious liability for an “associate’s” malpractice, as opposed to their “personal” or direct liability.

Model Rule 1.8(h) “clarifies and modifies [Disciplinary Rule] 6-102 of the predecessor Model Code by differentiating between prospective limitations of liability and settlements or defenses to existing malpractice claims.”<sup>52</sup> In one respect, Model Rule 1.8(h) appears to be broader than the predecessor disciplinary rule. Unlike the disciplinary rule, Model Rule 1.8(h) does not refer to “personal malpractice.” Unlike Ethical Consideration 6-6, which clearly states that a stockholder in a professional corporation may “limit his liability for [the] malpractice of his associates,”<sup>53</sup> the Comments to the Model Rules do not include such a qualification.

Did the drafters of the Model Rules and its accompanying Comments intentionally omit the reference to “personal malpractice,”<sup>54</sup> and the qualification for PCs, or did the drafters simply overlook the matter, implicitly adopting the earlier construction?<sup>55</sup> If the text of the rule is ambiguous, the answer to this question can affect the interpretation of Model Rule 1.8(h).<sup>56</sup> With ambiguity, canons of construction can be considered in interpreting whether the prohibition in Model Rule 1.8(h) applies to practice in LLPs. For example, one established canon of construction disfavors repeal by implication.<sup>57</sup> Similarly, a prior legal rule should be retained if nothing in the legisla-

52. ABA CENTER FOR PROF’L RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(h), at 135 (3d ed. 1996).

53. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-6 (1983).

54. If the term “personal malpractice” could be viewed as essential to the construction of the prohibition under Disciplinary Rule 6-102, then omission of the term from the later adopted Model Rules could evidence an intent to change the meaning. *See, e.g.,* *Bentkamp v. United States*, 40 C.C.P.A. 70, 77 (1952) (explaining that a change of legislative language is presumed to evidence an intent on the part of Congress to effect a change in meaning; however, the court limited its holding by stating that this rule is not hard and fast and noting that exceptions exist).

55. The legislative history of the Model Rules does not provide much guidance on whether the drafters intended 1.8(h) to cover prospective limits on vicarious liability. *See* ABA CENTER FOR PROF’L RESPONSIBILITY, *THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES* 60–62, 64, 65, 67–68 (1987); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.8:901, at 281 (Supp. 1997) (discussing the adoption of Rule 1.8 and its proviso, “unless permitted by law”).

56. “Where there is no ambiguity in the words, there is no room for construction.” *Yates v. United States*, 354 U.S. 298, 305 (1957).

57. *See Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (stating that the intent to repeal must be “clear and manifest”).

tive history shows explicit intent to change it.<sup>58</sup> This canon supports the interpretation that Model Rule 1.8(h), like the predecessor rule, does not prohibit limits on vicarious liability for the malpractice of “associates.”

Commentators, including Professors Geoffrey C. Hazard, Jr. and W. William Hodes, agree that the Model Rule prohibition does not prevent lawyers from limiting their vicarious liability.<sup>59</sup> Given this view, the predecessor Code provisions, and the widespread use of PCs,<sup>60</sup> the ABA Ethics Committee could have justified its position that the LLP limit on vicarious liability did not violate Model Rule 1.8.

On the other hand, the committee’s conclusion that Model Rule 1.8 does not apply to the LLP liability shield because there “is not an agreement with a client prospectively limiting the lawyer’s liability”<sup>61</sup> ignores the realities of the attorney-client relationship. In most cases, an attorney-client relationship commences when an attorney/firm and the prospective client enter an oral or written representation agreement. The identity of the attorney and structure of the firm entering into the attorney-client relationship should be viewed as one aspect of

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58. See *Chisom v. Roemer*, 501 U.S. 380, 396 (1991) (noting that silence indicates the lack of intent to change the rule).

59. HAZARD & HODES, *supra* note 55, § 1.8:901, at 282 (stating that “[n]othing in the Model Rules, or the Code of Professional Responsibility before it, prohibit [attorneys’ attempts to limit their vicarious liability]” and predicting that “future decisions are likely to sustain the limitation”). See also LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 51:1101 (1996) (citing the ABA Formal Ethics Opinion 96-401 and other ethics opinions). The ABA Formal Ethics Opinion 96-401 and other ethics opinions are cited by the *Lawyers’ Manual on Professional Conduct* in support of the following statement:

It is generally acknowledged that in preventing attorneys from attempting to limit personal liability to their own clients, Rule 1.8(h) and DR 6-102(A) do not prevent lawyers from organizing their practice as a limited liability partnership, limited liability company, or professional corporation in order to limit their personal liability for misconduct committed by other lawyers in the firm.

*Id.* at 51:1111 (citations omitted).

60. In the opinion of Steven C. Krane, the Chair of the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York, attorneys should take “[c]onsiderable comfort . . . from 24 years of unquestioning acceptance, as a matter of both law and ethics, of lawyer professional corporations in New York, a fact that should by itself dispose of any material concerns as to the propriety of the new limited liability entities.” Stephen C. Krane, *An Ethical Lawyer’s Guide to LLC Firms*, 212 N.Y. L.J. 1, 4 (1994).

61. ABA Ethics Opinion, *supra* note 34, at 1. Compare Marilyn B. Cane & Helen R. Franco, *Limited Liability in Registered Limited Liability Partnerships: How Does the Florida RLLP Measure Up?*, 20 NOVA L. REV. 1299, 1315 (1996) (“Because the limiting of a lawyer’s liability under the LLP Act is self-executing and, therefore, requires no additional agreement between the lawyer and the client, the [Florida] Act does not violate the prohibition on entering into liability-restricting agreements in the [Florida] Bar rule.”).

the representation agreement. In entering the representation agreement, the client accepts the terms of the agreement, including the persons to perform services.<sup>62</sup> Therefore, the limited liability nature of the firm as a party to the agreement can be treated as part of the representation agreement.<sup>63</sup>

Query whether the ABA Ethics Committee would reach a different conclusion if a firm's representation agreement included a provision expressly limiting the vicarious liability of firm owners.<sup>64</sup> Such a provision in the representation agreement which clearly spells out the limited liability shield provides more information to clients than an agreement which merely refers to the firm as an LLP.<sup>65</sup> As suggested by Professor Charles W. Wolfram, partners should not be permitted "to limit the malpractice liability of partners in a transaction that is secret and of which the client need be given no notice."<sup>66</sup> The ABA Ethics Opinion on PCs recognized the importance of informing clients of the firm's limited liability structure in stating that "[r]estrictions on liability as to other lawyers in the organization must be made apparent

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62. When a client retains a lawyer practicing in a firm, "the lawyer's firm assumes the authority and responsibility of representing that client, unless the circumstances indicate otherwise." *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 26 cmt. h (Proposed Final Draft No. 1, 1996).

63. Admittedly, an LLP firm and prospective client do not technically enter an agreement which expressly limits the attorneys' liability. Still, courts recognize that an attorney-client relationship may be based on an express or implied contract. *See, e.g., Simpson v. James*, 903 F.2d 372, 376 (5th Cir. 1990). In an ethics opinion addressing conflicts in a family context, the ABA Ethics Committee refers to the *Restatement (Third) of the Law Governing Lawyers* in stating that a "client-lawyer relationship does not, however, require an explicit agreement, let alone a written letter of engagement: it may come into being as a result of reasonable expectations and a failure of the lawyer to dispel those expectations." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-390 (1995).

64. Professor Charles W. Wolfram explains that such a provision would both violate applicable ethics rules and public policy. *See Charles W. Wolfram, Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign*, 39 S. TEX. L. REV. 359, 370-73 (1998). A recent ethics opinion concluded that language in a retainer agreement that limits the amount of damages in a malpractice action violates the California ethics rule prohibiting a "contract with a client prospectively limiting the member's liability to the client for the member's professional malpractice." Los Angeles County Bar Ass'n Professional Responsibility and Ethics Comm., Formal Op. 489 (1997). Courts have disciplined attorneys for using contractual provisions to limit their liability. *See, e.g., People v. Foster*, 716 P.2d 1069, 1071-72 (Colo. 1986) (suspending an attorney who inserted a clause in a client's stock purchase agreement that released the attorney from liability for claims arising from the transaction).

65. As provided in the *Restatement (Third) of the Law Governing Lawyers*, a lawyer can limit a duty to a client if the client is "adequately informed" and "the terms of the limitation are reasonable in the circumstances." *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 30 (Proposed Final Draft No. 1, 1996).

66. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 16.2.4, at 890 (1986) (referring to the practice of law in professional corporations).

to the client.”<sup>67</sup> In the next section of its opinion on LLPs, the ABA Ethics Committee applies this criterion in considering the measures that LLP firms use in making the liability restriction apparent to clients.

### C. *LLP Designation and Communications with Clients*

Although the members of the ABA Ethics Committee agreed that the restriction on liability must be “made apparent to the client,”<sup>68</sup> they parted ways on the amount of disclosure necessary to inform clients as to the limitation on liability.<sup>69</sup> A minority of the committee expressed concern “that the use of initials, without more, is not sufficient to make the limitation of liability apparent to the client.”<sup>70</sup> The majority believed that the use of abbreviations “places clients on notice that their lawyer is practicing in a particular business form, and encourages them to inquire if they are in doubt as to its implications for them.”<sup>71</sup> When clients do inquire about the form of entity, the ABA Ethics Opinion states that “a lawyer must clearly explain the limitation of liability features of his firm’s business organization.”<sup>72</sup> Unless faced with such a client inquiry, the ABA opinion does not require that lawyers explain the restriction on liability.<sup>73</sup>

Every statute creating limited liability entities specifies that the firm include in its name a notation or reference to its limited liability structure.<sup>74</sup> Most statutes require the initials “LLP” (with or without

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67. ABA Comm. on Professional Ethics, Formal Op. 303 (1961).

68. ABA Ethics Opinion, *supra* note 34, at 2.

69. The ABA Ethics Committee issues an opinion only with the concurrence of five committee members. *See* Rules of Procedure, *supra* note 34, at 636.

When drafting an opinion, policy statement or other document to be publicly disseminated, the Committee shall make every effort to reach a consensus. When, after a full examination of the issues and an exchange of views, the Committee cannot reach a consensus, a dissenting opinion may be appropriate to express the views of a Committee member or members.

*Id.* No ABA Ethics Committee member published a dissenting opinion in connection with the ABA Ethics Opinion on LLPs.

70. ABA Ethics Opinion, *supra* note 34, at 2.

71. *Id.*

72. *Id.*

73. “As an aside, [the committee] note[s] that the use of [ ] statutorily required or permitted abbreviation[s, such as L.L.P.], . . . satisfies the requirements of Model Rules 7.1 and 7.5(a) that a lawyer’s public communications not be ‘misleading’ or ‘deceptive.’” *Id.* The ABA Ethics Committee also indicated that references to an LLP as “a partnership” should not be viewed as a misrepresentation because LLPs are indeed partnerships. *See id.*

74. *See* Johnson, *Limited Liability for Lawyers*, *supra* note 14, at 120. Under the Prototype Registered LLP Act, “[t]he name of a registered limited liability partnership shall contain the words ‘Registered Limited Liability Partnership’ or ‘Limited Liability Partnership,’ or the abbreviation ‘R.L.L.P.’ or ‘L.L.P.’ or the designation ‘RLLP’ or ‘LLP’ as the

periods), “Limited Liability Partnership,” or “Registered Limited Liability Partnership” as the last letters or words in the partnership name.<sup>75</sup> “The policy underlying the name requirement is to maximize notice to the world concerning the fact that a partnership has elected LLP status and is an LLP.”<sup>76</sup> To give notice, a few states like New York require publication in a local newspaper for a certain number of days after the LLP registration date.<sup>77</sup> Beyond the name change in all states and the publication in a few states, LLP statutes do not require that the LLP notify its customers, creditors, clients, or patients.<sup>78</sup>

Other than compliance with the minimum statutory requirement of using initials to designate the LLP, the ABA Ethics Opinion does not require notice to clients and others dealing with the LLP. Based upon “legislative approval of the use of initials and the relative unimportance, today, of the lawyer’s business form for clients,” most of the committee members opined “that the use of initials, without more, is adequate to meet ethical criteria.”<sup>79</sup> The ABA Ethics Opinion does not cite any authority or data to support its conclusion that the form

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last words or letters of its name.” ABA BUS. LAW SEC., COMM. ON PARTNERSHIPS AND UNINCORPORATED BUSINESS ORGANIZATIONS, WORKING GROUP ON REGISTERED LIMITED LIABILITY PARTNERSHIPS, PROTOTYPE REGISTERED LIMITED LIABILITY PARTNERSHIP ACT § 911, reprinted in BROMBERG & RIBSTEIN, *supra* note 20, at 522.

