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INTRODUCTION

The Kentucky Limited Liability Company Act,[1] like similar laws passed in numerous states, was intended to extend the advantages of the limited liability corporation ("LLC") or partnership ("LLP") to professionals. Anxious to enjoy this new status, 748 Kentucky businesses organized themselves as LLCs or LLPs within a year of the Act's passage.[2] The Kentucky Supreme Court responded, however, by rejecting a proposed rule which would have expressly allowed the practice of law in these limited liability forms.[3] The refusal was grounded in the court's assertion that lawyers may not "'so limit their liability'"[4] This appeared to affirm Model Rule of Professional Conduct 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.[5]

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[1] KY. REV STAT. ANN. [hereinafter K.R.S.] § 275 (Michie Supp. 1996).

[2] *See* John T. Ballantine & Thomas E. Rutledge, *Kentucky Supreme Court Rejects Use of LLCs, LLPs and PSCs by Attorneys*, KY. BENCH & BAR, Winter 1996, at 21, 21.

[3] *See id.* at 29.

[4] *Id.* (quoting *In re* Order Amending Rules of Civil Procedure (CR) Rules of Criminal Procedure (RCr) Rules of Supreme Court 95-1 (Sept. 22, 1995)).

[5] KY. SUP. CT. R. 3.130; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (1998).

The court acted to prevent the indirect accomplishment of a goal long prohibited by attorneys' ethical guidelines. Courts in other states considering the interplay between similar LLC statutes and the same or similar Model Rule have reached inconsistent conclusions. Indeed, as discussed below, several states expressly authorize the practice of law by LLCs and LLPs, often creating additional rules in an attempt to protect the spirit of Model Rule 1.8(h).[6] While the Kentucky Supreme Court's resolution of the issue may not be popular among law firms,[7] it preserves an important and essential tradition of the legal profession–the tradition of protecting clients' interests even at the risk of exposure to malpractice liability

The form in which attorneys are permitted to practice law is intertwined with the profession's evolving ideas about attorneys' accountability and liability, both individually and vicariously This Note does not attempt an in-depth evaluation of the ramifications of practicing law as an LLC or LLP aside from the ethical considerations presented by the Model Rules of Professional Conduct.[8] Instead, this Note explores the effect the Model Rules and other ideas about professional responsibility have on the entities available to law firms.

Parts I and II of this Note explore the development of these closely related issues. While the Kentucky Supreme Court's refusal to allow law firms to become LLPs or LLCs may appear restrictive, the early attitude

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[6] *See infra* Part III.

[7] The Kentucky Supreme Court's prohibition of the practice of law by LLPs or LLCs was especially unwelcome to the Kentucky law firms which had adopted such a form before receiving permission from the court. The options available to such firms are discussed in Ballantine & Rutledge, *supra* note 2, at 30. For example, these firms may choose to reconvert from LLC or LLP form to a general partnership, to keep the LLC or LLP entity but practice without the limited liability status conferred by the Kentucky LLC statute, or to ignore the Kentucky Supreme Court's decision. *See id.*

[8] For a thorough analysis of other aspects of the LLC/LLP form, such as federal income taxation, continuity of life, transferability of interests, and centralized management, as well as a comparison of LLCs and LLPs with general partnerships, limited partnerships, and close corporations, see generally Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 378 (1992) [hereinafter Keatinge et al., *The Limited Liability Company*]; Robert R. Keatinge & George W Coleman, *Practice of Law by Limited Liability Partnerships and Limited Liability Companies*, PROF. LAW. (ABA Ctr. for Prof'l Responsibility, Chicago, Ill.), 1995 Symposium, at 5 [hereinafter Keatinge & Coleman, *Practice of Law*].

that law firms could not incorporate at all must be remembered. As the availability of options to law firms increased, ideas about vicarious liability and the policies behind Model Rule 1.8(h) evolved rather than eroded.[9]

Part III analyzes the reception given to LLC and LLP statutes by other states' supreme courts, demonstrating the wide variety of approaches to the problem of whether a firm practicing as a limited liability organization may still conform to the ethical and legal expectations of the profession. Some states have attempted a compromise, allowing law firms to practice as LLCs or LLPs, but subjecting them to additional rules and restrictions imposed by bar authorities.[10] Finally, Part IV evaluates Kentucky's resolution of the issue.

I. THE DEVELOPMENT OF FORMS IN WHICH TO PRACTICE LAW

A. The Regulatory Power of State Supreme Courts

In choosing an organizational form in which to practice, law firms have not been permitted to select from the wide variety of entities available to nonprofessionals. The matter has long been governed by state supreme courts, which typically have the authority to regulate the legal profession.[11] Regardless of how they resolve the issue, state supreme courts have emphasized and reaffirmed their power to refuse or grant permission to law firms to practice as some type of limited liability entity.[12] Some state LLC/LLP statutes implicitly include attorneys in the group of professionals who may use this type of organization,[13] but neither express nor implied legislative authority is enough to allow law firms to convert to a limited liability form. The regulators of the legal profession must approve the use of this entity by lawyers before the statutes will have any practical effect.[14] Courts have made clear that notwithstanding legislative action, only the

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[9] *See infra* Part II.

[10] *See infra* Part III.

[11] *See infra* notes 14-19 and accompanying text.

[12] *See, e.g.*, *In re* Florida Bar, 133 So. 2d 554, 555 (Fla. 1961); *In re* New Hampshire Bar Ass'n, 266 A.2d 853, 854 (N.H. 1970); *In re* Rhode Island Bar Ass'n, 263 A.2d 692, 694 (R.I. 1970).

[13] *See* KAN. STAT. ANN. § 17-7603 (1995) (authorizing an LLC to "conduct or promote any lawful business which a partnership or individual may conduct or promote").

[14] *See* Keatinge et al., *The Limited Liability Company*, *supra* note 8, at 458.

judicial branch vested with regulation of the bar may approve the LLC/LLP form for attorneys:

> [T]he power of the court to regulate and control the practice of law remained where it had always been, notwithstanding the exercise by the General Assembly of its undoubted power to declare acts of unauthorized practice illegal in aid of the authority of this court in the regulation and control of the practice of the law, and not subversive to it.[15]

Similarly, a New Hampshire court remarked, "The power and authority of the Supreme Court to supervise and regulate the practice of law has been recognized and acknowledged from an early date by custom, practice, judicial decision, and statute."[16]

The "veto power" given to state supreme courts concerning the organizational forms available to firms is justified in two ways. First, the courts exercise this power because, as a matter of public policy, judges and not legislators are best suited to regulate the practice of law.[17] Second, because the application of LLC and LLP statutes to the practice of law is so closely intertwined with the judicial branch, a separation of powers doctrine dictates that state supreme courts have the ability to override the legislature in this matter.[18] Therefore, state courts which have either granted or denied law firms the right to organize themselves as limited liability entities have not been constrained by statutory language. Because only the judicial branch may regulate the practice of law, the legislature has no power to make final determinations regarding the limitation of liability of shareholders and members of law firms.[19]

Likewise, the Kentucky Supreme Court examined the LLC/LLP issue pursuant to its long-standing authority to regulate the practice of law.[20] Although Kentucky's LLC statute contemplates the use of the limited

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[15] *In re Rhode Island Bar Ass'n*, 263 A.2d at 694.

