# Articles

# 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

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## INTRODUCTION

### *Preliminary Comments*

Until the early 1960s, courts and legislatures did not permit lawyers to practice law in corporate form.[1] The principal reasons for this prohibition were that (1) the lawyer-client relationship is a personal one, and a corporation cannot have personal attributes; (2) if a corporation employs the lawyer, his first duty is to his employer, not to his client; (3) an intermediary should not be permitted to intervene between a lawyer and his client; and (4) lawyers might improperly insulate themselves from liability in malpractice claims.[2]

In the early 1960s, however, the states began to permit lawyers, as well as other professionals, to practice in corporate form.[3] Certain tax advan-

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1. "[I]t is obvious that so far as members of the bar are concerned the idea of the practice of law within a corporate structure is an emotional thing. It is much like 'cats, olives and Roosevelt;' it is either enthusiastically embraced or resolutely rejected." State ex rel. Green v. Brown, 173 Ohio St. 114, 115, 180 N.E.2d 157, 158 (1962).

2. Jones, *The Professional Corporation*, 27 FORDHAM L. REV. 353, 354-355 (1958).

3. *See generally* Comment, *Shareholder Liability in Professional Legal Corporations: A Survey of the States*, 47 U. PITT. L. REV. 817 (1986); Comment, *Accident and Malpractice Liability of Professional Corporation Shareholders*, 10 MICH. J. L. REF. 364 (1977); Jones, *supra* note 2; Note, *Professional Legal Corporations: Limited or Unlimited Liability for Shareholders in Missouri after First Bank & Trust Co. v. Zagoria?*, 28 ST. LOUIS U.L.J. 297 (1984); Philipps, McNider III, Riley, *Origins of Tax Law: The History of the Personal Service Corporation*, 40 WASH. & LEE L. REV. 64 (1978); Comment, *Corporation Law: Nontax Aspects of Professional Corporations*, 18 WASHBURN L. REV. 64 (1978); Chapman, *The Future of Personal Service Corporations*, 24 ARIZ. L. REV. 503 (1982); Note, *Attorneys—Professional Corporation Acts—Inherent Judicial Power to Prohibit Corporate Practice of Law*, 48 IOWA L. REV. 490 (1963); Hayes, *The Professional Corporation: An Over-*

tages, such as qualified retirement plans, provided the impetus for this change. Each state, through its legislature or supreme court, adopted laws or rules, which, subject to a multitude of restrictions, permitted lawyers to practice law in corporate form. In the early 1980s, Congress revised the tax code to eliminate most of these tax advantages.[4]

There is, nevertheless, still one significant advantage in permitting lawyers to incorporate. The shareholders, as lawyer-owners, may be able to limit their personal, financial liability for corporate obligations.[5] The principal purpose of this Article is to address a variety of issues related to the question of whether lawyer-owners should be able to limit, by incorporation, liability for their own and their colleague's professional negligence.

There is no consensus as to the appropriate answer to these questions. Legislatures and courts have articulated different resolutions. Frequently, the rules are ambiguously worded. Moreover, to compound the problem, courts, insisting on an inherent and exclusive authority to regulate lawyers, have readily rejected various legislative solutions.[6] In some instances, they have even interpreted their own rules gingerly.[7]

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*view*, 12 UNIV. RICH. L. REV. 323 (1978); Note, *Shareholder Liability in Ohio, Confounding Attorneys and Others*, 17 AKRON L. REV. 143 (1983); Arnold, *Incorporation of Professionals in Ohio: Past, Present, and Future*, 15 AKRON L. REV. 191 (1981); Arnold, *Professional Corporations in Oklahoma*, 17 TULSA L.J. 1 (1981); Note, *Recent Legislation—Legal Profession-The Ethics of Practice Under Pennsylvania's Professional Association Act*, 110 U. PA. L. REV. 465 (1962); Note, *Taxes-Professional Associations-Not Permissible for Lawyers Under Present Ohio Court Rules*, 31 U. CIN. L. REV. 341 (1962); Note, *The New Ohio Professional Associations Act and the Preclusion of Corporations from the Practice of Law*, 24 OHIO ST. L.J. 685 (1963); P. AITELLI AND D. DIETRICH, RESEARCH GUIDE TO PROFESSIONAL CORPORATION LAW (1985); Paas, *Professional Corporations and Attorney-Shareholders: The Decline of Limited Liability*, 1986 J. CORP. L. 371; Rotgin, *The Professional Corporation for Lawyers*, 52 N.Y. ST. B.J. 634 (1980).