75. See BROMBERG & RIBSTEIN, *supra* note 20, § 2.05, at 62. For a chart summarizing each state’s name requirements, see *id.* at 104.

76. Martin I. Lubaroff, *Registered Limited Liability Partnerships—The Next Wave*, 8 NO. 5 INSIGHTS 23, 27 (1994). LLC statutes, like LLP statutes, generally require that the LLC use the designation “limited liability company” or a specified abbreviation such as “LLC.” See Thomas Earl Geu, *Understanding the Limited Liability Company: A Basic Comparative Primer (Part One)*, 37 S.D. L. REV. 44, 54 (1992) (noting that “[t]he apparent purpose of the name provisions, taken together, is to provide notice to the public and creditors that the [LLC] members are not personally liable for the liabilities of the LLC”).

77. See, e.g., N.Y. PARTNERSHIP LAW §§ 121.1500(a), 121.1502(f) (McKinney Supp. 1997) (requiring that domestic and out-of-state LLPs publish a copy of the registration or notice within 120 days after the effective registration date); ARIZ. REV. STAT. ANN. § 29-244D (West Supp. 1996) (requiring that notice be published in a general circulation newspaper three times within 60 days of the LLP filing).

78. See R. Dennis Anderson et al., *Registered LLPs*, TEX. B.J., July 1992, at 728, 733. “There have been discussions . . . as to whether the lawyer has ethical obligations outside the statutes to notify and explain to clients and potential clients the limitations on the lawyer’s professional liability under [LLP and LLC] entities.” Ronald E. Mallen, *Ethics/Malpractice Issues: The Professional and Ethical Issues Facing the Attorney-Employee*, in THE BEST ENTITY FOR DOING THE DEAL 993, 1073 (PLI Corp. L. and Practice Course Handbook Series No. 937, 1996) (referring to state bar ethics opinions). A few authors recommend that partnerships notify their existing clients, patients, and customers of the conversion to an LLP. See, e.g., Alson R. Martin, *Limited Liability Companies (LLCs): The New Game in Town*, C936 ALI-ABA 89, 151 (1994).

79. ABA Ethics Opinion, *supra* note 34, at 2. In concluding that the “use of the abbreviations or phrases permitted by the LLC or LLP statutes will in most cases provide clients with sufficient notice,” the ethics opinion of the Bar of New York City suggested

of business is unimportant to clients. The relative importance of the business form to clients could be determined if firms provide enough information on the new liability structure, so that clients can make an informed decision. Rather than requiring meaningful disclosure of the restrictions on liability, the ABA Ethics Committee gives attorneys an ethical license to use the minimum initials.

The ABA Ethics Opinion also fails to explain how the minimum initials "make apparent" the restriction on liability. In a narrow sense, the LLP initials do "make apparent" the limited liability structure of the firm when "apparent" means "readily seen."<sup>80</sup> To the contrary, initials alone do not "make apparent" the limited liability structure when "apparent" is defined as "readily understood."<sup>81</sup> Speaking candidly, firm attorneys would probably acknowledge that most clients do not understand the alphabet soup included in firm names.<sup>82</sup> Information obtained from a recent survey of prospective clients clearly indicates that most laypeople do not understand the effect of attorneys practicing in limited liability firms, let alone the meaning of the initials in a firm name.

On May 19, 1997, I mailed 220 questionnaires to a random sample of members of the Greater Houston Partnership, the Chamber of Commerce for Houston, Texas.<sup>83</sup> Within six weeks I received 93 completed questionnaires, resulting in a response rate of 42%.<sup>84</sup> Eighty-five percent of the respondents (79 persons) reported that they did not

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that attorneys consider whether the use of initials "is adequate in all circumstances." Ass'n of the Bar of the City of New York, Formal Op. 1995-7 (1995).

80. *The Concise American Heritage Dictionary* first defines "apparent" as "readily seen; visible." THE CONCISE AMERICAN HERITAGE DICTIONARY 33 (1980). *Webster's Third New International Dictionary* first defines "apparent" as "capable of easy perception: as (a) readily perceptible to the senses, esp. sight: open to ready observation or full view: unobstructed and unconcealed . . . (b) capable of being readily perceived by the sensibilities or understanding as certainly existent or present." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 102 (3d ed. 1971).

81. The second definition of "apparent" is "readily understood or perceived." THE CONCISE AMERICAN HERITAGE DICTIONARY, *supra* note 80, at 33. The first definition of "apparent" in *Webster's Third New International Dictionary* also connotes some level of understanding. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 80, at 102.

82. As bluntly stated by Professor John Dzienkowski, "It is also foolish to believe that the majority of clients will understand what the designation at the end of the law firm name means in practice." John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967, 985 n.82 (1995).

83. In identifying the sample, I eliminated attorneys and foreign consulates listed as members of the organization, but included physicians, some of whom practice as LLPs.

84. A copy of the survey instrument and results are on file with the *South Texas Law Review*.

“know how a law firm organizing itself as a limited liability partnership or limited liability company affects the malpractice liability of the firm’s attorneys.”<sup>85</sup> Similarly, 85% (79 persons) indicated that they did not know how incorporation affects attorney malpractice liability. Presumably, the survey respondents as members of a metropolitan Chamber of Commerce possess more business acumen than members of the general population. Nevertheless, the vast majority of respondents did not appreciate the significance of law firms operating as PCs, LLCs or LLPs.<sup>86</sup>

Contrary to the unsupported ABA Ethics Opinion conclusion that the lawyer’s form of business is relatively unimportant,<sup>87</sup> a significant number of respondents believed that organizational structure was “important.” In response to the question, “Would it be important to you if the organizational structure of a law firm affects the personal liability of firm attorneys not directly involved in your representation?,” 46% (43 persons) marked “yes,” 23% (21 persons) marked “no,” and 31% (29 persons) marked “I don’t know.” Focusing on the respondents who expressed an opinion on whether firm structure was important, 67% recognized the importance of organizational structure affecting the personal liability of firm attorneys not directly involved in the representation. The large percentage of respondents (31%) who marked “I don’t know” suggests that those respondents either do not understand the consequences of personal liability of firm attorneys or do not consider liability questions at the time that they retain counsel.<sup>88</sup>

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85. See survey instrument and results on file with the *South Texas Law Review*.

86. In June 1996, I obtained similar results in polling a random sample of members of the Austin, Texas Chamber of Commerce. Ninety-one percent (55 of the 60 respondents) reported that they did not understand the effect of law firms practicing as LLPs or LLCs (survey results on file with the *South Texas Law Review*).

87. The ABA Ethics Committee based its opinion, in part, on “the relative unimportance, today, of the lawyer’s business form for clients.” ABA Ethics Opinion, *supra* note 34, at 2.

88. In challenging the law and economics assumptions that people act rationally in considering events that might occur in the future, Professor Robert W. Hamilton made the following observation:

It is an unusually sophisticated person who considers in advance what should happen if the other person does not do what he promised. An average person probably does not consider at all the consequences of what should happen if the other party does not perform, or for that matter, what should happen if he himself does not perform.

Robert W. Hamilton & Larry E. Ribstein, *Limited Liability and the Real World*, 54 WASH. & LEE L. REV. 687, 696 (1997). This fascinating law review piece, consisting of an electronic mail debate, fleshes out various issues related to limited liability law firms.

Sophisticated persons, such as lenders and landlords, who do not understand the significance of the PC, LLC, and LLP initials, commonly require personal guarantees from firm owners, pledges of firm receivables, or both. If sophisticated contract creditors demand personal guarantees or security from members of limited liability law firms, why should less sophisticated creditors settle for less, if given a choice?<sup>89</sup>

To enable clients to make informed decisions on matters affecting representation, various Model Rules require client consultation with full disclosure.<sup>90</sup> In requiring attorneys to communicate with clients, Model Rule 1.4(b) expressly states that an attorney “shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”<sup>91</sup> This rule “requires the lawyer to provide the client with the information necessary to make the client’s participation informed and meaningful.”<sup>92</sup> This duty to explain matters to clients should extend to all aspects of repre-

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89. In the opinion of one ethics expert:

It is much too early to tell whether clients will care one way or another whether their lawyers are or are not limited liability entities, at least at the moment of engagement. However, it is perfectly reasonable to suppose that a sophisticated client, given a choice between two otherwise equivalent and qualified firms for a particular engagement, one of which is a limited liability entity and one of which has retained the traditional joint and several liability, will select the firm where the potential for recovery—if things do not work out as planned—is greater.

Anthony E. Davis, *Limited Liability for Lawyers*, PROF. LAW., Aug. 1995, at 1, 6.

90. See, for example, Model Rule 1.7(b) allows attorneys to handle a matter notwithstanding a conflict if the client consents after consultation. As stated:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b)(2) (1997). The terminology section of the Model Rules defines “consultation” as “communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.” *Id.* Terminology. (1997).

91. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1997). “Although the ABA Model Code of Professional Responsibility had no express counterpart to Model Rule 1.4, the obligation to communicate has been recognized throughout the history of the legal system and the profession as the lawyer’s duty.” ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 52, at 34.

92. SCHUWERK & SUTTON, JR., *supra* note 39, at 56 (referring to the comparable Texas Rule of Professional Conduct and accompanying comment that parallels the comment to Model Rule 1.4).

sentation. Applying this rule to the terms of the initial engagement, attorneys should be required to provide prospective clients with enough information on the LLP structure so that prospective clients can make an informed decision on hiring the LLP firm. Moreover, clients who retained the firm before the LLP conversion should be provided enough information so that they can make informed decisions on retaining the LLP firm.<sup>93</sup>

Evidently, the Wisconsin Supreme Court appreciates the importance of attorneys informing clients and prospective clients of their firm's limited liability status. The recently adopted amendment to the *Wisconsin Supreme Court Rules of Professional Conduct for Attorneys* allowing attorneys to practice in LLPs and other limited liability organizations requires public notice, as well as actual notice to clients.<sup>94</sup> In addition to meeting other conditions,<sup>95</sup> a limited liability law firm must "[i]nclude a written designation of the limited liability structure as part of its name."<sup>96</sup> The use of abbreviations, such as LLP, will not satisfy this provision.<sup>97</sup> A firm must also "[p]rovide to clients and potential clients in writing a plain-English summary of the features of the limited liability law under which [the firm] is organized."<sup>98</sup> This plain English summary of the firm's liability provisions should enable clients and prospective clients to make informed decisions on retaining limited liability law firms.

Unless firms provide laypeople with a plain English explanation of the firm's liability features, communications by LLP attorneys may actually confuse or mislead clients. Because LLP owners refer to each other as "partners" and function as partners, clients may assume that the firm is a traditional general partnership in which partners person-

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93. For a discussion of approaches to disclosure and the civil liability risks associated with not giving notice, see *infra* notes 158-200 and accompanying text.

94. WISCONSIN SUPREME COURT RULES OF PROFESSIONAL CONDUCT Rule 20:5:7 (West Supp. 1997).

95. Among other conditions, Wisconsin LLP law firms must maintain a current annual registration and mandatory liability insurance with prescribed minimum coverage. See *id.* Rule 20:5:7(b).

96. *Id.* Rule 20:5:7(e)(1).

97. The Wisconsin Supreme Court rejected language proposed by the Wisconsin State Bar which would have allowed firms to use abbreviations in designating their liability structure. See Clay R. Williams, *LLCs, LLPs and S.C.s: The Rules for Lawyers Have Changed*, Wis. LAW., May 1997, at 10, 61 & n.17 (referring to a letter of Feb. 27, 1997 to the Supreme Court clerk, requesting that the rule include the language "or an appropriate abbreviation thereof").

98. WISCONSIN SUPREME COURT RULES OF PROFESSIONAL CONDUCT Rule 20:5:7(e)(2) (West Supp. 1997).

ally share all risks and liabilities. As explained by Professor Robert Hamilton:

How many people are dimly aware that when they deal with a partnership that the personal credit of each partner stands behind the firm? A great many, I suspect. How many will understand that the little letters "L.L.P." on the door means [sic] that the rule of personal liability has been changed for that partnership? Not very many, I suspect.<sup>99</sup>

One partner with a large Texas firm boasted that following conversion to LLP status "[n]one of my clients asked about the change."<sup>100</sup> Maybe clients did not inquire about the change because they did not understand the significance of the change, and because "little altered in [the firm's] practice, day-to-day business, or client relationships."<sup>101</sup>

An early state ethics opinion recognized the potential for clients to be confused or misled when dealing with LLP firms. In response to a 1993 inquiry related to a Texas LLP which wanted to practice in the District of Columbia (D.C.), the Legal Ethics Committee for the D.C. Bar required LLP firms practicing in D.C. to include the words "registered limited liability partnership" in their firm names.<sup>102</sup> The 1993 opinion of the D.C. Ethics Committee reasoned:

The concept of a "registered limited liability partnership" (as well as the concept of a "limited liability company") is unfamiliar to citizens of the District of Columbia, including many experienced lawyers . . . . (We note that the abbreviations "L.L.P." and "L.L.C." are especially infelicitous in that they closely resemble the abbreviation "L.L.B.," which for decades until the 1970's the public and clients understood to be the description of a person who possessed a law degree).<sup>103</sup>

After the District of Columbia adopted its own LLP and LLC legislation, the D.C. Legal Ethics Committee concluded that firms

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99. Hamilton, *supra* note 10, at 1094 (explaining that the Minnesota statute which covers tort and contract claims changes the "basic default rule of personal liability for partnership law that has existed for centuries").