[16] *In re New Hampshire Bar Ass'n*, 266 A.2d at 854.

[17] *See* Keatinge & Coleman, *Practice of Law*, *supra* note 8, at 35.

[18] *See id.* at 35-36 (citing David Paas, *Professional Corporations and Attorney-Shareholders: The Decline of Limited Liability*, 11 J. CORP. L. 371 (1986)).

[19] *See* Paas, *supra* note 18, at 383.

[20] Section 116 of the Kentucky Constitution grants the Kentucky Supreme Court power to govern "admission to the bar and the discipline of members of the bar." KY. CONST. § 116. Section 116 was interpreted in *Ex Parte Auditor of Public Accounts*, 609 S.W.2d 682 (Ky. 1980), as completely removing regulation of the bar "from any legislative authority and render[ing] obsolete and ineffective the statutes pertaining to it." *Id.* at 684.

liability form by professionals, subject to certain exceptions not imposed on nonprofessional groups,[21] the court acted well within its exclusive power to approve or disapprove of legislative acts so closely affecting the practice of law in the state.[22] Unless the court overturns its decision disallowing this form for the practice of law, firms must adhere to the ruling or risk professional discipline.

B. Early Attitudes Toward the Practice of Law in Corporate Form

Although the Kentucky Supreme Court's disapproval of the practice of law in the LLC/LLP form may have been "surprising as well as disconcerting" to some firms,[23] the ability to practice in any organizational form has not always been assumed. In the early part of the century, state bar authorities typically asserted the general rule that the "learned professions" could not incorporate themselves.[24] Courts which refused to allow the practice of law in corporate form grounded their decisions on the unique relationship between attorneys and clients.[25]

Two early cases demonstrate the policies and concerns behind this general prohibition of the incorporation of law firms. In *In re Co-operative Law Co.*,[26] the Court of Appeals of New York held that a group of attorneys could not lawfully organize under the state's business corporations law [27] Although the court acknowledged the legislature's power to authorize the formation of corporations to carry on "any lawful business," it interpreted the statute to exclude the "learned professions."[28] The court was primarily concerned that an attorney's loyalty would belong to the corporation, rather than to his or her client:

> The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and

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[21] *See* K.R.S. § 275.380 (Michie Supp. 1996).

[22] *See* Paas, *supra* note 18, at 383.

[23] Ballantine & Rutledge, *supra* note 2, at 21.

[24] *See* J.F Rydstrom, Annotation, *Practice by Attorneys and Physicians as Corporate Entities or Associations Under Professional Service Corporation Statutes*, 4 A.L.R.3d 383, 385 (1965).

[25] *See id.* (stating that the "noncorporate status of the lawyer or physician was deemed necessary to preserve to the client or patient the benefits of a highly confidential relationship, based on personal confidence, ability, and integrity").

[26] *In re* Co-operative Law Co., 92 N.E. 15 (N.Y. 1910).

[27] *See id.* at 17

[28] *Id.* at 16-17

> confidence. [I]t cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation, and not to the directions of the client. The corporation would control the litigation, the money earned would belong to the corporation, and the attorney would be responsible to the corporation only. His master would not be the client but the corporation [29]

In holding that the statute authorizing business corporations did not extend to attorneys, the court commented that physicians were also excluded. Just as a lawyer owes his or her fidelity to clients and not to the corporation, a physician should place his or her loyalty only with patients.[30] These, according to the court, were the "great professions, which for time out of mind have been given exclusive rights and subjected to peculiar responsibilities."[31]

In re Opinion of the Justices[32] was a response by the Supreme Judicial Court of Massachusetts to the state legislature's question: could the legislature act either to forbid or permit the practice of law by corporations or associations?[33] The court responded that the legislature could only prohibit and never authorize such a practice.[34] Like the New York Court of Appeals in *In re Co-operative Law Co.*, the Massachusetts Supreme Judicial Court based its holding partly on the nature of the attorney-client relationship, stating that a corporation could never perform such a human function:

> A dual trust is imposed on attorneys at law: they must act with all good fidelity both to the courts and to their clients. The relation of an attorney to his client is pre-eminently confidential. In addition to adequate learning, it demands on the part of the attorney undivided allegiance, a conspicuous degree of faithfulness and disinterestedness, absolute integrity, and utter renunciation of every personal advantage conflicting in any way directly or indirectly with the interests of his client. Only a human being can conform to these exacting requirements. Artificial creations such as corporations or associations cannot meet these prerequisites.[35]

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[29] *Id.* at 16.
[30] *See id.*
[31] *Id.* at 17
[32] *In re* Opinion of the Justices, 194 N.E. 313 (Mass. 1935).
[33] *See id.* at 316.
[34] *See id.*
[35] *Id.* at 317

The Massachusetts Supreme Judicial Court did hold that the state legislature would be acting within its scope of authority by passing a statute forbidding the practice of law by corporations. Indeed, the court seemed to encourage such a law, stating that it would "enhance" the judicial branch.[36] The court even suggested that "[c]rimes might be established for the infraction of prohibitions of such practice of the law "[37]

In considering the ethical implications of permitting the practice of law by an LLC or LLP, it is useful to note these traditional views toward corporate practice. *In re Co-operative Law Co.* and *In re Opinion of the Justices* condemned the practice of law in any corporate form. Although few states adhere to such a strict rule today, the underpinnings of the above cases–the unique sort of loyalty and responsibility an attorney owes a client–are still rooted in case law as well as in the Model Rules.[38]

Those who supported the practice of law as professional corporations may have sought only a business form which would be taxed as a corporation, with muted interest in acquiring limited liability [39] In *United States v. Kintner*,[40] one of the earliest acknowledgments of a professional corporation, the court held that a group of doctors working together in a clinic under articles of association could be treated as a corporation rather than a partnership for tax purposes.[41]

Attorneys followed the physicians' example. By the 1960s, corporate forms of law practice increased and diversified. As the Internal Revenue Code changed, attorneys began soliciting legislatures, bar associations, and state supreme courts for permission to adopt corporate forms of practice. The American Bar Association ("ABA") announced its support of federal legislation which would extend to self-employed attorneys the same tax privileges which had been long enjoyed by employees of nonprofessional corporations.[42] The ABA gave its qualified blessing to law firms practicing

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[36] *See id.* at 316.

[37] *Id.*

[38] *See, e.g.*, Fund of Funds, Ltd. v. Arthur Anderson & Co., 567 F.2d 225, 232-33 (2d Cir. 1977) (holding that a client has an "absolute right to the firm's undivided loyalty"); Alexander v. Russo, 571 P.2d 350, 357 (Kan. Ct. App. 1977) (describing the relationship between a lawyer and client as one of utmost trust and confidence); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. 1 (1998) (stating that "[l]oyalty is an essential element in the lawyer's relationship to a client").

[39] *See* Keatinge & Coleman, *Practice of Law*, *supra* note 8, at 33.

[40] United States v. Kintner, 216 F.2d 418 (9th Cir. 1954).

[41] *See id.* at 428.