4. *See* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981); Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982).

5. "The continual increase in legal malpractice claims and correlatively high insurance premiums make the corporate benefit of limited liability even more appealing. However, this benefit of the corporate form is usually not available to attorneys, or, if available, only within specific confines." R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 34, at 63 (2d Ed. 1981).

6. The leading cases insisting that the judiciary has the exclusive power to design regulations to admit attorneys, thereby giving it authority to make rules with respect to incorporation and liability, are South High Development Ltd. v. Weiner, Lippe & Cromley Co., 4 Ohio St. 3d 1, 445 N.E.2d 1106 (1983); State ex rel. Green v. Brown, 173 Ohio St. 114, 180 N.E.2d 157 (1962); First Bank & Trust Co. v. Zagoria, 250 Ga. 844, 302 S.E.2d 674 (1983). In the latter case, the court wrote:

> 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.

*Zagoria*, 250 Ga. at 846, 302 S.E.2d at 675. *See also* In re Florida Bar, 133 S.2d 554 (Fl. Sup. Ct. 1961); In re New Hampshire Bar Ass'n., 266 A.2d 853 (N.H. Sup. Ct. 1970); In re Rhode Island Bar Ass'n., 263 A.2d 692 (R.I. Sup. Ct. 1970); In re Bar Ass'n of Hawaii, 55 Hawaii 121, 124, 516 P.2d 1267 (1973).

One commentator, after reviewing these cases, concluded that "the courts have no adequate reason for overriding a legislative determination that limited liability is appropriate." Paas, *supra* note 3, at 372. *See also* Note, *Professional Corporations-Shareholder Liability in Ohio: Confounding Attorneys and Others*, 48 IOWA L. REV. 490 (1963); Note, *Attorneys-Professional Corporation Acts-Inherent Judicial Power to Prohibit Corporate Practice of Law*, 17 AKRON L. REV. 143 (1983).

7. In *Zagoria*, *supra* note 6, the court cautiously interpreted Ethical Consideration 6-6 of the Rules and Regulations for the Organization and Government of the State Bar of Georgia.

*American Bar Association—Ethics*

Before examining the statutory patterns, it should be noted that the American Bar Association (ABA), and its committees, have equivocated on these issues. In Formal Opinion 303, the ABA Committee on Ethics and Professional Responsibility addressed the issue of limited liability.[8] It concluded that lawyers could engage in the practice of law in a professional corporation if the following conditions were met:

1. The lawyer or lawyers rendering the legal services to the client must be personally responsible to the client.

2. Restrictions on liability as to other lawyers in the organization must be made apparent to the client.

Today, there are few problems with respect to the second condition. Whatever the concerns twenty-five years ago, they have been alleviated by the passage of time and general business familiarity. Most persons know that incorporation entails, on the whole, limited liability for the corporation's owners. This is an ordinary fact of the business world. The only question, therefore, is how effectively to make the fact of incorporation known to persons. Ethical Consideration 2-11 suggests that if lawyers are going to organize as a professional corporation, this fact "should be clearly designated as such."[9]

In reality, providing notice of incorporation is not difficult. If the firm consistently labels itself in all its communications as a professional corporation, or as a professional association, or merely as a "P.C." or "P.A.," this should be adequate today. Most persons will recognize the significance of these labels, and even if they don't, it is fair to conclude that they have been appropriately warned. As with "Inc." or "Ltd.," "P.C." has become a common symbol in the modern business world.

In the twenty-five years since Formal Opinion 303 took a permissive stance with respect to professional corporations, they have become commonplace. Far more intricate forms of business organizations, with their respective ramifications for owner and lawyer liability, have appeared. Lawyers are developing acceptable ways of communicating the liability arrangements. For example, in 1977 the Committee on Ethics and Professional Responsibility opined that a law partnership could not include one or more professional corporations.[10] An important reason for the result was the difficulty in making the liability rules clear.[11] Just four years later, however, in Informal Opinion 1471, the Committee reversed itself. It no longer found these

8. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 303 (1961), 48 A.B.A. J. 159 (1962).