100. *Why 569 Texas Law Firms Just Switched to LLP*, L. OFF. MGMT. AND ADMIN. REP., Apr. 1994, at 1, 18 (quoting an administrative partner of the District of Columbia branch of Baker & Botts).

101. *Id.*

102. See Legal Ethics Comm. of the D.C. Bar, Op. 235 (1993). While the other state may permit the firm to use merely the abbreviation "L.L.P." or "L.L.C." after its name, as the case may be, in the District the firm name must include the following: "registered limited liability partnership" or "limited liability company." See *id.* "The only exception to the foregoing are [sic] the unpaid line item listings in the white and yellow telephone books . . . ." *Id.*

103. *Id.*

could omit the full description after its name and use initials because D.C. residents understood the implications of the abbreviations.<sup>104</sup>

The original D.C. ethics opinion required firms to provide, upon the receipt of inquiries from clients, an oral or written summary of the limitation of liability feature of the applicable law.<sup>105</sup> The ethics committee of the Kansas Bar Association went a step further in recommending that “a full discussion take place with the firm’s clients of what is happening to the firm regarding the attorney-client relationship.”<sup>106</sup> Unlike the ABA Ethics Opinion, the Kansas opinion takes into account clients’ limited understanding of new limited liability business structures and the potential for clients to believe that the firm operates as a traditional partnership.<sup>107</sup>

The Kansas ethics opinion also reminds attorneys of their ethical obligations to adhere to the “principles of vicarious liability” for acts and omissions of other firm participants. As discussed below, the ABA Ethics Opinion echoes the Kansas Ethics Opinion in noting that the statutory limits on civil liability for LLP partners do not absolve attorneys of their supervisory responsibilities under the ethics rules.

#### *D. Responsibilities of Supervisors and Partners*

The last section of the ABA opinion refers to the supervisory obligations for subordinate attorneys under Model Rule 5.1(b)<sup>108</sup> and nonlawyer assistants under Model Rule 5.3(b).<sup>109</sup> Specifically, it re-

104. See Legal Ethics Comm. of the D.C. Bar, Op. 254 (1995).

105. See *id.* Compare Ass’n of the Bar of the City of New York Comm. on Professional and Judicial Ethics, Formal Op. 1995-7 (1995) (“[L]awyers changing to LLC or LLP form should be prepared to answer any client questions regarding the nature of the change and its ramifications.”). The majority of the ABA Ethics Committee believe that “the [LLP] abbreviation[s] place clients on notice that their lawyer is practicing in a particular business form, and encourages them to inquire if they are in doubt as to its implications for them.” ABA Ethics Opinion, *supra* note 34, at 2 (“When faced with such inquiries from clients, of course, a lawyer must clearly explain the limitation of liability features of his firm’s business organization.”).

106. Ethics Advisory Comm. of the Kansas Bar Ass’n, Op. 94-3 (1994). Although the Kansas ethics committee believed that the Model Rule 1.8 prohibition on limiting liability did not apply because the “LLP format is not an ‘agreement’ to limit liability,” the committee thought “it appropriate that a full discussion take place with the firm’s clients.” *Id.* at 5.

107. See *id.*; see also New Mexico State Bar Advisory Opinions Comm., Op. 1996-1 (1996) (advising firms “to disclose the form and ramifications [of the LLP structure] to its clients”).

108. Model Rule 5.1(b) requires that a lawyer having direct supervisory authority over another lawyer “make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1(b) (1997).

109. With respect to nonlawyers employed or retained by or associated with a lawyer, Model Rule 5.3(b) states that “a lawyer having direct supervisory authority over the non-

fers to portions of the rules which require that supervising attorneys "make reasonable efforts to ensure" that supervised persons comply with the rules of professional conduct. The ABA Ethics Committee correctly points out that supervising attorneys must satisfy their ethical responsibilities for subordinates, notwithstanding any applicable statutory shield for civil liability claims.<sup>110</sup> Although the opinion recognizes supervising attorneys' responsibilities with respect to subordinates, the opinion does not mention other sections of Model Rules 5.1 and 5.3 which deal with the other responsibilities of law firm partners.

Model Rule 5.1(a) states: "A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that *all lawyers* in the firm conform to the rules of professional conduct."<sup>111</sup> Under this rule, a partner can be disciplined for failing to ensure that the firm implements risk and quality control measures such as conflicts checks and docket control systems.<sup>112</sup> If Rule 5.1(a) applies to all firm partners, a partner may not avoid responsibility under the rule by delegating compliance matters to another partner or administrator.<sup>113</sup> In this sense, each partner in a law firm must make "reasonable efforts" to ensure that firm associates' and partners' conduct conforms to the applicable ethics rules.<sup>114</sup>

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lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3(b) (1997).

110. As stated, "[a] lawyer must satisfy his responsibilities under Rules 5.1(b) and 5.3(b) for the conduct of those he supervises, even if state law provides certain damage limitations or exclusions for purposes of tort liability." ABA Ethics Opinion, *supra* note 34, at 2.

111. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1(a) (1997) (emphasis added). The official comments to Model Rule 5.1 clarify that the provisions of section (a) refer to "lawyers who have supervisory authority over the professional work of a firm[,] . . . [including] members of a partnership and the shareholders . . . [of] a professional corporation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 cmt. (1997).

112. According to the official comments to Model Rule 5.1, the propriety and adequacy of measures depends on firm structure and practice. As explained, "[i]n a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary." MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 cmt. (1997). In his seminal article advocating law firm discipline, Professor Ted Schneyer suggested that the effectiveness of Rule 5.1 in promoting an "ethical infrastructure" varies inversely with firm size. See Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 17-20 (1991).

113. See Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 U. COLO. L. REV. 329, 356 n.129 (1995) [hereinafter Fortney, *Am I My Partner's Keeper?*].

114. Professors Hazard and Hodes believe that Model Rule 5.1(a) effectively makes all partners in a firm "supervisory" lawyers per se, and accordingly, all partners are responsible for making "reasonable efforts" to ensure compliance by members of the firm, includ-

Model Rule 5.3(a) imposes similar responsibilities with respect to nonlawyer assistants. This rule requires that a law firm partner “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the [nonlawyer’s] conduct is compatible with the professional obligations of the lawyer.”<sup>115</sup> Rather than imposing an affirmative duty to monitor all nonlawyer assistants, this rule requires that firm partners make “reasonable efforts” to ensure that the firm train and supervise nonlawyer assistants so that the nonlawyers’ conduct conforms with the ethical rules. This responsibility under 5.3(a), like the responsibility under 5.1(a), extends to all firm partners, not just supervising attorneys.

Given that attorneys intend to rely on the LLP to shield themselves from vicarious civil liability for the acts and omissions of other firm players, the ABA Ethics Opinion should have reminded attorneys of their obligations under Model Rules 5.1(a) as well as 5.3(a). An attorney cannot shirk these responsibilities by hiding behind the LLP structure. Unfortunately, the LLP structure may actually undermine partners’ willingness to get involved in firm management and risk management activities.

In imposing supervisory liability,<sup>116</sup> LLP statutes shift a disproportionate share of liability to managers and supervisors.<sup>117</sup> To avoid such liability, partners may avoid service as mentors, managers, and supervisors simply because those roles could subject them to personal liability for others’ acts or omissions.<sup>118</sup> “The economic incentive for

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ing other partners. See HAZARD & HODES, *supra* note 55, § 5:2:101, at 778. The Illinois version of Model Rule 5.1(a) clarifies that the provisions of the rule apply to each firm partner. As stated, “[e]ach partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the conduct of all lawyers in the firm conforms to these Rules.” ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 5.1(a) (1993) (emphasis added).

115. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3(a) (1997).

116. See *infra* notes 201–12 and accompanying text.

117. See Carter G. Bishop, *Unincorporated Limited Liability Business Organizations: Limited Liability Companies and Partnerships*, 29 SUFFOLK U. L. REV. 985, 1014 (1995). See also Ribstein, *supra* note 28, at 330 (explaining that the supervisory liability could “give rise to a kind of vicarious liability that is concentrated on particular partners”).

118. For a more detailed discussion of how the LLP structure adversely affects attorneys’ willingness to work with and to supervise others, see Vestal, *supra* note 32, at 470–77; Susan Saab Fortney, *Seeking Shelter in the Minefield of Unintended Consequences—The Traps of Limited Liability Law Firms*, 54 WASH. & LEE L. REV. 717, 732–37 (1997) [hereinafter Fortney, *Seeking Shelter*]. Professor Vestal explains that the extent to which the “disincentive” to supervise results in decreased supervision depends

on a wide variety of factors in each case, such as the skill of the supervisee, the probability of a mistake by the supervisee, the consequences of a supervisee mistake, the availability of firm assets to satisfy claims, the availability of insurance to

individual LLP partners to avoid a supervisory role runs counter to a firm's need to provide the supervision necessary to ensure quality professional service . . . ."<sup>119</sup> The remote risk of discipline for failing to meet one's supervisory responsibilities may not effectively counter the economic incentive to avoid supervisory responsibilities.<sup>120</sup>

*E. Effect of the ABA Ethics Opinion on LLPs*

As illustrated above, the ABA Ethics Opinion does not mention certain Model Rules implicated by practice in limited liability law firms. Those rules covered in the opinion receive cursory treatment. Unfortunately, the ABA Committee reaches conclusions on LLP practice without explaining the rationale or support for its position. A few ethics scholars have expressed similar concerns about the quality of ethics opinions. In a 1991 article, Professors Ted Finman and Theodore Schneyer evaluated opinions issued by the ABA Ethics Committee, concluding that the "opinions are seriously flawed, so much so that their overall influence may well be unfortunate."<sup>121</sup> To reach this

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cover supervisee-based claims, the relationship with the client, and the difficulties of proof involved in making the claim, and others.

Vestal, *supra* note 32, at 475.

119. Jennifer J. Johnson, *The Oregon Limited Liability Partnership Act*, 32 WILLAMETTE L. REV. 147, 169-70 (1996) [hereinafter Johnson, *Oregon LLP Act*]. The recently adopted amendments to the New York disciplinary rules imposing firm discipline clarify that supervision is both an individual and collective responsibility. See The Comm. on Professional Responsibility of the Ass'n of the Bar of the City of New York, Report on Discipline of Law Firms 19 (May 1993) (on file with the *South Texas Law Review*). As provided in § 1200.5(c), "[a] law firm shall adequately supervise, as appropriate, the work of partners, associates and nonlawyers who work at the firm." Joint Order of the Appellate Divisions of the Supreme Court (May 22, 1996) (on file with the *South Texas Law Review*). Professor Schneyer, the author of the seminal article recommending firm discipline, has suggested that the amended New York rules may "counterbalance" the effect of LLP attorneys being wary of supervisory roles within firms. See *New York Adopts New Rules Subjecting Firms to Discipline*, 12 LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 191, 193-94 (June 12, 1996) (quoting Professor Schneyer's presentation at the 22nd National Conference on Professional Responsibility). Professor Schneyer believes that limited liability status may actually cause principals with supervisory liability to "fortify [the firm's] internal controls." Ted Schneyer, *A Tale of Four Systems: Reflections of How Law Influences the "Ethical Infrastructure" of Law Firms*, 39 S. TEX. L. REV. 245, 275 (1998).

120. "As a precondition to assuming supervisory responsibility . . . , LLP partners may insist that the partnership agreement require both indemnification by the firm and contribution by each LLP partner." Johnson, *Oregon LLP Act*, *supra* note 119, at 172. For a discussion of the wisdom of inter partner contribution in LLPs, see Simeon Gold, *Limited Liability Partnerships and Inter-Partner Contribution*, 121 N.Y. L.J. 1, 4, 27 (1994).