[42] *See* Eugene J. Koegh, *Tax Equity for the Self-Employed*, 47 A.B.A. J. 665, 665 (1961).

as professional associations or corporations, even if they possessed characteristics of limited liability.[43] Issued in 1961, ABA Formal Opinion 303 stated that while the Committee on Professional Ethics did not intend to remark on the wisdom of the practice of law as a professional association or corporation, it was a subject on which "the members of the Committee have grave doubts."[44] Stressing an asserted distinction between "professional liability" and "legal liability," the Committee stated that law firms could utilize a form of organization involving limited liability only if certain requirements were met:

- The attorney rendering the service remains personally responsible.
- The fact of limited liability is made clear to the client.
- Firm ownership is limited to attorneys.
- No fees are shared with non-attorneys.
- Management of the firm is exclusively by attorneys.[45]

Although ABA Formal Opinion 303 set forth important safeguards adopted by state supreme courts that later ruled that attorneys could practice in the LLC/LLP form, it should not be read as an approval of the practice of law in LLC or LLP forms today for several reasons. First, ethics opinions issued by the ABA (as well as the Model Rules and Model Code) are not binding on state supreme courts or state bar associations. The opinions and rules promulgated by the ABA are intended as advisories or models and are meaningless unless adopted by a state supreme court.[46] Second, ABA Formal Opinion 303 was issued long before the approval of the Model Rules of Professional Conduct. In 1961, most state bar members were governed by the Canons of Professional Ethics, drafted in 1908. The Canons had no rule similar to Model Rule 1.8(h) and contemplated the practice of law only in a general partnership form.[47] Although the successor to the Canons, the Model Code of Professional Responsibility, had a

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[43] *See* ABA Comm. on Professional Ethics, Formal Op. 303 (1961).

[44] *Id.*

[45] Joseph P McMonigle et al., *Navigating Partnership Perils*, A.B.A. J., Sept. 1996, at 84, 84.

[46] *See* THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY 13 (6th ed. 1995). "Courts often cite such opinions as evidence of the law, but they are not formally binding on any lawyer." *Id.*

[47] *See* CANONS OF PROFESSIONAL ETHICS Canon 33 (1908), *reprinted in* THOMAS D. MORGAN & RONALD D. ROTUNDA, 1998 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 616 (1998).

counterpart to the later Rule 1.8(h) of the Model Rules of Professional Conduct, the Model Code was not adopted by the ABA until 1969.[48] Therefore, in interpreting Formal Opinion 303 on the practice of law by corporations, it is important to note that at that date there was not yet a rule prohibiting an attorney from prospectively limiting his or her potential malpractice liability.

C. *The Rise of Limited Liability Companies and Partnerships*

The influx of LLC/LLP statutes throughout the nation has been attributed to a desire to "craft the perfect business entity, one that limits the liability of its owners to their investment while avoiding the taxation of business income at the entity level."[49] There appear to be as many approaches to the meaning of "limited liability" in the professional context as there are state LLC/LLP statutes. Most statutes allow the removal of the liability of a member or manager for the liabilities incurred by the LLC or its members.[50] Some statutes remove an attorney's malpractice liability for the tort of another member of the firm, provided that the attorney did not participate in or supervise the misconduct. These statutes may state that the LLC or LLP status will only protect attorneys from vicarious liability arising from tort claims involving the law firm's business dealings, leaving breach of contract claims uncovered.[51] Other statutes go further and limit the liability of the attorney for contractual liability, provided that the attorney did not expressly assume or give assurance for the contractual obligation.[52] Finally, some statutes allow the limitation of vicarious liability only for misconduct arising from "the provision of professional services," so that attorneys are still individually liable for the company's contractual obligations and for the tortious acts of other members.[53] This limited

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[48] *See* MORGAN & ROTUNDA, *supra* note 46, at 12.

[49] James C. Seiffert & Alan K. MacDonald, *The Kentucky Limited Liability Company Act: An Analysis of Applications in Its Second Year*, KY. BENCH & BAR, Winter 1996, at 20, 20.

[50] *See* Anthony E. Davis, *Limited Liability for Lawyers*, PROF. LAW. (ABA Ctr. for Prof'l Responsibility, Chicago, Ill.), Aug. 1995, at 1, 4. "While the statutes vary as to the scope of protections apparently promised by the new business structures, the proponents of these laws certainly intend that they work to limit the liabilities of lawyers who seek the shelter which they are supposed to offer." *Id.*

[51] *See* McMonigle et al., *supra* note 45, at 84.

[52] *See* Davis, *supra* note 50, at 4.

[53] *See* McMonigle et al., *supra* note 45, at 84. If attorneys remain vicariously liable for other associates' tortious acts, this "may include claims ranging from

liability is, however, subject to an important exception. No LLC/LLP statute will abrogate an attorney's personal liability for his or her own act, omission, or other malpractice, and several statutes expressly state that a professional remains liable for the misconduct of those under his or her supervision.[54] Further, several state courts allowing a firm to incorporate itself as an LLC or LLP have expressly noted that this new status "will not be permitted to protect the unfaithful or the unethical"[55] and will not allow attorneys to "be cloaked with an immunity inimical to legal order and public interest."[56]

Kentucky's LLC statute is similar to its counterparts in other states. It generally provides that a member or manager of a Kentucky LLC shall not be liable for torts, breaches of contracts, or acts and omissions of those associated with the LLC.[57] Exceptions to this limited liability include the provisions that a member or manager must still be personally responsible for the liabilities created by his or her own conduct and that a member or manager must remain liable to the LLC or its members for wanton or reckless misconduct.[58] Essentially, however, an attorney practicing within a Kentucky LLC would be free from vicarious liability for malpractice claims brought against other attorneys in the corporation.[59]

Because attorneys practicing in LLCs and LLPs remain personally liable for their own acts and omissions, Model Rule 1.8(h) is at least partially met. Attorneys cannot make agreements prospectively releasing themselves from personal liability incurred because of their own professional acts. However, the practice of law in partnerships or groups has a long tradition of vicarious liability Rule 1.8(h) is not expressly limited to "personal" liability Assuming Rule 1.8(h) impliedly prohibits the prospective limitation of vicarious as well as personal liability (or, if it does not, assuming case law imposing vicarious liability has not been overruled by Model Rule 1.8(h)), LLCs and LLPs may still violate the ethical guidelines adopted by state supreme courts.

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breach of fiduciary duty to sexual harassment." *Id.*

[54] *See, e.g.*, MONT. CODE ANN. § 35-8-1306(1) (1997). A member or an employee of a professional LLC will be liable for the misconduct of other employees if that employee is at fault in supervising them. *See id.*

[55] *In re* Florida Bar, 133 So. 2d 554, 556 (Fla. 1961).

[56] Street v Sugerman, 202 So. 2d 749, 751 (Fla. 1967).

[57] *See* K.R.S. § 275.150 (Michie Supp. 1996).

[58] *See* Seiffert & MacDonald, *supra* note 49, at 24. Some statutes expressly state that professionals in an LLC will remain personally liable for their own negligence. *See* Davis, *supra* note 50, at 4.

[59] *See* Ballantine & Rutledge, *supra* note 2, at 21.