9. MODEL CODE OF PROFESSIONAL RESPONSIBILITY E.C. 2-11 (1980).

10. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1383 (1977).

11. The Informal Opinion stated:

> The partnership arrangement you propose is a hybrid which does not appear to be permitted by DR 2-102(C); and it seems unlikely that the proposed arrangement could be carried out without causing confusion in the use of letterheads, shingles, and listings that identify the lawyers and the relationships among them. The liability of a corporation is normally limited to that entity, and this limitation is inconsistent with the concept of partnership liability.

*Id.* at 270.

disclosure requirements insurmountable.[12] More recently, the ABA Committee has permitted the communication of more confusing arrangements. Separate law firms can designate themselves as "affiliated" or "associated."[13]

Given the complexity of the organization of law practice, the simple professional corporation no longer contains any misleading surprises. Indeed, if there is any confusion remaining, it is in the number of ways which are used to communicate the legal fact of limited liability. This possible confusion could be cured if all states require an incorporated law firm to be designated as either "Professional Corporation" or "P.C."[14] Whatever the case, there are fewer problems with the notice provision of Formal Opinion 303 than there are with the first provision of that opinion.

Virtually each phrase of the Committee's first condition is subject to interpretation. How does one determine which *lawyer or lawyers* are *rendering* the legal services? How does one determine what are *legal services* for this purpose? What is the significance of *personal* responsibility, as opposed to some other type of, *responsibility*? Does this responsibility run only to *the client*?

The Committee didn't answer these questions directly. However, it did emphasize two factors which will help in the appropriate interpretation of these and similar mandates. First, the Committee insisted that the "client's reasonable expectations as to the scope of the responsibility for the legal services being rendered [must be] a reality."[15] This Article will emphasize the importance of "reasonable expectations" as a governing theme of appropriate rule interpretation.

Second, the Committee insisted that a client had the reasonable expectation of "direct and personal" service from her lawyer. In its elaboration of this expectation, the Committee drew a distinction between a broad professional responsibility to make one's expertise available to an associate, to assist a colleague, or perhaps to take over for a disabled partner, and the more personal, financial responsibility which mandated that one lawyer would be financially liable for the acts and omissions of a colleague.[16] The Committee

12. "The Committee does not here attempt to determine how the difficulties can be avoided or overcome. It is, however, the Committee's view that, at the minimum, any listing of partners should indicate which partners are professional corporations." ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1471 (1981).

13. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 84-351 (1984).

14. *E.g.*, MODEL PROFESSIONAL CORPORATION ACT, § 8(1)(1977):

> The name of a domestic professional corporation or of a foreign professional corporation authorized to transact business in this State:
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> (1) shall contain the words "professional corporation" or the abbreviation "P.C."

The Comment highlights the issue. It states that "Existing statutes vary in the selection of terms required in the corporate name as corporate designators. To encourage uniformity and avoid confusion the model act approves and requires only the term 'professional corporation' or its abbreviation." *Id.*

15. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 303 (1961), 48 A.B.A. J. 159, 160 (1962).

16. The Committee justified the splitting of fees in an organization by noting that "All lawyers within an organization bear a professional responsibility for the legal services of the organization, whether they are under any personal legal liability for all of such services or not." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 303 (1961), 48 A.B.A. J. 159, 160 (1962).

did not believe that it was reasonable to expect that all of a lawyer's colleagues necessarily would financially stand behind her for her malpractice.

An early draft of the Code of Professional Responsibility apparently rejected the Committee's opinion. It provided:

> A lawyer should not seek to limit his liability to his client for malpractice, whether by contract, limitation of corporate liability, or otherwise. Thus the liability of lawyers who are stockholders in a professional legal corporation should be the same as it would be if they were practicing as partners.[17]

The Code of Professional Responsibility, as finally adopted, took a guarded, but more permissive, tone. Ethical Consideration 6-6 provides: "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."[18]

Although citing Formal Opinion 303 in a footnote, Ethical Consideration 6-6 does not enthusiastically embrace it. First, the Ethical Consideration states that liability may be limited by incorporation *only* to the extent permitted by law. The presumption is apparently against permitting lawyers to limit their liability in this way. Second, at least one court has insisted that the Ethical Consideration is not self-enforcing. The court emphasized that incorporation, even if permitted by law, would not be enough to afford shareholders limited liability. In *First Bank & Trust Company v. Zagoria*, the Georgia Supreme Court stated:

> It can be argued that [Ethical Consideration 6-6, which had been adopted as a court rule] authorizes a limitation of liability for the malpractice of associates by contract or arrangement with the clients of the professional corporation. However, it cannot successfully be argued that Ethical Consideration 6-6 is a self-executing rule which automatically insulates each shareholder of a professional corporation from liability for the malpractice of the other.[19]

The Model Rules of Professional Conduct do not address this issue directly. In a new approach to vicarious liability issues, Rule 5.1 explicitly addresses if, and when, one lawyer might be subject to professional discipline for the acts or omissions of a colleague or associate. However, in the Official Comment, the drafters state that "Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question beyond the scope of these rules."[20]

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17. *See* AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 273 (1979).

The American Bar Association adopted the MODEL CODE OF PROFESSIONAL RESPONSIBILITY in 1970. It has recommended its adoption to all jurisdictions, and most states have adopted it. In form, it is made up of nine axiomatic statements, called Canons. Under each Canon, there are aspirational statements, called Ethical Considerations, and mandatory rules, called Disciplinary Rules.

18. MODEL CODE OF PROFESSIONAL RESPONSIBILITY E.C. 6-6 (1979).

19. First Bank & Trust Co. v. Zagoria, 250 Ga. 844, 847, 302 S.E.2d 674, 676 (1983).

20. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 comment (1983). In 1983, the American Bar Association adopted, after lengthy and heated debate, the MODEL RULES OF PROFESSIONAL CONDUCT. In form, they are organized as a series of black-letter, mandatory rules, and then official comment.

*Statutes*

There is a wide diversity among state professional corporation statutes, both in essential concept and in language.[21] Some apply to all, or at least many, professions. Others apply only to lawyers. There is often confusion about the appropriate rule for the lawyer, *qua* owner, and the lawyer, frequently the same person, *qua* employee. One recent commentator has categorized the existing state statutes in four general categories.[22] Many of the statutes are poorly worded and subject to more than one interpretation.

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21. Some statutes provide limited liability for shareholders. *See* DEL. CODE ANN. tit. 8, § 608 (1983); IDAHO CODE § 30-1306 (1980); ILL. ANN. STAT., ch. 32, § 415-8 (Smith-Hurd 1970). Some states provide that the shareholders should be liable as if they were partners. *See* ARIZ. REV. STAT. ANN. § 10-905 (1977); ME. REV. STAT. ANN. tit. 13, § 708 (1981). Some condition the limited liability of shareholders on insurance. *See* State Bar of California, LAW CORP. RULES, IV A(7)(1975).

22. Comment, *Shareholder Liability in Professional Legal Corporations: A Survey of the States*, 47 U. PITT. L. REV. 817 (1986). The categories follow:

1. The Extreme Approaches—Unlimited Liability for Owners, and Limited Liability for Owners, *see* ARIZ. REV. STAT. ANN. § 10-905 (1977); COLO. R. CIV. P. 265; IOWA CODE ANN. § 496C.9 (West Supp. 1985); N.M. STAT. ANN. § 53-6-8 (1978); OR. REV. STAT. § 58.185 (1980-81); R.I. GEN. LAWS § 7-5.1-1 (1985); WIS. STAT. ANN. § 180.99(8) (West Supp. 1985); WYO. STAT. § 17-3-102 (1977).

2. Limited Liability Except for the Lawyer's Own Acts and Omissions, *see* ALA. CODE § 10-4-390 (Supp. 1985); ALASKA STAT. § 10.45.140 (1962); HAW. REV. STAT. § 416-153 (1976); KY. REV. STAT. ANN. § 274.055 (Baldwin 1981); LA. REV. STAT. ANN. § 12:807 (West 1969); ME. REV. STAT. ANN. tit. 13, § 708 (1964); MINN. STAT. ANN. § 319A.10 (West Supp. 1986); NEV. REV. STAT. § 89.060 (1979); N.D. CENT. CODE § 10-31-09 (1985); S.C. CODE ANN. § 33-51-70 (Law Co-op. 1976); S.D. CODIFIED LAWS ANN. § 47-13A-7 (1983); TEX. STAT. ANN. art. 1528e(16) (Vernon 1980).