121. Ted Finman & Theodore Schneyer, *The Role of the Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67, 72 (1981). After discussing the role that ethics opinions play in self-governance and analyzing formal ethics opinions, the authors made excellent recommendations for improving the quality of ABA ethics

conclusion, they analyzed both the reasoning and holdings in twenty-one ABA opinions issued since the ABA adopted the Model Code.<sup>122</sup> In evaluating the ABA Ethics Committee's reasoning, the authors asked whether the opinions possessed the following attributes: identification of a tenable, rule-based rationale;<sup>123</sup> identification of relevant authorities;<sup>124</sup> identification and analysis of problems of interpretative choice<sup>125</sup>; and clarity.<sup>126</sup>

Applying these criteria, the ABA Ethics Opinion on LLPs appears to be lacking in a number of respects. First, the opinion fails to provide tenable rationale and authority for its conclusions.<sup>127</sup> For example, the opinion does not cite relevant authority for the conclusion that business form is unimportant to clients and that initials adequately inform clients as to the limitation on liability. Second, the opinion does not recognize problems of interpretative choice in discussing the applicability of the limitation on liability. Instead, the opinion simply concludes that the prohibition on prospective limits on

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opinions, most notably the adoption of adversarial procedures. *See id.* at 145–63. The authors conclude by stating that the entire enterprise could profitably be abandoned “[i]f no reforms are instituted or if reforms prove unavailing.” *Id.* at 167. They end the article by stating, “Half a loaf may be better than none, but halfway analysis by a body that shapes the conduct of lawyers and the decisions of Code enforcers is not.” *Id.* In a recent article updating the Finman-Schneyer critique, Professor Lawrence K. Hellman joined the call for improving the quality of the ABA ethics opinions. *See* Lawrence K. Hellman, *When “Ethics Rules” Don’t Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 *GEO. J. LEGAL ETHICS* 317, 336 (1996).

122. *See* Finman & Schneyer, *supra* note 121, at 92 (noting that the ABA Ethics Committee presumably prepares formal opinions with greater effort and care than the committee uses in preparing informal opinions).

123. The tenable rationale test requires that the opinion refer to the disciplinary section that supports the holding for which it is cited. *See id.* at 95.

124. An opinion should identify both relevant disciplinary provisions, as well as pertinent earlier opinions. *See id.* “[A]n opinion [that] does not mention a significant rule or opinion . . . clearly fails this [identification of relevant authority] test.” *Id.*

125. Problems of interpretative choice arise when disciplinary provisions seem to compel conflicting results or when disciplinary provisions appear to be ambiguous. *See id.* at 96.

126. Because the Model Code includes both aspirational ethical considerations (ECs) as well as legally binding disciplinary rules (DRs), an opinion should clarify whether it is based on ECs or DRs. *See id.*

127. Although the ABA Ethics Opinion on LLPs refers to criteria articulated in an earlier opinion on PCs, the opinion does not discuss other opinions related to associations and networks of attorneys. *See, e.g.,* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-338 (1994) (noting that “[w]ords like ‘affiliated,’ ‘associated,’ ‘correspondent,’ or ‘network,’ without further explanation, can be misleading and, therefore, use of these terms, without a meaningful description of the nature of the relationship, violates Model Rule 7.1”). Furthermore, the opinion fails to mention the applicability of Model Rules 1.4, 1.7, 5.1(a) and 5.3(a) to LLPs. *See supra* notes 90–98, 111–15 and accompanying text.

liability does not apply to the statutory shield for vicarious liability. Similarly, the ABA Ethics Committee, as an aside, notes that the use of abbreviations satisfies the requirement of Model Rules 7.1 and 7.5(a) that a lawyer's public communications not be "misleading" or "deceptive." The committee reasons that LLPs "are indeed partnerships, and thus there is no actual or implied misrepresentation when a firm describes itself as such."<sup>128</sup> This conclusion completely ignores the potential for confusion created by an LLP firm that looks and operates like a traditional partnership.<sup>129</sup> To achieve clarity, the ABA LLP opinion resorts to what Professor Charles W. Wolfram characterized as "strong statement, rather than flawless reasoning."<sup>130</sup>

Despite the apparent flaws in the ABA opinion, it will still wield considerable influence. In discussing the significance of ethics opinions as one of the components of lawyer self-governance, Professors Finman and Schneyer examined various ways in which the ethics opinions exert influence by interpreting applicable rules for attorneys and persons who enforce the applicable rules.<sup>131</sup> "In shaping enforcers' Code interpretations, [ethics] opinions obviously protect lawyers whose behavior is permitted under those interpretations."<sup>132</sup> As indicated by the articles that have already cited the ABA Ethics Opinion on LLPs, the ABA Ethics Opinion will be relied on by attorneys looking for guidance as to the applicability of the disciplinary rules to prac-

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128. ABA Ethics Opinion, *supra* note 34, at 2. Under Model Rule 7.5(d), "[l]awyers may state or imply that they practice in a partnership or other organization only when that is the fact." MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.5(d) (1997).

129. The composition of the ABA Ethics Committee and the bias of committee members may have contributed to the committee's apparent willingness to jump to conclusions. Seven of the ten committee members who issued the LLP opinion are affiliated with law firms. See ABA Ethics Opinion, *supra* note 34, at 1; MARTINDALE-HUBBELL LAW DIRECTORY NJ628B, NJ630B, CO166B, CO167B, PA439B, PA440B, DC888B, DC890B, OH350B, DC236B, DC237B (1997). Of these seven committee members, five are members of law firms and two hold "of counsel" or "advisory counsel" positions. Of the seven law firms with which committee members are associated, six firms have more than one office, with four firms operating on a multi-state basis. Perhaps the committee would have reached different conclusions had it not been dominated by large firm lawyers or had it included nonlawyers. Over fifteen years ago, Professors Finman and Schneyer voiced a similar criticism, noting that the ABA Committee "consists exclusively of lawyers, and nearly exclusively of lawyers from the most prestigious level of the profession." Finman & Schneyer, *supra* note 121, at 151.

130. WOLFRAM, *supra* note 66, at 66.

131. See Finman & Schneyer, *supra* note 121, at 74-88.

132. *Id.* at 88. "Even when lawyers look to enforcement decisions for guidance, ethics opinions may be playing a significant role, since the enforcement decision itself may have been shaped by a prior ethics opinion." *Id.* at 81.

tice in LLPs.<sup>133</sup> The ethics opinions on LLPs coupled with the widespread use of the LLP structure by attorneys will provide attorneys a kind of safe harbor in the unlikely event that enforcement officials assert that practice in an LLP violates one or more disciplinary rules.

If a dispute involving an LLP law firm makes it to court, the ABA Ethics Opinion on LLPs and state ethics opinions could easily influence the court. A study of state and federal court decisions citing bar ethics opinions from 1924 to 1990 revealed that courts have frequently relied on ethics opinions in deciding cases involving legal ethics issues.<sup>134</sup> The majority of cases surveyed treated the ABA ethics opinions with great deference,<sup>135</sup> notwithstanding the advisory nature of the opinions.<sup>136</sup> Although the ABA and state ethics opinions only apply disciplinary rules, the opinions may influence jurists in deciding professional malpractice cases.<sup>137</sup> For example, in a malpractice case where the plaintiff alleges that the LLP initials did not clearly disclose

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133. See, e.g., Williams, *supra* note 97, at 11–12; Marci A. Reddick & David C. Worrell, *Amending Rule 27: Proposal I Makes Sense for the Bar and the Public*, RES GESTAE, Mar. 1997, at 7, 7–9.

134. Using information collected from a computerized survey, Professor Jorge L. Carro analyzed the data on a quantitative and qualitative basis. The quantitative analysis revealed “a substantial number of cases reported by both federal and state courts, at various levels, that cited bar ethics opinions.” Carro, *supra* note 33, at 23.

135. See *id.* (explaining that the qualitative analysis of ethics opinions attempts to measure the degree of reliance that courts have displayed when referring to ethics opinions).

136. Following a Department of Justice antitrust suit against the ABA alleging practices constituting restraints of trade, the ABA Ethics Committee announced that the *Code of Professional Responsibility* and its ethics opinions regarding advertising would not bind any individual lawyer. See *id.* at 15. The ABA Ethics Committee explained the advisory nature of its opinions in a 1978 informal opinion, stating that the “opinions of the Committee are undertaken as faithful interpretations of the Code with respect to professional standards and obligations, they are issued in response to a request for advice, and there is no backup machinery, so to speak, for enforcement or effectuation of such advice.” ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1420 (1978). For criticism of the non-binding character of the ethics opinions and the procedures of the ethics committee, see Whitney A. McCaslin, Note, *Empowering Ethics Committees*, 9 GEO. J. LEGAL ETHICS 959, 978–80 (1996).

137. Various opinions in legal malpractice cases rely on ethics opinions. See, e.g., *Campbell v. Fine, Olin & Anderson, P.C.*, 642 N.Y.S.2d 819, 821 (Sup. Ct. 1996) (referring to a New York State Bar Association Committee ethics opinion dealing with the limits on the scope of representation); *Walden v. Hoke*, 429 S.E.2d 504, 509 (W. Va. 1993) (agreeing with the opinion of the West Virginia Bar’s Committee on Legal Ethics which concluded that lawyers could not represent a husband and wife in divorce proceedings). *But see Rice v. Strunk*, 670 N.E.2d 1280, 1287 & n.8 (Ind. 1996) (disagreeing with a formal ABA ethics opinion which concluded that attorneys for a partnership do not have an attorney-client relationship with each of the general partners). An expert witness could refer to ethics opinions in opining on whether a defendant-attorney’s conduct comported with the standard of care. See 2 RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE

the limitation on liability, a court may rely on the ABA opinion's conclusion that initials are adequate.

This leads to the most detrimental effect of leading attorneys to believe that they are out of the ethical woods. Although the ABA Ethics Opinion on LLPs clearly states that it is limited to compliance with the Model Rules,<sup>138</sup> attorneys may interpret the ABA Ethics Opinion as an approval of practice in limited liability firms. Such an interpretation can hurt attorneys if they fail to recognize the advisory nature of ethics opinions and the fact that the opinions do not address professional liability questions. Therefore, law firm partners should not assume that compliance with the minimum standards of the ABA Ethics Opinion or state ethics opinions will mean that they will be protected from vicarious tort liability.<sup>139</sup> In those states where the supreme court has not approved practice in limited liability firms,<sup>140</sup> the future of limited liability law firms remains very uncertain.<sup>141</sup> The following survey of professional liability issues illuminates some unresolved professional responsibility questions related to limited liability law partnerships.

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§ 18.7, at 582–83 (4th ed. 1996) (discussing different judicial approaches to allowing ethical standards to be used in legal malpractice litigation).

138. "This opinion . . . does not purport to examine the controlling law of the 50 states or other relevant jurisdictions but rather is limited to compliance with the Model Rules of Professional Conduct." ABA Ethics Opinion, *supra* note 34, at 3.

139. In opining that the use of the LLP initials "is adequate to meet ethical criteria," the ABA Ethics Opinion reminded attorneys that "[t]he committee cannot and does not express any opinion as to whether, as a matter of law, the use of initials is sufficient to shield the partners of a lawyer held liable for malpractice from vicarious tort liability." *Id.* at 2.

140. Some state supreme courts have adopted rules allowing attorneys to practice in LLPs, subject to certain conditions. *See, e.g.*, OHIO REV. CODE ANN., GOV. BAR R. III, § 4 (Anderson 1997) (requiring "adequate professional liability insurance or other form of adequate financial responsibility"); MASS. CT. R. 3:06(3)(b) (1995) (requiring professional liability insurance or the segregation of funds in a designated amount determined by the number of attorneys, not to exceed \$500,000).

141. Commentators have recognized the uncertain future of LLPs. *See, e.g.*, Mallen, *supra* note 78, at 1073 (warning attorneys that "the liability protections afforded by LLP's are uncertain"); Terrence A. Oved, *New York State Limited Liability Partnerships*, N.Y. ST. B.J., Mar.–Apr. 1995, at 38, 41 (explaining that the "lack of precedent creates uncertainty"). One commentator has even suggested that the uncertainty is beneficial in causing firm partners to carry adequate levels of insurance so that they do not rely on the uncertain shield to their detriment. *See* Carol R. Goforth, *Limiting the Liability of General Partners in LLPs: An Analysis of Statutory Alternatives*, 75 OR. L. REV. 1139, 1215 (1996). The New Mexico Ethics Opinion on LLPs cautions attorneys by stating that "neither the legislature nor the [state] Supreme Court has provided explicit legal authority for lawyers to practice in the Registered LLP form. Accordingly, lawyers who opt to practice through a Registered LLP must assess the legal risks which inhere in that choice." New Mexico State Bar Advisory Opinions Comm., Op. 1996-1, at 10 (1996).