II. VICARIOUS LIABILITY IN THE PRACTICE OF LAW

The interest of law firms in finding new ways to organize themselves is driven largely by attorneys' desire to reduce their vicarious liability[60] Even if state LLC/LLP statutes expressly permit the limitation of personal malpractice liability, the Model Rules, where adopted, expressly prohibit this.[61]

The desire to reduce the costs of vicarious liability is understandable, if not permissible. From 1982 to 1992, claims against members of Attorneys' Liability Assurance Society grew from 3.8 per 1000 attorneys each year to 11.3 per 1000 attorneys each year.[62] A 1992 survey reveals that during a two-year period, forty percent of studied firms were defending a malpractice claim.[63] Additionally, from 1982 to 1989, the average loss grew from $1.3 million to $7.9 million, indicating that "[t]he severity of the claims has risen dramatically"[64] The legal profession's fear of vicarious malpractice liability is well-founded, which explains the search for business entities capable of reducing these high costs.

A. The Tradition of Vicarious Liability

As a general rule, partners in a law firm are vicariously liable for the malpractice of any one partner.[65] Unlike individual and supervisory liability, vicarious liability is not incurred by an attorney because of his or her personal acts or omissions, either in the practice of law or the supervision of another. The vicarious liability of an attorney-shareholder in a firm may result from the tortious conduct and breaches of contractual or fiduciary duties of another attorney within a firm.[66]

Malpractice itself may be defined simply as an attorney's failure to meet his or her duty to a client by exercising "the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated."[67] Typically, vicarious liability can be

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[60] *See* Keatinge & Coleman, *Practice of Law*, *supra* note 8, at 32.

[61] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (1998).

[62] *See* Keatinge & Coleman, *Practice of Law*, *supra* note 8, at 6.

[63] *See id.*

[64] Rita Henley Jensen, *Malpractice Insurers' Bad Patch*, NAT'L L.J., Nov 9, 1992, at 3, 33 (basing statistics on a survey of 50 law firms between these dates).

[65] *See* Keatinge & Coleman, *Practice of Law*, *supra* note 8, at 19.

[66] *See id.* at 17-19.

[67] J.R. Kemper, Annotation, *Vicarious Liability of Attorney for Tort of Partner in Law Firm*, 70 A.L.R.3d 1298, 1300 (1976).

imposed on all members of a firm if one member's malpractice occurred as part of the firm's ordinary course of business or with another attorney's authority, even if other members had no actual knowledge of or participation in the misconduct giving rise to the malpractice claim.[68] Despite the expense of vicarious liability, as demonstrated by the abovementioned statistics, sound policies support it.

The Restatement of the Law Governing Lawyers imposes vicarious liability on law firms and their members "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 authority."[69] The comment to this rule explains that vicarious liability "helps to 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."[70] This approach follows a long tradition of vicarious liability within the legal profession.[71]

Kentucky courts have long held partners of law firms liable for each other's malpractice. In *Whitaker v. Kesler*,[72] a senior partner left the state without returning received money to a client. The court held that another member of the firm was liable to the client for the lost sum, even in the absence of evidence suggesting the other member had any knowledge of or participation in the senior partner's misconduct.[73] In Kentucky, the concept of "malpractice liability" embraces and includes vicarious liability for malpractice committed by members of a law firm.

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[68] *See generally* Blackmon v. Hale, 463 P.2d 418 (Cal. 1970); Model Bldg. & Loan Ass'n v. Reeves, 186 N.Y.S. 759 (Sup. Ct. 1921), *rev'd on other grounds*, 194 N.Y.S. 383 (App. Div. 1922), *rev'd*, 140 N.E. 715 (N.Y. 1923).

[69] RESTATEMENT OF THE LAW GOVERNING LAWYERS § 79 (Tentative Draft No. 8, 1997).

[70] *Id.* § 79 cmt. b.

[71] *But see* Michael A. Rosenhouse, Annotation, *Derivative Liability of Partner for Punitive Damages for Wrongful Act of Copartner*, 14 A.L.R.4th 1335 (1982).

> Every member of a partnership is liable for a tort committed by one of the members acting in the scope of the firm business, even if the other partners did not participate in, ratify, or have knowledge of the tort. But the rule with respect to punitive damages is different. Generally, the courts have held that a partner who did not authorize, participate in, or ratify the wrongful act of his copartner is not liable for punitive damages awarded in connection with the partner's wrongful act, although there is authority to the contrary, particularly in cases involving fraud.

Id. at 1336 (footnotes omitted).

[72] Whitaker v. Kesler, 3 Ky. Op. 236 (1869).

[73] *See id.* at 237

The Model Rules do not take a position on the vicarious liability of law firm partners. Rule 5.1 states that a lawyer is responsible for another lawyer's violation of the rules if:

> 1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
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> 2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.[74]

Rule 5.1 appears to impose vicarious liability on one member of a firm for another member's misconduct only if that member has supervisory authority over the member who is charged with misconduct or if he or she has actual knowledge of that misconduct. Comment 4 to the Rule states that "[p]artners of a private firm have at least indirect responsibility for all work being done by the firm."[75] Comment 6 further notes that apart from this Rule and Rule 8.4(a), a lawyer is generally not subject to discipline for the misconduct of another member or associate of his or her firm. The comment does, however, distinguish between liability for disciplinary purposes (with which the Rules are concerned) and civil or criminal liability for a colleague's misconduct, the latter being "beyond the scope of these Rules."[76] Although the Model Rules may excuse vicarious discipline for another attorney's violation of the Rules, they do not purport to excuse vicarious liability for civil malpractice claims, which is a matter left to state law As discussed above, the vicarious liability of a firm member for a malpractice claim brought against another member is deeply rooted in Kentucky[77]

B. Model Rule 1.8(h): A Prohibition of the Prospective Limitation of Liability

Vicarious malpractice liability, a creature of the common law imposed by individual state supreme courts in their regulation of the legal profession, is not expressly outlined in the Model Rules. By contrast, the Model Rules are quite clear on whether malpractice liability may be limited

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[74] MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1(c)(1)-(2) (1998).

[75] *Id.* Rule 5.1 cmt. 4.

[76] *Id.* Rule 5.1 cmt. 6.

[77] *See supra* notes 72-73 and accompanying text.

by an attorney before representation begins. Model Rule 1.8(h) states: "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 ..."[78]

The Rule has its origins in the Model Code of Professional Responsibility. Disciplinary Rule ("DR") 6-102 forbade any attorney from attempting "to exonerate himself from or limit his liability to his client for his personal malpractice."[79] The Code reinforced this disciplinary rule with Ethical Consideration ("EC") 6-6. Though not binding, that provision cautioned attorneys that "[a] lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so."[80]

Concededly, the Model Code considered ABA Formal Opinion 303[81] and, as an ethical consideration, noted that an attorney practicing in a professional legal corporation may limit his or her own liability for other members' malpractice, "but only to the extent permitted by law ..."[82] Because almost all state supreme courts, and not state legislatures, are vested with the authority to regulate the practice of law, EC 6-6 permitted the limitation of vicarious malpractice liability of attorneys practicing in professional corporations only to the extent those courts chose to allow the limitation.[83] More importantly, the more recent and widely accepted Model Rules of Professional Conduct include no such caveat. Rule 1.8(h) disallows the

[78] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (1998). *See also* CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 3-400(A) (West 1996) (stating that a member shall not "[c]ontract with a client prospectively limiting the member's liability to the client for the member's professional malpractice"); DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (Michie 1998) (adopting language similar to that of Model Rule 1.8(h)); N.Y. JUD. LAW § 1200.31 [DR 6-102] (McKinney Supp. 1998).