3. Limited Liability Except for the Lawyer's Own Acts and Omissions and for Those by Any Persons Supervised by Him, *see* CONN. GEN. STAT. ANN. § 33-182(e) (1987); DEL. CODE ANN. tit. 8, § 608 (1974); FLA. STAT. ANN. § 621.07 (West 1976 & Supp. 1985); IDAHO CODE § 30-1306 (1980); ILL. REV. STAT. ch. 32, § 415-8 (1970); IND. CODE ANN. § 23-1.5-2-6 (Burns 1984); MICH. COMP. LAWS ANN. § 450.226 (West 1973); MISS. CODE ANN. § 79-9-11 (1972); MONT. CODE ANN. § 35-4-404 (1983); NEB. REV. STAT. § 21-2210 (1983); N.H. REV. STAT. ANN. § 294-A:17(II) (Supp. 1985); N.J. REV. STAT. § 14A:17-8 (Supp. 1985); N.Y. BUS. CORP. LAW § 1505(A) (McKinney Supp. 1986); 15 PA. CONS. STAT. ANN. § 2913(b) (Purdon Supp. 1985); VA. CODE ANN. § 54-892 (1982); WASH. REV. CODE § 18.100.070 (1978); D.C. CODE ANN. § 29-611 (1981).

4. The Saving Clause, which Typically Insists that the Professional Relationship Between Lawyer and Client Remain the Same. Some of statutes contain the savings clause in addition to a detailed clause, *see* ALASKA STAT. § 10.45.140 (1962); ARIZ. REV. STAT. ANN. § 10-905 (1977); CONN. GEN. STAT. ANN. § 33-182(e) (1987); DEL. CODE ANN. tit. 8, § 608 (1974); FLA. STAT. ANN. § 621.07 (West Supp. 1985); HAW. REV. STAT. § 416-153 (1976); IDAHO CODE § 30-1306 (1980); ILL. REV. STAT. ch. 32, § 415-8 (1970); IOWA CODE ANN. § 496C.9 (West Supp. 1985); KY. REV. STAT. ANN. § 274.055 (Baldwin 1981); LA. REV. STAT. ANN. § 12:807 (West 1969); ME. REV. STAT. ANN. tit. 13, § 708 (1964); MICH. COMP. LAWS ANN. § 450.226 (West 1973); MINN. STAT. ANN. § 319A.10 (West Supp. 1986); MISS. CODE ANN. § 79-9-11 (1972); MONT. CODE ANN. § 35-4-404 (1983); NEB. REV. STAT. § 21-2210 (1983); NEV. REV. STAT. § 89.060 (1979); N.H. REV. STAT. ANN. § 294-A:17(II) (Supp. 1985); N.J. REV. STAT. § 14A:17-8 (Supp. 1985); N.M. STAT. ANN. § 53-6-8 (1978); N.D. CENT. CODE § 10-31-09 (1985); OR. REV. STAT. § 58.185 (1980-81); 15 PA. CONS. STAT. ANN. § 2913(b) (Purdon Supp. 1985); S.C. CODE ANN. § 33-51-70 (Law Co-op. 1976); S.D. CODIFIED LAWS ANN. § 47-13A-7 (1983); TEX. STAT. ANN. art. 1528e(16) (Vernon 1980); VA. CODE ANN. § 54-892 (1982); WASH. REV. CODE § 18.100.070 (1978); WIS. STAT. ANN. § 180.99(8) (West Supp. 1985); WYO. STAT. § 17-3-102 (1977); D.C. CODE ANN. § 29-611 (1981).

Other statutes only have the savings clause, *see* ARK. STAT. ANN. § 64-2015 (1980); CAL. CORP. CODE § 13410 (West 1977); GA. CODE ANN. § 84-5407 (1985); KAN. STAT. ANN. § 17-2715 (1981); MD. CORPS. & ASS'NS CODE ANN. § 5-120 (1985); MASS. GEN. LAWS ANN. ch. 156A, § 10 (West 1970); MO. ANN. STAT. § 356.150 (Vernon 1966); N.C. GEN. STAT. § 55B-9 (1982); OHIO REV. CODE ANN. § 1785.04 (Page 1985); OKLA. STAT. ANN. tit. 18, § 812 (West Supp. 1985);

Furthermore, most states include a "savings" clause that provides that "nothing in the act will affect the law applied to the professional relationship and liability between a person rendering the professional service and a person receiving the service."[23]