### III. PROFESSIONAL LIABILITY ISSUES

#### A. *Uncertainties Related to Courts' Recognition of the Liability Shield*

Professional liability questions will depend on how courts approach and interpret the statutory shield against vicarious liability.<sup>142</sup> Malpractice plaintiffs could attack the statutory limit of liability,<sup>143</sup> assert that the shield does not apply to the alleged claims because the firm did not comply with statutory prerequisites for LLP status,<sup>144</sup> or plead around the shield.<sup>145</sup> Even in those states where LLP legislation expressly allows attorneys to use the LLP form,<sup>146</sup> the courts can reject the statutory limit on vicarious liability by exercising the courts' inherent authority to regulate the legal profession.<sup>147</sup> Some commentators in referring to reported cases involving PCs have suggested that

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142. Professors Bromberg and Ribstein acknowledge that the LLP approach to "combining limited liability with provisions designed for personally liable members may make the courts' job of interpreting and filling gaps in the statute and the parties' agreement more difficult." BROMBERG & RIBSTEIN, *supra* note 20, § 1.03(c), at 20-21.

143. For a discussion of issues related to allowing attorneys to limit their liability and externalize their costs, see *id.* § 3.01, at 111-18; Fortney, *Seeking Shelter*, *supra* note 118, at 751-57.

144. Statutory prerequisites may include maintaining insurance, registering annually, and using the appropriate partnership name. See BROMBERG & RIBSTEIN, *supra* note 20, § 2.09(a), at 77-78 (referring to sections in the treatise discussing these statutory prerequisites).

145. For example, a malpractice plaintiff might allege contract claims rather than tort claims in an attempt to avoid the LLP protection under statutes that only cover tort-type claims. See LA. REV. STAT. ANN. § 9:3431 (West Supp. 1996) (limiting the liability shield to "liabilities and obligations of the partnership arising from errors, omissions, negligence, incompetence, malfeasance, or willful or intentional misconduct committed in the course of the partnership business by another partner or a representative of the partnership"). Referring to similar language in the original Texas LLP statute, Professor Alan Bromberg explained, "The statutory words have a distinct torts flavor and appear not to cover any contractual liability. Plaintiffs will probably try to plead their cases in ways to avoid the statutory words." TEX. REV. CIV. STAT. ANN. art. 6132b, § 15 (Source and Comments of Alan R. Bromberg—1991 Amendments) (Vernon Supp. 1997). Recently, the Texas Legislature extended the liability shield to cover all "debts and obligations of the partnership incurred while the partnership is a registered limited liability partnership." Act of May 13, 1997, 75th Leg., R.S., ch. 375 § 113, 1997 Tex. Sess. Law Serv. 6 (Vernon) (to be codified as an amendment to TEX. REV. PARTNERSHIP ACT § 6132b-3.08).

146. See, e.g., TENN. CODE ANN. § 61-1-147 (Supp. 1996) (allowing a partnership engaged in rendering professional services to register as an LLP subject to the laws and regulations governing the professional and other terms and conditions imposed by the professional licensing authority).

147. For a thoughtful analysis of whether courts will rely on the inherent powers doctrine "to rein in the LLP legislation so as to assure protection for clients," see Wolfram, *supra* note 64, at 373-82, 402. See also Debra L. Thill, Comment, *The Inherent Powers Doctrine and Regulation of the Practice of Law: Will Minnesota Attorneys Practicing in Professional Corporations or Limited Liability Companies Be Denied the Benefit of Statu-*

the courts will uphold the LLP liability shield.<sup>148</sup> Such a prediction based on professional corporation cases does not recognize the differences between a firm practicing as a PC and a firm practicing as an LLP.<sup>149</sup> On a conceptual level, a court could reject the liability shield, concluding that as a matter of professional responsibility, *partners in a partnership* should remain jointly and severally liable for acts and omissions by firm actors.

The recent debate over section 79 of the *Restatement (Third) of the Law Governing Lawyers* (Restatement) illustrates different perspectives on whether the courts should hold law firm principals jointly and severally liable, regardless of firm structure. As first proposed, section 79 of the Restatement imposed vicarious civil liability on firm principals based on the principles of respondeat superior and enterprise liability.<sup>150</sup> As stated, “[a] law firm [and each of its principals] is subject to civil liability for injury legally caused to a person by any wrongful act or omission of any principal or employee of the firm who was acting in the ordinary course of the firm’s business or with actual

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*tory Liability Shields?*, 20 WM. MITCHELL L. REV. 1143, 1163–70 (1994) (discussing the court’s use of inherent powers to invalidate the liability shield for attorneys).

148. See, e.g., LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 91:351, 91:363 (June 25, 1997) (“[T]he modern view seems to be swinging away from rigid imposition of vicarious liability.”). In referring to “[the] scant appellate case law on the issue of whether lawyers may take advantage of the limited liability provisions of LLCs and LLPs,” the commentary suggests that “the same policy considerations that come into play when analyzing the propriety of limited liability PCs would also seem to be persuasive when analyzing LLCs and LLPs.” *Id.* at 367.

149. PCs differ from LLPs in a number of respects. The key difference between a PC and an LLP is that the LLP operates as a partnership, while the PC must function as a corporation. PCs, unlike LLPs, must observe corporate formalities such as election of officers and directors and maintenance of corporate records. Failure to observe these formalities can lead to the piercing of the corporate veil. See ROBERT W. HAMILTON, BUSINESS ORGANIZATIONS—UNINCORPORATED BUSINESSES AND CLOSELY HELD CORPORATIONS § 7.9 (1996) (considering how the veil piercing concept could apply to LLPs).

Unlike LLP legislation which was enacted to provide professional limited liability protection, states first enacted PC statutes to allow professionals to take advantage of tax benefits available to corporate shareholders. See 1 MALLEN & SMITH, *supra* note 137, § 5.4, at 272 (explaining that the original interest in PCs “stemmed primarily from the desire to secure preferential tax advantages”).

Federal income tax laws deter large firms from incorporating because PCs with over 35 shareholders will be subject to double taxation. See Simpson, *supra* note 17, at B11. With LLPs, firm size does not affect taxation. As a result, large firms can function as LLPs without adverse tax consequences. In smaller firms, supervision and monitoring takes place on an informal basis. See Dzienkowski, *supra* note 82, at 976–77 (describing the differences between practice in large firms and small firms). As compared to the LLP structure, the PC structure appears to provide clients more protection.

150. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 79 cmt. b (Tentative Draft No. 7, 1994).

authority.”<sup>151</sup> After some American Law Institute (ALI) members objected to the proposed language, asserting that it did not take into account state statutes and cases supporting limited liability and reflected a “policy bias” rather than restating the law,<sup>152</sup> the ALI members rejected this proposed section, asking the reporters to revise the section and comments to take into account legislation allowing attorneys to limit their liability.<sup>153</sup> At a May 1997 meeting, the ALI members approved the reformulated version of section 79 which deals separately with the vicarious liability of partners in general partnerships and principals using other law firm structures.<sup>154</sup> Under the approved section of the Restatement, “A principal of a law firm organized other than as a general partnership as authorized by law is vicariously liable for the acts of another principal or employee of the firm *to the extent provided by law*.”<sup>155</sup> In referring to the state legislation that allows lawyers to practice in PCs, LLPs, and LLCs, the commentary following section 79 states that the effect of such statutory language on lawyers may be limited by the state supreme courts’ rules and by statutory provisions concerning professional regulation.<sup>156</sup> As adopted, section 79 provides little guidance to courts struggling with the limited liability issue.<sup>157</sup>

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151. *Id.* § 79(1).

152. For a discussion of the opposition to the original version of section 79, see *Several Restatement Sections Receive Cool Response from ALI*, 10 *LAW. MAN. ON PROF. CONDUCT* (ABA/BNA) 9, 139 (June 1, 1994) (referring to complaints lodged by ALI members including Robert O’Malley, Loss Prevention Counsel of the Attorneys’ Liability Assurance Society, Inc., a malpractice carrier insuring many of the nation’s largest firms). Professor Leubsdorf, one of the Restatement’s reporters, responded to the objections by explaining that in only about one-third of the jurisdictions with limited liability statutes have the courts actually ruled on the limitation of liability issues, with just two or three states favoring unqualified limitation, another seven permitting it with certain conditions, and seven imposing vicarious liability. *See id.* at 141.

153. *See id.*

154. *See ALI Wraps Up Product Liability Project, New UCC Article on Licenses Makes Debut*, 65 *U.S. L. WK.* 2777, 2782 (1997) (explaining that the ALI members who opposed the original version of section 79 “complained that the section took an extreme position embracing vicarious liability . . . and failing to recognize the impact of state laws that permit lawyers to limit or eliminate such liability”).

155. *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 79(3) (Tentative Draft No. 8, 1997) (emphasis added). After setting forth the civil liability of a law firm, section 79 covers the vicarious liability of firm principals in two subsections. Subsection (2) restates the liability of partners in a general partnership as follows: “Each of the principals of a law firm organized as a general partnership is liable jointly and severally with the firm.” *Id.* § 79(2). Subsection (3) then defers to applicable law in covering the vicarious liability of firm principals using other types of law firm organizations. *See id.* § 79(3).

156. *See id.* § 79 cmt. c.

157. In imposing vicarious liability on firm principals, a court could refer to the comments under section 79 which explain how vicarious liability helps maintain the quality of

Although a court may make a policy determination on vicarious liability of lawyers practicing in LLPs, the particular controversy between the litigants will probably affect a court's decision. A survey of possible claims indicates that the court's treatment of the liability shield and the outcome of the case may turn on the facts, allegations, and lawyering in a particular case.

*B. Plaintiffs' Claims Based on Common Law Theories and Equitable Principles*

The law firm structure at the time the client retained legal services could affect plaintiffs' claims. If the firm operated as a general partnership when the attorney-client relationship commenced, the plaintiff could allege a breach of fiduciary duty if the law firm failed to disclose the effect of the firm converting to an LLP. "As a fiduciary, an attorney is obligated to render a full and fair disclosure of facts material to the client's representation."<sup>158</sup> According to legal malpractice experts Ronald Mallen and Jeffrey Smith, "the disclosure must include not only all material facts, but also should include an explanation of their legal significance."<sup>159</sup> Conversion from a general partnership, in which partners share unlimited liability, to an LLP structure, in which partners are no longer jointly and severally liable, poses both financial and quality control risks to clients. The joint and several liability feature of a general partnership protects clients in two ways. First, it provides incentives for partners to monitor the quality

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legal services and helps assure compensation to those who may have claims against principals of a firm. See *id.* § 79 cmt. b. On the other hand, a court inclined to recognize the limits on vicarious liability might be influenced by another comment which states that "limited liability is a principle generally accepted for those engaged in gainful occupations." *Id.*

158. *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988). The introductory note to Chapter Two of the *Restatement (Third) of the Law Governing Lawyers* recognizes the unique fiduciary nature of the attorney-client relationship. As stated:

A lawyer is a fiduciary agent, to whom clients entrust matters, property, and information, which may be of great importance and sensitivity, and whose work is usually not subject to detailed client supervision because of its complexity. Because those characteristics of the client-lawyer relationship make clients vulnerable to harm, and because of the importance to the legal system of faithful representation, the law stated in this Chapter provides a number of safeguards for clients beyond those generally provided to principals.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS Introduction to Chapter 2 (Proposed Final Draft No. 1, 1996).

159. 2 MALLEN & SMITH, *supra* note 137, § 14.17, at 286. "Essential to the attorney's fiduciary obligations of undivided loyalty and confidentiality is the responsibility to promptly advise the client of any important information that may impinge on those obligations." *Id.* (citations omitted).

of legal services.<sup>160</sup> Second, holding partners jointly and severally liable maximizes clients' recovery in the malpractice actions.<sup>161</sup> Therefore, clients who retained a general partnership firm are entitled to know that the firm no longer operates on an "all for one, one for all" basis. A client who establishes a breach of fiduciary duty may be entitled to fee forfeiture even where the client has suffered no loss as a result of the attorney's misconduct.<sup>162</sup>

A legal malpractice plaintiff will face a more difficult challenge if the defendant firm operated as an LLP at the time when the plaintiff first retained the firm.<sup>163</sup> Such a plaintiff may still try to bust the LLP shield by alleging that the limit on vicarious liability creates a conflict of interest that firm attorneys must disclose. In forming the attorney-client relationship, a lawyer should "consult with the client about such matters as the benefits and disadvantages of the proposed representation and conflicts of interest."<sup>164</sup> At the commencement of the attor-

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160. In describing malpractice control measures as "institutional measures," Professor John Leubsdorf convincingly argues that vicarious liability "ensures that partners will institute such measures . . . [and that] once instituted, [the measures] will receive more than lip service." John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 143 (1995). The comments to the adopted version of section 79 of the *Restatement (Third) of the Law Governing Lawyers* reflect this view by stating that vicarious liability helps "maintain the quality of legal services, by requiring not only a firm but also its principals to stand behind the performance of other firm personnel." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 79 cmt. b (Tentative Draft No. 8, 1997).

161. "The thin capitalization of many firms makes vicarious liability important to ensure internalization of the full costs of malpractice." Leubsdorf, *supra* note 160, at 142. For an analysis of the externalization risk posed by thinly capitalized LLP firms, see Fortney, *Seeking Shelter*, *supra* note 118, at 751-757.