[79] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-102(A) (1980).

[80] *Id.* EC 6-6.

[81] *See supra* notes 43-45 and accompanying text.

[82] MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-6 (1980) (footnote omitted).

[83] Reiner v. Kelley, 457 N.E.2d 946, 950-51 (Ohio Ct. App. 1983) (imposing vicarious liability on members of a firm whose partner had violated EC 6-6, where a state statute and the state supreme court required that an attorney who is a stockholder in a legal professional association guarantee financial responsibility for the association's breach of any duty, including the duty of the association to pay its debts).

prospective limitation of malpractice liability–except where permitted by law and when the client is independently represented in making such an agreement–without express or implied regard to whether an attorney practices in corporate or noncorporate form.[84]

EC 6-6 of the Model Code does, however, provide an intriguing parallel with the traditional prejudice against the practice of law in corporate form. As discussed above,[85] early decisions forbade, or at least discouraged, the incorporation of law firms due to concerns regarding the attorney-client relationship. These courts stated that an attorney owes a special duty of loyalty to a client and shares with the client a unique relationship of trust. By choosing a corporate form, the courts feared an attorney's loyalty and primary relationship would belong to a faceless corporation rather than to the client. Likewise, EC 6-6 arose out of concern for the attorney-client relationship, taking the approach that a limitation of malpractice liability is necessary only when an attorney does not intend or is incapable of providing loyal and competent representation to a client.[86]

Model Rule 1.8(h) has been applied by the supreme courts of several states in disciplinary proceedings, resulting in consequences ranging from public reprimands to six-month suspensions.[87] Its predecessor, DR 6-102, was utilized fairly recently in Kentucky[88] *Kentucky Bar Ass'n v.*

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[84] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (1998). Model Rule 1.8(h) also prohibits an attorney from obtaining a release from malpractice liability after the malpractice has been committed unless the attorney advises the client in writing that independent representation is appropriate. Releases from malpractice liability are distinguished from prospective releases which are prohibited unless the client does in fact have independent counsel. The ability for an attorney to obtain this retrospective release may, however, be limited by the courts. *See, e.g.*, Marshall v. Higginson, 813 P.2d 1275 (Wash. Ct. App. 1991) (holding that although the attorney fulfilled the obligations imposed by the Model Rules in advising a client to obtain independent counsel in signing a release for malpractice liability, the agreement violated public policy and was unenforceable because the attorney insinuated that she would not provide testimony the client needed unless the release was signed).

[85] *See supra* notes 24-37 and accompanying text.

[86] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-6 (1980).

[87] *See generally In re* Blackwelder, 615 N.E.2d 106 (Ind. 1993); *In re* Cissna, 444 N.E.2d 851 (Ind. 1983); Committee on Legal Ethics of the W Va. State Bar v. Cometti, 430 S.E.2d 320 (W Va. 1993).

[88] Model Rule 1.8(h) was later adopted by the Kentucky Supreme Court. *See* KY. SUP CT. R. 3.130(1.8).

Vincent[89] involved the disbarment of an attorney for, among other violations, an attempt to limit his malpractice liability [90] Just as the implied limitation on malpractice liability present in the LLC/LLP form may violate Model Rule 1.8(h), other actions by attorneys may also be impliedly prohibited by the rule.[91]

As one commentator has noted, both DR 6-101 of the Model Code and Rule 1.8(h) of the Model Rules are important in the consideration of whether a firm may adopt a limited liability status because these rules "to a greater or lesser degree *expressly* preclude limitation of liability by lawyers from malpractice claims. The question, therefore, is whether this preclusion extends to the vicarious liability for the acts of others from which the new statutes are intended to protect lawyers–among other professionals."[92]

III. THE RESOLUTION OF THE LLC/LLP ISSUE IN OTHER STATES

Although some state statutes expressly prohibit the use of an LLC or LLP for the practice of law while other statutes expressly allow it,[93] the statutory language is meaningless without the approval of the state's supreme court. Among those state supreme courts which have addressed the issue, a substantial number appear to have approved the practice of law in some limited liability form.[94] However, these courts leave unanswered a variety of Model Rule 1.8(h) concerns arising from the use of such an entity by a law firm. Also, many of the decisions add important

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[89] Kentucky Bar Ass'n v Vincent, 819 S.W.2d 313 (Ky. 1991) (sanctioning attorney for attempting to limit his liability to a client for malpractice as well as attempting to obtain a client's promise not to file a complaint with the Kentucky Bar Association).

[90] *See id.* at 314.

[91] *See* Joanne Pitulla, *Please Release Me: There is No Easy Way Around Malpractice Liability*, A.B.A. J., Aug. 1996, at 92, 92 (commenting that Model Rule 1.8(h) has been used to prevent coercive behavior by attorneys, such as "refusing to forward clients' files until a release of all malpractice claims has been signed"); Joanne Pitulla, *Taking Note: Securing Fees by Confessions of Judgment*, A.B.A. J., Oct. 1993, at 117, 117 (commenting that Model Rule 1.8(h) may prevent attorneys from seeking confessions of judgment from clients to secure fees before representation begins).

[92] Davis, *supra* note 50, at 4.

[93] *See* Keatinge & Coleman, *Practice of Law*, *supra* note 8, at 39.

[94] *See infra* notes 95-108 and accompanying text.

requirements to the statutory authorization for a firm to be permitted to make the conversion.

One early approval by a state supreme court of the practice of law in a form permitting limited liability was offered by the Rhode Island Supreme Court in *In re Rhode Island Bar Ass'n.*[95] The manner in which the issue arose was to be repeated in other states: the state bar association filed a petition with the state supreme court, asking for express, affirmative approval of the practice of law in a corporate form as allowed under the state's professional service corporation law.[96] While the petitioners freely admitted that a driving force behind the request was the prospect of limiting an attorney's liability for torts committed by associates of his or her firm, they also cited the need for other benefits conferred by the state's professional service corporation law.[97] These benefits included "tax-qualified pension and profit-sharing plans, tax-free death benefits for employees' beneficiaries and tax-free group life insurance[,] continuity of life of the corporate entity, and the ease of transferring ownership interests."[98] The court briefly acknowledged the traditional argument against the limited liability forms, that the attorney-client relationship would be compromised,[99] and reaffirmed its own authority to either grant or deny approval.[100] The court granted the petitioners' request, insisting there would be no detrimental effect on the attorney-client relationship and suggesting that the conversion from vicarious to personal liability of attorneys was not terribly significant.[101] In fact, the court stated that

> [t]he only substantial change made by the act from practice of law in partnership form is that there will be limited liability in that the lawyer-shareholders who do not participate in the rendering of the services out of which an actionable wrong arises will be free from personal liability and will not be responsible for the debts of the corporation.[102]

The Rhode Island Supreme Court clearly stated that its decision did not sanction the limitation of an attorney's individual liability.[103] Additionally,

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[95] *In re* Rhode Island Bar Ass'n, 263 A.2d 692 (R.I. 1970).
[96] *See id.* at 693.
[97] *See id.* at 695.
[98] *Id.* (footnote omitted).
[99] *See id.* at 696.
[100] *See id.* at 694.
[101] *See id.* at 696-97.
[102] *Id.*
[103] *See id.* at 697.

it asserted that the state's professional service corporation law contained safeguards to protect, if not preserve, clients' rights to vicarious liability.[104] The act required mandatory liability insurance and the court insisted this would ensure that "the clients served by the corporation and the members of the public who otherwise deal with the corporation will not suffer by reason of such limited liability."[105] Thus, while a client would no longer be able to bring a malpractice claim against the associate of an attorney who behaved improperly in representation, the offending attorney's insurance coverage would be capable of fully satisfying any judgment obtained by the client. The court found another safeguard in the fact that the corporate firm itself would remain liable for malpractice claims against its members "to the extent of the corporate assets."[106]

The Rhode Island Supreme Court's resolution of the limited liability problem left at least two concerns unaddressed. First, neither the promise of sufficient insurance coverage nor the liability of the entity itself furthers the purpose and policy of professional vicarious liability. As discussed in the Restatement of the Law Governing Lawyers, vicarious liability of firm associates serves to ensure that clients receive the best possible legal services.[107] Presumably, the fear of being sued for the misprisions of one's associates prompts attorneys to expect and encourage colleagues to avoid acts which may give rise to legal malpractice. A sort of firm-wide "honor code," involving preventive measures rather than whistle-blowing, is effectuated. An attorney who knows that the firm's insurance will protect him or her from vicarious liability may be far less likely to follow this honor code.

Second, the Rhode Island Supreme Court's assurance that the corporation itself will be liable for any member's malpractice to the extent of its corporate assets offers little solace to the client who is harmed to a degree surpassing those assets. If the corporate law firm is able to liquidate its assets before a claim for serious malpractice is brought, a client will receive no protection from this so-called safeguard.

Similar criticisms may be made against the treatment of this issue by other state supreme courts. Alabama, Colorado, Connecticut, the District of Columbia, Kansas, Louisiana, Michigan, New York, Texas, and Virginia currently allow the practice of law in the limited liability form.[108] As one

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[104] *See id.*

[105] *Id.*

[106] *Id.*

[107] *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 79 cmt. b (Tentative Draft No. 8, 1997).

[108] *See* Robert R. Keatinge & George W. Coleman, *Professional Practices, in* PLANNING AND USING LIMITED LIABILITY VEHICLES: LIMITED LIABILITY PART-

attorney has noted, however, in states in which supreme courts have spoken affirmatively on the issue, "none of these opinions addresses the language of Model Rule 1.8(h) requiring that, in addition to being permissible by law, a client's consent to prior limitation of liability requires that *the client be independently represented*."[109]

Initially, the Supreme Court of Georgia held that the use of the limited liability form by attorneys is impermissible.[110] The issue was first considered by the Court of Appeals of Georgia. In *Zagoria v. DuBose Enterprises, Inc.*,[111] the Georgia Court of Appeals considered the vicarious liability of an attorney/shareholder of a professional legal corporation for another attorney/shareholder's malpractice.[112] Attorneys Zagoria and Stoner were shareholders of a professional corporation.[113] Georgia's Professional Corporation Act, by reference to the Business Corporation Code, stated that shareholders are not personally liable for the debts of the corporation.[114] In connection with a real estate closing, Zagoria issued checks to a client which were dishonored due to insufficient funds in the corporate account. Stoner had no involvement in these acts.[115] The Court of Appeals of Georgia held that vicarious liability would not be imposed,[116] but the Supreme Court of Georgia overturned the decision.[117]

NERSHIPS, LIMITED LIABILITY COMPANIES, LIMITED PARTNERSHIPS, AND LIMITED LIABILITY LIMITED PARTNERSHIPS 203, 233 (A.L.I.-A.B.A. Comm. on Continuing Prof'l Educ. Q243, 1996); *see also* Keatinge & Coleman, *Practice of Law*, *supra* note 8, at 40 n.192 (remarking that the District of Columbia opinion is important because many national firms maintain offices in Washington, D.C.).

[109] Davis, *supra* note 50, at 5.

[110] *See* First Bank & Trust Co. v. Zagoria, 302 S.E.2d 674 (Ga. 1983), *overruled by* Henderson v. HSI Fin. Servs., Inc., 471 S.E.2d 885 (Ga. 1996).

[111] Zagoria v. DuBose Enters., Inc., 296 S.E.2d 353 (Ga. Ct. App. 1982), *rev'd sub nom.* First Bank & Trust Co. v. Zagoria, 302 S.E.2d 674 (Ga. 1983), *overruled by* Henderson v. HSI Fin. Servs., Inc., 471 S.E.2d 885 (Ga. 1996).

[112] *See id.* at 355.

[113] *See id.*

[114] *See id.* Georgia's Business Corporation Code contains this provision, but the state's Professional Corporation Act states that shareholders of professional corporations are under all obligations and liabilities shareholders in for-profit corporations organized under the Code. *See id.* These provisions are currently codified at sections 14-2-622 and 14-7-3 of the Code of Georgia Annotated. *See* GA. CODE ANN. §§ 14-2-622, 14-7-3 (Michie 1994).

[115] *See Zagoria*, 296 S.E.2d at 355.

[116] *See id.* at 356.

[117] *See* First Bank & Trust Co. v. Zagoria, 302 S.E.2d 674 (Ga. 1983), *overruled by* Henderson v. HSI Fin. Servs., Inc., 471 S.E.2d 885 (Ga. 1996).

The Georgia Court of Appeals maintained that Stoner was not subject to vicarious liability because he was not the attorney in the attorney/client transaction which created the liability.[118] The court relied in part on EC 6-6 of the Model Code of Professional Responsibility. EC 6-6 states that while an attorney should not seek to limit his or her individual malpractice liability to a client, an attorney who is a stockholder in or associated with a professional legal corporation may limit that liability to the extent permitted by law.[119] The court stated:

> [U]nder the Georgia Professional Corporation Act, the personal responsibility of the attorney to his client is unchanged. However, attorney-shareholders of a professional corporation who do not participate in the rendering of the services out of which a claim arises will be free from personal liability for that claim, should it mature.[120]

The Georgia Supreme Court, in overruling the court of appeals, stated that the enactment of the professional corporation statute was a "useful and constitutional act" by the legislature and acknowledged the various benefits created by such a law.[121] However, it emphasized that the power to regulate the legal profession was exclusively within its jurisdiction and that such a statute "cannot extend to the regulation of the law practice so as to impose a limitation of liability for acts of malpractice or obligations incurred because of a breach of a duty to a client."[122] Indeed, the court noted that interpretation of the statute was unnecessary, since any attempt by the legislature to regulate the legal profession presented a separation of powers problem.[123] The court noted that EC 6-6 is merely an ethical consideration, not a rule which "automatically insulates each shareholder of a professional corporation from liability for the malpractice of the other."[124]

Not unlike the early cases which distinguished the legal profession from other trades or businesses, the Georgia Supreme Court asserted that

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[118] *Zagoria*, 296 S.E.2d at 355.