162. See Thomas D. Morgan, *Sanctions and Remedies for Attorney Misconduct*, 19 S. ILL. U. L.J. 343, 351 (1995). Recently, in a case of first impression, the Texas Supreme Court recognized fee forfeiture as a remedy for breach of an attorney's fiduciary duty, regardless of damage or causation. See *Arce v. Burrow*, No. 14-95-00360-CV, 1997 WL 528389, at \*4 (Tex. App.—Houston [14th Dist.] 1997, n.w.h.) (citing RESTATEMENT (SECOND) OF AGENCY § 469 (1958)). "Courts have reached differing results on the question of whether to impose fee forfeitures for ethical violations." *Fee Forfeiture May Be Imposed for Breach of Fiduciary Duty, Without Showing of Causation or Damages*, PROF. LIABILITY REP., Oct. 1997, at 352, 352-53.

163. Normally, an attorney's fiduciary obligations are predicated on an attorney-client relationship. See 2 MALLEN & SMITH, *supra* note 137, § 14.1, at 232 (noting that the "responsibilities of the fiduciary obligations and correlative disabilities usually do not burden attorneys in their everyday affairs, but only when they act in a professional capacity or otherwise use the integrity of their office in a relationship"). Fiduciary responsibilities may arise when an attorney discusses legal problems with a prospective client. See *Nolan v. Foreman*, 665 F.2d 738, 739 n.3 (5th Cir. 1982) (stating that under Texas law "[t]he fiduciary relationship between an attorney and his client extends even to preliminary consultations between the client and the attorney regarding the attorney's possible retention").

164. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 cmt. c (Proposed Final Draft No. 1, 1996).

ney-client relationship the interests of the firm principals in limiting their liability potentially conflicts with the interests of the client in unlimited liability of firm principals in the event of a malpractice claim.<sup>165</sup> To recover in a malpractice action, the client must prove that the conflicting interest prevented the attorney from providing competent representation, proximately causing the client's injury.<sup>166</sup> Such a showing may be difficult to make in a case where the only conflicting interest is the limitation on vicarious liability.

Depending on the facts, aggrieved clients could assert constructive fraud claims.<sup>167</sup> In the context of an attorney-client relationship, the Texas Supreme Court in *Archer v. Griffith* defined constructive fraud as "the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests."<sup>168</sup> In fashioning a constructive fraud claim, a plaintiff could allege that the LLP structure is inherently misleading. As discussed in Part I, the majority of laypeople probably do not understand the unintelligible initials at the end of a firm name.<sup>169</sup> Moreover, clients may actually be confused by the LLP structure.<sup>170</sup> Professors Alan R. Bromberg and Larry E. Ribstein acknowledge "the potential for confusing clients" as "[o]ne reason for refusing to permit professional

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165. When there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interest or by the lawyer's duties to others, ethics rules require that attorneys obtain the prospective client's informed consent. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1997) (stating that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities . . . unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation." See also Model Rule 1.8 which classifies "agreement[s] prospectively limiting . . . liability" as a conflict of interest. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (1997).

166. See 2 MALLEN & SMITH, *supra* note 137, § 15.18, at 395.

167. "Constructive fraud reposes exclusively in [attorneys'] fiduciary obligations and simply is a characterization of a breach of such a duty." 1 MALLEN & SMITH, *supra* note 137, § 8.10, at 599-600 (citations omitted).

168. 390 S.W.2d 735, 740 (Tex. 1964). According to the Texas Supreme Court, a presumption of unfairness or invalidity attaches to a contract entered into while the attorney-client relationship existed. See *id.* at 739. Because the attorney failed to show that the contract was reasonable, the court set aside the contingency fee agreement, stating that under the facts, the agreement was "so unfair and unreasonable that a court of equity should intervene and set the [agreement] aside." *Id.* at 740.

169. See *supra* notes 82-86 and accompanying text.

170. In seeking "comment on the ways to properly advise clients of the correct status of the organizational structure providing representation," the Indiana Supreme Court expressed concern that "some clients may not understand fully the status of limited liability corporations or partnerships." *Comment Sought Re: The Practice of Law as LLC, LLP, RES GESTAE*, Feb. 1997, at 7, 7.

firms to practice as LLPs while permitting firms to practice as other types of limited liability entities.”<sup>171</sup> As revealed by Internet discussions, even “lawyers creating LLPs for themselves were well aware that there was a real risk that what they were doing was misleading and [they] were struggling to say enough to avoid claims of fraud—but not to say too much.”<sup>172</sup>

At a minimum, firm partners should inform clients of the firm’s limited liability structure. A few LLP statutes expressly eliminate the liability protection for partners who contract without using the required name unless the partners “can show that the third party did not rely on the firm’s being a general partnership.”<sup>173</sup> Under common law principles, the failure to place clients on notice could result in the firm losing the LLP shield because in appropriate cases limited liability status “[may] not be raised against injured parties who were not made aware of, or could not have known of, the limited liability nature of the entity.”<sup>174</sup> A firm could improve the chances of a court recognizing the LLP shield by consistently using the words “limited liability partnership” rather than relying on abbreviations.<sup>175</sup> Plain language

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171. BROMBERG & RIBSTEIN, *supra* note 20, § 7.04(a), at 251–52 (“Unsophisticated third parties may not understand that LLP partners, unlike those in other general partnerships, have limited liability for misconduct-type claims.”). “The standard ‘LLP’ designation required by the LLP statutes . . . may not go far enough to dispel this confusion.” *Id.* § 7.04(a), at 252 (citations omitted). Referring to LLP statutes that limit liability for negligence and similar misconduct, Professor Carol Goforth believes that the “risk of confusing even sophisticated business persons seems substantial.” Goforth, *supra* note 141, at 1180. If people are being fooled by inadequate disclosure, Professor Ribstein suggests regulating disclosure rather than imposing general restrictions on the availability of limited liability. See Hamilton & Ribstein, *supra* note 88, at 703.

172. Hamilton & Ribstein *supra* note 88, at 712.

173. BROMBERG & RIBSTEIN, *supra* note 20, § 2.05, at 63 (referring to the Alabama, Florida, Minnesota, and North Dakota statutes). In other states the consequences of not using the required name “are uncertain.” *Id.*

174. Marquis, *supra* note 6, at 702. See, e.g., *Smith v. Style Adver., Inc.*, 470 So. 2d 1194, 1196 (Ala. 1985) (holding that limited partnership and its general partners are liable for advertising services performed by plaintiff because no evidence indicated that plaintiff was informed of corporate status); *Philipp Lithographing Co. v. Babich*, 135 N.W.2d 343, 344 (Wis. 1965) (“[P]artners who continue to hold themselves out as such after the formation of a corporation cannot escape responsibility for contracts entered into after the change in business status without adequate notice that the partnership has been dissolved.”); *Hill & Co. v. O’Malley*, 817 P.2d 660, 663 (Kan. Ct. App. 1991) (“[A] corporate director or officer cannot escape personal liability under a contract entered into with third persons on behalf of the corporation if the third person is unaware of the corporation’s existence and the directors or officers failed to disclose its existence.”).

175. “Consistent use of the legal name, including the designator required by the statute, should minimize opportunities available for third parties to argue (i) they did not have notice the partnership had become an LLP or (ii) their sources for recovery on claims against the partnership include the assets of general partners.” Robert R. Keatinge et al., *Limited Liability Partnerships: The Next Step in the Evolution of the Unincorporated Busi-*

disclosure of the effect of LLP status should avoid claims based on lack of notice.<sup>176</sup>

Clients represented by a firm prior to LLP registration could easily challenge notice.<sup>177</sup> Those clients could seek to hold all partners personally liable, arguing that the liability arose out of the single engagement agreement entered prior to the LLP registration.<sup>178</sup> The Minnesota statute expressly adopts this view stating that “[a]ll partnership debts and obligations under or relating to a note, contract, or other agreement arise and accrue when the note, contract, or other agreement is entered into.”<sup>179</sup> Absent an express statutory provision dealing with preregistration contracts and post-registration liabilities, a court could still conclude that partners’ liability for contractual claims arose when the contract was made, not when the breach occurred.<sup>180</sup> For other claims, a court could compare the LLP registration to partnership dissolution and “require notice to prior clients just as a dissolving partnership must give actual or constructive notice to pre-existing creditors in order to limit post-dissolution liabilities.”<sup>181</sup>

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*ness Organization*, 51 BUS. LAW. 147, 171 (1995) [hereinafter Keatinge et al., *Limited Liability Partnerships*].

176. See Dzienkowski, *supra* note 82, at 985 n.82 (suggesting that states require a limited liability firm “to disclose in plain language the effect of the state law on the client’s ability to bring an action against the firm in the future”).

177. For a concise discussion of timing questions, see Keatinge et al., *Limited Liability Partnerships*, *supra* note 175, at 185–86. “[I]f a partnership enters into a professional relationship with a client before registering and, after registration, commits an error or omission, the client might be able to argue the partnership has violated an obligation it undertook prior to registration . . . .” *Id.* at 186.

178. “Clients of professional firms have a particularly strong argument for notice based on the theory that all of their dealings arise out of a single engagement agreement that began prior to the [LLP] registration.” BROMBERG & RIBSTEIN, *supra* note 20, § 3.11(c), at 150.

179. MINN. STAT. ANN. § 323.14(6) (West Supp. 1997). Compare the Maryland statute which provides that the liability limitation shall not affect

[t]he liability of a partner for debts and obligations of the partnership, whether in contract or in tort, that arise from or relate to a contract made by the partnership prior to its registration as a limited liability partnership, unless the registration was consented to in writing by the party to the contract that is seeking to enforce the debt or obligation.

MD. CODE ANN., CORPS. & ASS’NS. § 9-307(C)(3) (Supp. 1996).

180. See Bishop, *supra* note 117, at 1010 (distinguishing a partner’s liability for tort claims which will depend on when the liability “arose”). The comment to the Uniform Limited Liability Partnership Act § 306(c) “focus[es] on the reasonable expectations of contracting parties to determine when obligation incurred.” *Id.* at 1010 n.113.

181. LARRY E. RIBSTEIN, UNINCORPORATED BUSINESS ENTITIES 339 (1996) (referring to section 35 of the Uniform Partnership Act and to *Redman v. Walters*, 152 Cal. Rptr. 42, 45 (Cal. Ct. App. 1979), where the court concluded that a client who did not receive notice of dissociation could hold a law partner liable for the negligent act of the partnership or its partners).

Therefore, clients who engaged firms prior to LLP registration may be able to hold all firm partners personally liable for malpractice claims if firms do not provide notice.<sup>182</sup> To avoid such claims and to minimize partners' liability exposure, firms should not rely on simple announcements advising clients of the firm's name change.<sup>183</sup> Instead, firms should fully inform clients of the nature and consequences of the registration and give clients an opportunity to withdraw.<sup>184</sup> Clients who want to hold firm partners vicariously liable can seek other counsel.<sup>185</sup>

Despite the fact that disclosure can help preserve the statutory limit on vicarious liability and defend against various malpractice claims, firms resist making such disclosure. Apparently, firm attorneys believe that such disclosure will create a wall between them and their clients, or even worse, cause the clients to find other counsel.<sup>186</sup> "Some firms simply believe that it's unsatisfactory for them to tell their clients as they walk in the door that there's a limit on their part-

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182. See BROMBERG & RIBSTEIN, *supra* note 20, § 3.11(c), at 150.

183. One author suggests that "cautious" law firms seriously consider:

(a) sending an announcement to, at a minimum, each of its current clients, advising them of the change in firm name (e.g., "[e]ffective Nov. 1, 1994, this firm will be known as 'Able, Baker & Charlie, R.L.L.P.')" and (b) being prepared to answer all client inquiries concerning the implications of the change, preferably in writing (or based on a written script) to avoid disputes later on as to what was said.

Krane, *supra* note 60, at 8. Perhaps such an announcement which does not explain the significance of the LLP designation can lead clients to believe that only the firm's name has changed.

184. See BROMBERG & RIBSTEIN, *supra* note 20, § 3.11(c), at 150. Professors Bromberg and Ribstein caution that the duty to inform clients raises "many questions," including whether the standard of informed consent compares to consents to conflicts of interest. See *id.* at 151. They indicate that the "information would probably have to include at least a description of the partners' former personal liability and a description of the matters (perhaps excluding current cases) that are subject to the liability limitation." *Id.* Once a firm makes this disclosure in writing, a client's retention of the firm could be treated as consent. Firms should retain a copy of the written disclosure in the firm's permanent records as part of the firm's "burden of proof" file.

185. By providing clients an opportunity to retain other counsel, firms honor the agency nature of the attorney-client relationship "grounded in mutual consent." See Charles Silver, *The Legal Establishment Meets the Republican Revolution*, 37 S. TEX. L. REV. 1247, 1248 (1996) (applying agency principles to the privity debate).