[119] *See id.* at 356 (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-6).

[120] *Id.*

[121] *First Bank & Trust Co.*, 302 S.E.2d at 675 (citing benefits such as ease in acquiring and transferring property and continuity in existence).

[122] *Id.*

[123] *See id.*

[124] *Id.* at 676.

the practice of law was not a mere profit-seeking or commercial undertaking.[125] Instead, "a profession is a calling which demands adherence to the public interest as the foremost obligation of the practitioner."[126] In recognition of the usefulness of vicarious liability in ensuring the public interest in the highest quality legal services, the court stated that the attorney-client relationship as well as an attorney's relationship to his or her firm was unique and important:

> When a client engages the services of a lawyer the client has the right to expect the fidelity of other members of the firm. It is inappropriate for the lawyer to be able to play hide-and-seek in the shadows and folds of the corporate veil and thus escape the responsibilities of professionalism.[127]

The abrogation of vicarious malpractice liability under the limited liability business form undermines a client's certainty that an attorney, as well as his or her firm, will meet professional obligations. Therefore, the court held that regardless of the form in which attorneys practice, they would be held liable for their individual "professional misdeeds" as well as for those of other firm members.[128] Underlying this holding was the policy against allowing "a corporate veil to hang from the cornices of professional corporations which engage in the law practice."[129]

Unfortunately, Georgia's adherence to this policy was short-lived. In 1996, *Zagoria* was overturned by the Georgia Supreme Court's ruling in *Henderson v. HSI Financial Services, Inc.*[130] *Henderson* involved a law firm organized as a professional corporation which held a contract with HSI, a financial services corporation, to collect its delinquent hospital accounts.[131] The firm became in arrears in making payments due HSI and breached a promissory note for that indebtedness. HSI sued the incorporated firm and its members individually.[132]

Using *Zagoria*, the Court of Appeals of Georgia affirmed a grant of summary judgment to HSI on its claim against the individual attorneys in the firm for joint and several liability.[133] The Georgia Supreme Court

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[125] *See id.* at 675.
[126] *Id.*
[127] *Id.*
[128] *See id.* at 676.
[129] *Id.*
[130] Henderson v. HSI Fin. Servs., Inc., 471 S.E.2d 885 (Ga. 1996).
[131] *See id.* at 886.
[132] *See id.*
[133] *See id.*

reversed, overruling *Zagoria* "to the extent it states that this court, rather than the legislative enabling act, determines the ability of lawyers to insulate themselves from personal liability for the acts of other shareholders in their professional corporation."[134] Not only did it opt to embrace the statutory grant of limited liability for law firms choosing it, the court also placed a severe limit on its own power to regulate the legal profession.[135]

While acknowledging the court's power to govern whether a professional corporation could be used by a law firm, the *Henderson* court stated that the consequences of such a status, once approved, were within the legislature's jurisdiction.[136] *Zagoria* did not deny law firms the ability to organize themselves as professional corporations, but held that firms could not avail themselves of the limited liability status usually accompanying such a business form.[137] *Henderson* held that attorneys could continue to use this form as well as enjoy the "same rights and responsibilities as shareholders in other professional corporations."[138]

In considering the ethical ramifications of its decision, the Georgia Supreme Court relied on the ABA's approval in Formal Opinion 303 of the practice of law under limited malpractice liability to clients, provided that an attorney performing the services giving rise to a malpractice claim remained personally liable.[139] Thus, the court reasoned, "permitting lawyers to practice in a corporate entity is consistent with the legal profession's ethical standards."[140]

Prior to the overruling of *Zagoria*, several other state courts favorably cited the case in preserving vicarious liability within the legal profession. For example, in *Beane v. Paulsen*,[141] a California appellate court noted that for the malpractice of one member of their professionally incorporated law firm, two other members had "joint and several liability to the former client of their corporation as guarantors of [the firm's] financial responsibility for malpractice."[142] In *State ex rel. Wise, Childs & Rice Co., L.P.A. v.*

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[134] *Id.*

[135] *See id.*

[136] *See id.*

[137] *See* First Bank & Trust Co. v Zagoria, 302 S.E.2d 674, 676 (Ga. 1983), *overruled by* Henderson v. HSI Fin. Servs., Inc., 471 S.E.2d 885 (Ga. 1996).

[138] *Henderson*, 471 S.E.2d at 886.

[139] *See id.* at 887; *see also supra* notes 43-45 and accompanying text.

[140] *Henderson*, 471 S.E.2d at 887

[141] Beane v. Paulsen, 26 Cal. Rptr. 2d 486 (Ct. App. 1993).

[142] *Id.* at 490.

Basinger,[143] an Ohio appellate court considered the vicarious liability of attorneys practicing as a legal professional corporation.[144] Although the court stated that a legal professional association was proper under Ohio law, attorneys were bound by a "duty upon a member of a legal professional association to guarantee the financial responsibility of the association for its breach of any duty."[145] Although a "lack of professionalism" was not at issue in the case, the court cited liberally from *Zagoria* "for the express purpose of indicating the continuing personal responsibility of attorneys who are members of legal professional associations."[146] Thus far, the overruling of *Zagoria* has not led either the California or Ohio courts to adopt opposite approaches.

An example of an early and clear condemnation of the use of professional corporations to limit attorneys' vicarious liability appears in *In re Bar Ass'n of Hawaii*.[147] As in Kentucky, the issue came before the Hawaii Supreme Court through a bar association petition. That petition sought approval of the incorporation of attorneys under Hawaii's Professional Corporation Law, which provided limited vicarious liability to shareholders.[148] Although approving of the bar association's desire to qualify for the federal tax advantages provided for such entities, the court refused to approve the portion of the proposed rule allowing attorneys to enjoy limited liability. The court cited EC 6-6 of the Model Code of Professional Responsibility as disallowing limited liability within the attorney-client relationship.[149] If permitted, such a limitation "would not provide adequate protection to a client's claims against a law corporation."[150]

IV. EVALUATION OF KENTUCKY'S REFUSAL TO PERMIT LAW FIRMS TO ADOPT A LIMITED LIABILITY STATUS

For several reasons, the Kentucky Supreme Court's refusal to grant approval for law firms to incorporate as LLCs and LLPs was a well-

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[143] State *ex rel.* Wise, Childs & Rice Co., L.P.A. v. Basinger, 561 N.E.2d 559 (Ohio Ct. App. 1988).

[144] *See id.* at 561.

[145] *Id.*

[146] *Id.* at 562.

[147] *In re* Bar Ass'n of Haw., 516 P.2d 1267 (Haw. 1973).

[148] *See id.* at 1268. Hawaii's Professional Corporation Law was repealed in 1987. The Professional Corporation Act is now codified at section 415A of the Hawaii Revised Statutes. *See* HAW. REV. STAT. ANN. § 415A (Michie 1993).

[149] *See In re Bar Ass'n of Haw.*, 516 P.2d at 1268.