186. As posed by one commentator: "[W]ill clients perceive the move as an attempt by firms to supervise their lawyers less and evade responsibility for shoddy work?" Lisa Isom-Rodriguez, *Limiting the Perils of Partnership*, AM. LAW., July-Aug. 1993, at 30, 30.

ners' liability."<sup>187</sup> Attorneys may also fear clients asking for fee reductions in exchange for the reduced liability exposure.<sup>188</sup>

Understandably, firm attorneys express concern over the way in which clients will perceive the firm's conversion to LLP status. Still, firms which "soft-pedal" the conversion may jeopardize partners' protection from vicarious liability. Consider the LLP announcement by a "Big Six" public accounting firm which notified recipients that partners of the firm would no longer risk personal liability as a result of actions in which they had no involvement and over which they have no control.<sup>189</sup> This form announcement was accompanied by a personally addressed letter which stated in part: "Let me reaffirm, however, that the Firm and the professionals who work with you will

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187. Darryl Van Duch, *Some Firms Hesitate to Adopt L.L.P.*, NAT'L L.J., May 5, 1997, at A1, A20 (quoting Professor Carter Bishop on the "public relations impact" of converting to LLPs). In discussing why 28 of the 40 megapartnerships headquartered in New York have not shifted to LLPs, John McCabe, legislative director of the Uniform Law Commissioners explained,

For some of the largest go-go firms in New York to maintain their long-time relationships with clients, they're going to have to spell out in new retainer agreements exactly who is going to stand behind the work of the firm. The clients are going to want to see all the senior partners personally responsible.

*Id.* at A20. *But see* Stephen E. Kalish, *Lawyer Liability and Incorporation of the Law Firm: A Compromise Model Providing Lawyer-Owners with Limited Liability and Imposing Broad Vicarious Liability on Some Lawyer-Employees*, 29 ARIZ. L. REV. 563, 580 (1987) (asserting that clients do not expect to hold lawyer-owners personally responsible for the acts or omissions of one of the firm's lawyer-employees).

188. In challenging Professor Ribstein's assumption that creditors pay premiums for unlimited liability, Professor Hamilton asserts that law firms should reduce their rates when they become LLPs. *See* Hamilton & Ribstein, *supra* note 88, at 705. Rather than reducing their fees, recent surveys reveal that the majority of firms are increasing their billing rates. The 1995 Attorney Billing & Compensation Survey conducted by the State Bar of Texas Department of Research & Analysis revealed that only 4% of the respondents had decreased their hourly rates during the prior three years; slightly more than half of the attorneys who use hourly billing reported that they had increased their hourly rates during the prior three years; and 41% reported that their hourly rates had remained the same over that time period. *See* Cynthia L. Spanhel & Leah V. Shimatsu, *Texas Attorneys Report on Hourly Rates*, TEX. B.J., Feb. 1996, at 114, 115. On the national level, billing rates have been climbing steadily, along with firm profits, salaries, billable hours, and hiring. *See* Hope Viner Samborn, *Business Is Booming*, A.B.A. J., Oct. 1997, at 34, 34. According to information obtained in a survey of 400 law firms, billable rates for attorneys with 25 to 29 years of experience increased from an average of \$184 an hour in 1993 to \$200 in 1996. *See id.* Another national survey conducted in conjunction with the *Law Office and Management Administration Report* found that the national median hourly billing rate for partners as of June 1, 1996 was \$183 per hour, an increase of about 4.5% since 1995. *See* Donna Gill, *National Survey Gives Billing and Pay Rates*, CHICAGO LAW., Mar. 1997, at 64.

189. *See LLP Announcements: Damage Control*, 82 J. TAX'N 127, 128 (1995) (reporting on the announcement of a large CPA firm which converted to a Delaware registered LLP).

continue to stand fully behind our work.”<sup>190</sup> The attempt to put a “positive spin” on the LLP conversion creates various questions and potentially confuses recipients on whether firm members will remain vicariously liable for malpractice committed by others in the LLP.<sup>191</sup> This illustrates how communications and conduct of firm attorneys can fail to preserve or even negate the liability shield.

Clients who have relied on communications from a firm and the conduct of its attorneys may assert equitable estoppel.<sup>192</sup> As suggested above, if firm partners communicate to clients and prospective clients that all partners will stand behind one another’s work product, the firm partners should be estopped from relying on the liability shield.

Similarly, an aggrieved client could attempt to invoke a doctrine of reasonable expectations.<sup>193</sup> Previously courts have considered reasonable beliefs and expectations in determining both the existence<sup>194</sup>

190. *Id.*

191. *See id.* (concluding that the accounting firm’s announcement “serves notice on us all that comforting one’s clients while simultaneously trying to reduce one’s potential personal liability to those clients is a tricky task”).

192. In this context, equitable principles prevent firm partners from escaping personal liability because of statements, representations, and conduct which communicated that the firm operated as a traditional partnership. Equitable estoppel requires the following:

First, the [firm partner], who usually must have knowledge, notice or suspicion of the true facts, communicates something to [the client] in a misleading way, either by words, conduct or silence. Second, the [client] in fact relies, and relies reasonably or justifiably, upon that communication. And third, the [client] would be harmed materially if the [firm partner] is later permitted to assert any claim inconsistent with his earlier conduct. A fourth element is that the [firm partner] knows, expects or foresees that the [client] would act upon the information given, or that a reasonable person in the [firm partner’s] position would expect or foresee such action.

DAN B. DOBBS, *LAW OF REMEDIES* 65 (2d ed. 1993) (citations omitted).

193. Beginning in the early 1960s, courts employed the doctrine of honoring the reasonable expectations of insurance policy holders. *See* ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* 630–32 (1988) (describing the historical development of the doctrine). When applying the doctrine, “court[s] will protect the reasonable expectations of applicants, insureds, and intended beneficiaries regarding the coverage afforded by insurance contracts even though a careful examination of the policy provisions indicates that such expectations are contrary to the expressed intention of the insurer.” *Id.* at 633.

194. *See, e.g.,* *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied) (concluding that an attorney-client relationship can be “implied from the conduct of the parties”); *In re Anonymous*, 655 N.E.2d 67, 70 (Ind. 1995) (noting that the putative client’s subjective belief that he is consulting a lawyer in his professional capacity and the putative client’s intent to seek professional advice are important factors in determining if an attorney-client relationship should be implied by conduct of parties). *But cf. Vinson & Elkins v. Moran*, 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, n.w.h.) (focusing on the “objective manifestations” necessary to support a finding that an attorney-client relationship existed).

and scope of an attorney-client relationship.<sup>195</sup> In considering client expectations and a firm's conversion to limited liability status, Professor Deborah A. Demott made the observation:

Clients may well expect members of the firm, individually, to monitor the work done under the firm's auspices. They may expect that, by holding themselves out as a single firm, members of even a large multi-site firm warrant their belief that firm work meets at least minimal professional standards. Thus, clients may expect firm members to stand behind the quality of the firm's work and to be accountable for lapses in that work's quality. They may expect members of the firm, regardless of their choice of organizational form, to have staked their professional reputations on the quality of their fellow professionals' work as well as on the quality of their own individual work. It is not evident why adding "L.L.P." or "A Professional Limited Liability Company" to the firm's letterhead should defeat those expectations.<sup>196</sup>

If malpractice plaintiffs can convince the court that they had reasonably understood that all partners would be responsible for acts and omissions of firm representatives, the court could hold all partners personally liable.

In asking a court to honor their reasonable expectations, clients might point to firm communications, beginning with promotional material such as firm brochures.<sup>197</sup> A sample of firm brochures obtained from many of the largest firms in Texas indicates that firms use different approaches to disclosing their organizational structure.<sup>198</sup> The majority of the LLP firms only use the L.L.P. initials in the firm name; a few use the words "limited liability partnership." One firm brochure waits until the last page to note that the firm is a registered limited liability partnership. Obviously, firm partners who want to avoid claims based on reasonable expectations should use more than the minimum statutory initials.

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195. See, e.g., *People v. Bennett*, 810 P.2d 661, 664 (Colo. 1991) (explaining that the attorney-client relationship gives rise to a continuing duty to a client "unless and until the client clearly understands, or reasonably should understand that the relationship is no longer to be depended on"); *Practical Offset, Inc. v. Davis*, 404 N.E.2d 516, 520 (Ill. App. Ct. 1980) (concluding that a client who retained attorney to consummate a sale of assets could infer that the scope of the attorney's employment encompassed the filing of a financing statement).

196. Deborah A. Demott, *Our Partners' Keepers? Agency Dimensions of Partnership Relationships*, 58 *LAW & CONTEMP. PROBS.* 109, 129 (1995).

197. Large and small firms alike use brochures to market their legal services and to create a firm "image." See Jill Schachner Chanen, *Getting the Word Out*, *A.B.A. J.*, Sept. 1997, at 84, 84.

198. Brochures are on file with the author.

Firm partners should also recognize that statements made in firm communications could bolster a claim based on reasonable expectations. Many brochures make reference to the “team approach,” “collective expertise” and collaborative efforts.<sup>199</sup> Depending on the strength and context of such statements, clients could assert that they understood that partners would work together and monitor quality and performance.

Clients might also rely on statements made in the initial engagement agreements. For example, a specimen engagement letter published by the ABA Section of Law Practice Management states, “All legal work performed will . . . be monitored and approved by one of the partners of the firm.”<sup>200</sup> A client could rely on such a statement in seeking to hold one or more firm partners personally liable for an associate’s malpractice. As discussed in the next section, malpractice plaintiffs may expand the number of personally liable attorneys by alleging some form of supervisory liability.

### C. *Supervisory Claims and Intra-firm Conflicts*

Most LLP statutes extend a partner’s personal liability to cover the acts and omissions of persons under a partner’s supervision.<sup>201</sup> The statutes use different approaches to impose supervisory liability.<sup>202</sup> Most make partners liable for persons under their direct supervision and control.<sup>203</sup> Others use verbal formulations describing when supervisors will be held liable.<sup>204</sup> None of the statutes offers much guidance as to precisely when a partner should be held personally liable for the misconduct of other persons in the partnership.<sup>205</sup> In dis-

199. For example, one page of a firm’s brochure uses the word “team” three times.

200. WIN-WIN BILLING STRATEGIES: ALTERNATIVES THAT SATISFY YOUR CLIENTS AND YOU 192 (Robert C. Reed ed., 1992).

201. Similarly, several PC and LLC statutes extend personal liability to persons under a professional’s direct supervision or control. See Donn, *supra* note 28, at 251 (supervisory liability in PCs); Robert R. Keatinge & George W. Coleman, *Professional Practices*, Q243 ALI-ABA 203, 234 (1996) (supervisory liability in LLCs and LLPs).

202. For a discussion of the different statutory approaches, see Goforth, *supra* note 141, at 1154–56.

203. See *id.* at 1154 (identifying 31 statutes in which the “direct supervision and control” language appears).

204. See, e.g., TEX. REV. CIV. STAT. ANN. art. 6132b, § 15 (Vernon Supp. 1997) (providing that an LLP partner is not individually liable for debts and obligations arising from the acts and omissions of other firm representatives not working under the supervision or direction of the first partner at the time the “errors, omissions, negligence, incompetence, or malfeasance occurred, unless the first partner: (a) was directly involved in the specific activity . . . ; or (b) had notice or knowledge of the errors, omissions, negligence, incompetence, or malfeasance by the other partner or representative at the time of occurrence”).

205. See Goforth, *supra* note 141, at 1154–56.

curring supervisory liability and the meaning of “direct supervision and control,” Professor Robert Hamilton poses the following questions:

How close does supervision have to be to constitute “direct” supervision? Does it cover the ultimate responsibility that a senior partner or rainmaker in a law firm has for “his” client? Is it limited to the mid-level partner who actually does the work or who supervises associates and more junior partners when they do the work? Does it extend to members of the opinion committee of a law firm who review all formal legal opinions before they are released?<sup>206</sup>

Professor Hamilton suggests that these are “fact-specific questions on which there is no statutory guidance.”<sup>207</sup> Fact-specific questions also arise when LLP statutes do not clarify whether a supervisor will be held liable for mere supervision without the showing of careless or negligent conduct on the part of the supervisor.<sup>208</sup>

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206. Hamilton, *supra* note 10, at 1082. For an analysis of statutory liability using specific examples of law firm partners serving in different capacities, see BROMBERG & RIBSTEIN, *supra* note 20, § 3.04(b), 3.3(a), at 125–26. In an attempt to limit the supervisory liability of managing partners, some attorneys are considering stating in their partnership agreements that managing partners do not directly supervise the day-to-day work of each of the firm’s lawyers. See Daniel R. White, *LLP Legislation Passed in Florida, Colorado*, 1 NO. 5 L. FIRM PARTNERSHIP AND BENEFITS REP., June 1995, at 9, 9 (quoting Robert Keatinge who stated that such a provision in a partnership agreement “doesn’t hurt” provided that it “reflects what’s really going on” in the partnership). For an example of a partnership agreement provision which attempts to delineate the supervisory responsibility of managing attorneys, see Robert R. Keatinge, *The Floggings Will Continue Until Morale Improves: The Supervising Attorney and His or Her Firm*, 39 S. TEX. L. REV. 279, 305–06 n.84 (1998) [hereinafter Keatinge, *The Floggings Will Continue*].