[150] *Id.*

reasoned and sound result. First, the court's ruling was consistent with the Kentucky Bar Association's ("KBA") earlier disposition toward attorneys' responsibilities to their clients. Although written in response to the issue of attorneys using a firm name insinuating a partnership when not actually practicing as one, a KBA opinion stated that "there can not be such a thing as a 'limited partnership' as far as responsibilities and liabilities are concerned."[151] This is because "the public is inclined to believe that the entire mental and legal resources of the firm are available, if need be."[152]

The public has a right to know that an attorney will provide competent representation guaranteed by the entire firm in which that attorney practices. Vicarious liability is an important tool in providing this assurance. First, vicarious liability serves a preventive purpose as a powerful incentive for attorneys within a firm to encourage and insist that their colleagues adhere to professional guidelines.[153] Second, it provides a remedial device. Should a client's malpractice claim be found valid, the client has every reason to expect that his or her full judgment will be paid, regardless of the insolvency of the attorney who actually committed the malpractice or of the extent of corporate assets held by the firm.[154]

More importantly, regardless of the merit of vicarious liability within the legal profession, the limitation of this liability is in discord with the ethical guidelines adopted by the Kentucky Supreme Court.[155] The language of Rule 1.8(h) of the Model Rules implicitly forbids the limitation of an attorney's individual or vicarious liability to a client for malpractice.[156] The Rule does not state that an attorney is precluded from prospectively limiting only his or her "individual liability." It does not apply only to the lawyer's liability to his or her personal client, but to "a client for malpractice."[157] Certainly, Rule 1.8(h) allows such a prospective limitation if the client is independently represented in making the agreement,[158] but this requirement will not be met by the mere addition of the words "Limited Liability Corporation" to a firm's letterhead or even a notice of the limited liability status in a retainer agreement. The limited liability status should not be used to indirectly perform an act the Kentucky Supreme Court has disallowed attorneys to directly accomplish.

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[151] *Ethics Opinion No. 62*, KY. B. J., Jan. 1974, at 24, 24.

[152] *Id.*

[153] *See supra* notes 107-08 and accompanying text.

[154] *See supra* notes 103-06 and accompanying text.

[155] *See supra* notes 3-4 and accompanying text.

[156] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (1998).

[157] *Id.*

[158] *See id.*

Until adopted by the Kentucky Supreme Court, the ABA's pronouncements on the issue are not controlling.[159] To whatever extent they are considered, the ABA Opinions are far less persuasive than the ethical opinions promulgated by the KBA, which can take in-depth account of the needs and expectations of Kentucky attorneys. The power to regulate the legal profession in Kentucky has long been held by the Kentucky Supreme Court.[160] Blind adherence to the ABA's pronouncements is inconsistent with this grant of regulatory power to a state judicial entity

There are alternatives to Kentucky's current refusal to permit the practice of law in limited liability form. Several procedures may lessen, but not eliminate, ethical concerns. First, if limited liability became available to law firms, notice procedures would be not only appropriate but necessary [161] Model Rule 1.4(b) requires attorneys to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[162] It is uncertain what sort of explanation would be required to allow a client to make a well-informed choice about the implications of retaining a limited liability firm.[163] Additionally, Model Rule 7.1 forbids a lawyer from making "a false or misleading communication about the lawyer or the lawyer's services,"[164] and Model Rule 7.5 extends this prohibition to firm names and letterheads.[165] Several states have held that the designation of "limited liability partnership" or "limited liability company" will meet the notice requirement, but others require "express and specific notice to every client."[166] However, a notation of a firm's corporate status on its stationery does not meet the Model Rule 1.8(h) requirement that a client be independently represented before agreeing to an attorney's prospective limitation of liability [167]

Another attempt to resolve the limitation of liability problem under professional ethics is to require law firms choosing this status to carry

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[159] *See supra* note 46 and accompanying text.

[160] *See supra* notes 19-20 and accompanying text.

[161] *See* Davis, *supra* note 50, at 6.

[162] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1998).

[163] *See* Davis, *supra* note 50, at 6 ("[I]t may turn out that unless the limitation is expressly set out, explained, and consented to in each and every engagement letter, limited liability status may simply not work.").

[164] MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1998).

[165] *See id.* Rule 7.5(a).

[166] Davis, *supra* note 50, at 6. Some cases state that express waivers must be executed by clients before attorneys may enforce the liability limitations. *See id.*

[167] *See id.*

insurance in order to satisfy clients' malpractice claims. This "solution" has been utilized in several states, including Rhode Island.[168] Some statutes make this heightened insurance protection a requirement to obtain a complete limitation of vicarious liability, while others require insurance only to cover the firm's general obligations, but not its liability for professional misconduct.[169] However, required insurance may not serve anyone's interests in the long run. As more firms organize themselves under limited liability statutes, insurance companies will become more concerned about the risk of insuring the firms.[170] Law firms may ultimately outsmart themselves should insurance companies find they must provide protection against more expensive liability than they anticipated: "In turn, this is likely to make insurers much more interested in firms' financial status. Some firms may regard that intrusiveness as an acceptable hidden cost of limited liability, but all should be aware of this as a potential issue."[171]

Another unsatisfactory result of the imposition of required insurance for limited liability firms is a potential heightened cost of insurance.[172] Assuming a great number of Kentucky law firms would opt for this status and assuming insurance companies would raise their premiums for coverage of limited liability firms, the average cost of legal representation may rise. Finally, it should be noted that it may be possible for law firms to practice as an LLC or LLP if they desire to do so because of advantages unrelated to limited liability. In at least one state, law firms have been authorized to incorporate themselves in ways to accomplish these goals, provided they do not avail themselves of limited liability.[173]

V. CONCLUSION

The Kentucky Supreme Court's resolution of the limited liability problem was an appropriate response to important ethical issues. Vicarious

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[168] *See In re* Rhode Island Bar Ass'n, 263 A.2d 692, 697 (R.I. 1970) ("Because of the requirement of mandatory liability insurance, the clients served by the corporation and the members of the public who otherwise deal with the corporation will not suffer by reason of such limited liability.").

[169] *See* Keatinge & Coleman, *Practice of Law*, *supra* note 8, at 26.

[170] *See* Davis, *supra* note 50, at 7.

[171] *Id.*

[172] *See id.*

[173] *See In re* Bar Ass'n of Haw., 516 P.2d 1267, 1268 (Haw. 1973) (rejecting an alteration of attorneys' liability status due to a belief "that its adoption would not provide adequate protection to a client's claims against a law corporation").

liability plays an invaluable and long-standing role in the state's legal profession, and its limitation would jeopardize the public's interest in ensuring that its attorneys remain fully accountable, responsible, and loyal to their clients. Despite an attempt by other states to sidestep the conflict, Model Rule 1.8(h) makes clear that attorneys may not seek to limit their malpractice liability before beginning representation unless the client's consent is given while represented by independent counsel. The Rule reflects the importance of preserving attorneys' accountability for their professional misconduct. Although several states have attempted to lessen the negative impact of the limited liability status by requiring notice and insurance, these methods do little to protect the letter and spirit of Model Rule 1.8(h).