207. Hamilton, *supra* note 10, at 1082. In answering questions related to supervisory liability, one commentator believes that the more directly a partner works with a supervised person and the more direct “hands on” supervisory responsibility the partner has, the more likely that the partner will be held liable for the acts and omissions of the supervised person. See Francis J. Mellen, Jr. et al., *Limited Liability Companies and Registered Limited Liability Partnerships in Kentucky: A Practical Analysis*, 22 N. KY. L. REV. 229, 262–63 (1995).

208. See Johnson, *Limited Liability for Lawyers*, *supra* note 14, at 113–114 (suggesting that attorneys should assume that the statutory provisions impose supervisory liability regardless of fault). But see Robert R. Keatinge & George W. Coleman, *The Right Entity May Limit Your Liability*, L. PRAC. MGMT., July–Aug. 1995, at 22, 27 (recommending that liability “be limited to those who have exercised negligent supervision, which is probably direct personal liability for negligence, in any case, rather than personal liability assigned to someone who happens to hold the title of manager or practice group leader”). For arguments supporting this recommendation, see Keatinge, *The Floggings Will Continue*, *supra* note 206, at 302–313. Some LLP statutes do base supervisory liability on negligence. See, e.g., MD. CODE ANN., CORPS. & ASS’NS. § 9-307(C)(1) (Supp. 1996) (stating that partners are liable if they are “negligent in appointing, directly supervising, or cooperating with the other partner, employee, or agent”).

The lack of clarity on the degree and quality of supervisory involvement can lead to litigation.<sup>209</sup> In attempting to hold partners personally liable, a plaintiff could name as defendants all managing partners, section leaders, and other partners who participated in the representation.<sup>210</sup> Although some commentators believe that liability should only be imposed on attorneys actively involved in the representation,<sup>211</sup> the questions of supervisory liability will ultimately depend on the factual circumstances.<sup>212</sup>

A plaintiff might also assert that all firm partners should be personally liable because each partner has an affirmative duty to monitor other partners.<sup>213</sup> The federal government took this tack in suing some law firms following the failure of various savings and loan associations.<sup>214</sup> In those actions, the government alleged that each law firm partner was personally liable for failing to monitor the conduct of other firm partners.<sup>215</sup> Plaintiffs may take a similar approach in attempting to bypass the statutory limit on vicarious liability by alleging that law firm partners are directly liable for failing to monitor other

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209. See Cane & Franco, *supra* note 61, at 1304 (“Because the degree and quality of supervisory involvement necessary for liability is unclear, vertical liability will undoubtedly be the subject of litigation.”).

210. See Ribstein, *supra* note 28, at 323 (suggesting that the statutory recognition of supervisory liability “will cause plaintiffs’ lawyers to press the courts to expand partners’ direct liability to the limits permitted by the statutory language”). Professor Ted Schneyer questions whether the “mere discussion and development of the firm’s internal controls will lead to personal liability.” Schneyer, *supra* note 119, at 274.

211. See, e.g., Lubaroff, *supra* note 76, at 25 (“An intimate involvement in supervision and control in connection with what is going on with respect to a matter appears to be required as a precursor to the imposition of liability.”); Thomas W. Van Dyke & Paul G. Porter, *Limited Liability Partnerships: The Next Generation*, J. KAN. B. ASS’N, Nov. 1994, at 16, 19 (“The [LLP] language certainly contemplates attentive, almost vigilant supervision and control. It appears that a department head, or one merely possessing ultimate responsibility over a matter or client, would not have sufficient direct ‘supervision and control’ to unveil such partner’s personal assets to a potential claimant.”).

212. See John Richards, Note, *Illinois Professional Service Firms and the Limited Liability Partnership: Extending the Privilege to Illinois Law Firms*, 8 DEPAUL BUS. L.J. 281, 287 (1996) (explaining that in order to determine whether a person had “direct supervision and control” over another person, Illinois courts have employed a “flexible rule that takes into account [the] factual circumstances in each individual case”). In pointing to material fact questions on whether attorney-shareholders “should be personally liable for their actions regarding representation,” the New Mexico Supreme Court recently reversed a summary judgment for members of a professional corporation. Sanders, Bruin, Coll & Worley, P.A. v. McKay Oil Corp., 943 P.2d 104, 105 (N.M. 1997).

213. See Davis, *supra* note 89, at 5 (noting that plaintiffs may sue all partners asserting that the partners did not meet their ethical responsibilities under Model Rules 5.1 and 5.3).

214. See Fortney, *Am I My Partner’s Keeper?*, *supra* note 113, at 331–36 (discussing the practical consequences of the government’s allegations).

215. See *id.* at 332 (citing complaints filed against law firms and their attorneys).

firm agents.<sup>216</sup> Until courts reject “failure to monitor” allegations as disguised vicarious liability claims, firm partners may be forced to defend against such allegations.

Ironically, by increasing the number of partners sued, a plaintiff may reduce the amount of insurance available to pay claims and settlements. Under most legal malpractice policies, the defense costs are subtracted from the limits of liability. If potential conflicts of interest prevent one counsel from defending all the claims against the defendant-attorneys, then the defense costs for providing multiple defense counsel will be subtracted from the available limit of liability, thus reducing the amount available to pay plaintiffs.<sup>217</sup> In negotiations with plaintiffs, defense attorneys can use this self-reducing feature of the insurance policies and the statutory liability shield in attempting to convince plaintiffs to accept a settlement funded by insurance.<sup>218</sup>

#### IV. CONCLUSION

Nationwide, firm attorneys embraced the LLP structure as a kind of catastrophe protection against vicarious liability when firms exhaust insurance and other assets available to pay claims.<sup>219</sup> In jumping on the LLP bandwagon, many attorneys may not have fully appreciated the professional responsibility and liability issues associated with attorney-fiduciaries practicing in LLP firms. Standards that

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216. For an analysis of a partners' duty to monitor their peers, see *id.* at 348–61. My survey of members of the Houston Chamber of Commerce revealed that 82% of the respondents (76 persons) believed that law firm owners have a “legal duty to monitor the manner in which all attorneys in their firm practice,” regardless of firm structure. Another 15% of the respondents (14 persons) indicated that they did not know if such a legal duty exists and only 3% of the respondents (3 persons) believed that attorneys did not have a legal duty to monitor other firm attorneys. Survey results on file with the *South Texas Law Review*. For a discussion of the survey, see *supra* notes 83–88 and accompanying text.

217. For a discussion of these insurance issues, see Fortney, *Seeking Shelter*, *supra* note 118, at 741–45.

218. See Sheldon I. Banoff, *New Ruling Adds Further Encouragement for Large Firms To Form LLCs*, 81 J. TAX'N 12, 12 (1994) (explaining that professional firms incorporated to at least “generate a ‘colorable claim’ defense, whereby a better settlement might be reached with the firm’s creditors than if the professionals continued to operate in general partnership form”).

219. See Edward A. Adams, *Firms Expected To Make Switch to New Format: Limited Liability Partnerships Seen Restricting Exposure*, 212 N.Y. L.J., 1, 2 (1994) (noting that “[t]he kind of disaster that would prompt use of LLP provisions is exceedingly rare”). Robert O’Malley, loss prevention counsel for the Attorneys’ Liability Assurance Society, which insures many of the nation’s largest firms, reported that only a few small firms have faced judgments in excess of their malpractice policy’s limits and only one large firm exceeded its policy limits. See *id.*

may be appropriate for LLP businesses in the rough-and-tumble marketplace do not suffice for attorneys.<sup>220</sup>

I urge the ABA Ethics Committee and state ethics committees to modify their ethics opinions to acknowledge the special relationship between attorneys and their clients, and the potential for clients to be misled by an LLP firm that looks like and functions like a traditional partnership. Recognizing that state ethics rules only set the minimum level of conduct for attorneys to avoid discipline,<sup>221</sup> courts must carefully evaluate professional responsibility questions raised by LLP law firms.

Academicians and practitioners are beginning to question whether the rule-based approach to ethics has caused the legal profession to lose its moral compass.<sup>222</sup> Recently, the ABA Board of Governors appointed The Special Committee on Evaluation of the Rules of Professional Conduct, called Ethics 2000. The Ethics 2000 Committee will study and evaluate the ethical and professional precepts of the legal profession.<sup>223</sup> In this study, the Ethics 2000 Committee should explore modifying the procedures<sup>224</sup> and expanding the charge of the

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220. In recommending that attorneys adopt standards of conduct that meet the public's reasonable expectations, Professor Ann Maxey concludes by stating that "rules that take into account the public's reasonable expectations are not only good for society, but they are good for lawyers earning a living within the restraints of practicing a profession." Ann Maxey, *Competing Duties? Securities Lawyers' Liability After Central Bank*, 64 *FORDHAM L. REV.* 2185, 2238 (1996).

221. While "the Model Rules of Professional Conduct set a minimum level of conduct with the consequence of disciplinary action, malpractice liability is premised upon the conduct of the 'reasonable' lawyer." 2 *MALLEN & SMITH, supra* note 137, § 18.7, at 581.

222. See, e.g., Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 *S. CAL. L. REV.* 885, 886-87 (1996) (contrasting "technocratic lawyering" with genuine deliberations). At the ABA's 23rd National Conference on Professional Responsibility held on May 29, 1997, Lawrence J. Fox, a member of the ABA Ethics Committee who practices with the Philadelphia firm of Drinker, Biddle & Reath, moderated a panel discussion on *The Model Rules of Professional Conduct: Have We Lost Our Professional Values?* In his remarks, Mr. Fox called for a "broader devotion to ethics than is stirred by the Model Rules." *ABA Speakers Debate Proposals for Reshaping Ethics Rules*, 13 *LAWS. MAN. ON PROF. CONDUCT (ABA/BNA)* 158, 158 (June 11, 1997).

223. See Memorandum from N. Lee Cooper, President of the ABA, to ABA Board of Governors (Apr. 15, 1997) (on file with the *South Texas Law Review*). The charge of the Ethics 2000 Committee also includes evaluating the Model Rules and the rules governing professional conduct in the state and federal jurisdictions; conducting original research, surveys and hearings; and formulating recommendations. See *id.* Chief Justice E. Norman Veasey, of the Delaware Supreme Court, chairs the 10-person committee. See Rex Bossett, *Overhauling Ethics*, *NAT'L L.J.*, July 14, 1997, at A4, A4 (listing committee members); see also James Podgers, *Model Rules Get the Once-over*, *A.B.A. J.*, Dec. 1997, at 90, 90 (discussing the reasons for appointing the Ethics 2000 Committee).

224. In investigating a mechanism for obtaining public comment from members of the legal community and the consuming public, the Ethics 2000 Committee should study

ABA Ethics Committee so that ethics opinions can provide guidance beyond the rules.

Finally, the Ethics 2000 Committee should seriously evaluate the consequences and wisdom of attorneys practicing in limited liability law firms. When the LLP movement swept through the country, proponents used the "liability crisis" to justify the radical restructuring of partnership law.<sup>225</sup> Now, national data on legal malpractice claims indicate that "[t]here is no crisis with respect to rising malpractice claims against lawyers."<sup>226</sup> Understanding that there is no liability crisis may help lawyers reconsider whether the catastrophe insurance provided by the LLP structure justifies attorneys hiding behind the LLP fence.

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Finman and Schneyer's recommendations for improving ethics opinions. See Finman & Schneyer, *supra* note 121, at 145-67.

225. See Goforth, *supra* note 141, at 1140-41.

226. ABA Report Examines New Data on Legal Malpractice Claims, 13 LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 110, 110 (Apr. 30, 1997) (quoting Kirk R. Hall, chief executive officer of the Oregon State Bar Professional Liability Fund, and author of the recently released ABA report on malpractice claims). The ABA report, *Legal Malpractice Claims in the 1990s*, provides a comprehensive collection and examination of national data on malpractice claims from January 1, 1990 to December 31, 1995, reported by lawyer-owned and commercial malpractice insurers. See *id.* According to the 1996 study, "most malpractice insurers have seen only a small and gradual increase in frequency and severity [of malpractice claims] over the last decade." ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., LEGAL MALPRACTICE CLAIMS IN THE 1990s 20 (1996).