This savings clause can complicate problems of interpretation. First, as with Formal Opinion 303, which it replicates, the terms of the clause are not self-defining. Second, it is rarely clear what the law was before the passage of the act. Third, in many statutes there is a more detailed statement about limited liability. How the courts should interpret the general savings clause when it is juxtaposed with a more detailed liability clause is unclear.[24]

In 1977, the Committee on Corporate Law of the American Bar Association proposed a Professional Corporation Supplement to the Model Business Corporation Act.[25] The Committee clarified the choices and issues by distinguishing lawyer-employees from lawyer-owners. As to lawyer-employees, the Model Professional Corporation Act proposed that the lawyer-employee should be liable only when at fault. Normal agency principles should apply.[26] With respect to lawyer-owners, the Model Professional Corporation Act set out three alternative solutions to the question of owner liability. It did not endorse any of them. In the first, the owners are not liable for any

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TENN. CODE ANN. § 48-3-407 (1984); UTAH CODE ANN. § 16-11-10 (1953); VT. STAT. ANN. tit. 11, § 808 (1984); W. VA. CODE § 30-2-5a (1980).

The author did not find it appropriate to include a category for participation liability as well as liability for direct supervision.

23. Although all existing state statutes include some provision concerning professional liability or professional responsibility, most statutes are silent as to the vicarious liability of shareholders leaving this question to be determined by the business corporation law. Several statutes clearly provide that shareholder liability is limited as in a business corporation. A few expressly state that shareholders shall be jointly and severally liable for debts of the corporation. And a few, either by statute or rule of practice, condition limited liability for some professions on maintenance of professional liability insurance. A majority of the statutes contain simply a provision to the effect that the statute does not modify any law applicable to the relationship between a person furnishing professional services and a person receiving such services including liability arising out of such professional services. * * * Accordingly, it seems that shareholders of professional corporations have limited liability under existing statutes in most states.

MODEL PROFESSIONAL CORPORATION ACT, § 11 comment (1977).

24. For an analysis of the Pennsylvania law, see Comment, *supra* note 22, at 835-837.

25. The Committee noted that there was an amazing diversity among various state statutes. In drafting its Professional Corporation Supplement to the Model Business Corporation Act it suggested three alternative approaches. It did not explicitly recommend any of them. *See* Paas, *supra* note 3, at 374.

26. Every individual who renders professional services as an employee of a professional corporation shall be liable for any negligent or wrongful act or omission in which he personally participates to the same extent as if he rendered such services as a sole practitioner. An employee of a professional corporation shall not be liable for the conduct of other employees unless he is at fault in appointing, supervising, or cooperating with them.

MODEL PROFESSIONAL CORPORATION ACT, § 11(b)(1977). The comment to this section states:

Section 11 of the model act states affirmatively the rules for liability of the professional corporation, its employees, and its shareholders resulting from negligence in the performance of professional services. Consistent with the common law doctrine of respondeat superior, subsection (b) limits liability of a professional employee to his personal negligence.

As will be developed more fully, many state statutes properly impose broader liability on the lawyer-employee. Frequently, the lawyer-employee is liable for professional services rendered, as in the "savings" clauses, or for acts in which she participated, rather than the Model Act's narrow language "personally participated." Second, in many jurisdictions, the lawyer-employee will be vicariously liable for the acts and omissions of those persons under her supervision.

corporate debts;[27] in the second, the owners are liable for all corporate debts as if they were partners;[28] in the third, the owners are liable as if they were partners unless the professional corporation has posted adequate security.[29]

*General Comment*

This Article pictures the law firm as a collection of sole practitioners. Each firm member is the owner of a business organization and a person who individually renders professional service. This duality clarifies the civil liability issue.

As an owner, the lawyer should have the opportunity to limit her liability by incorporation. This is consistent with the Model Professional Corporation Act, section 11(d)(Alternative 1).[30] Even if she limits her personal, financial liability by incorporation, however, she will remain personally liable as an employee as if she were a sole practitioner. This conceptualization of her liability has three aspects. If she renders professional service alone, she will be liable for her own negligence. If she in fact supervises another, she will be vicariously liable for her subordinate's negligence as if she were a sole proprietor. If she in fact participates with others, she will be vicariously liable for their negligence as if she were their partner or joint venturer. This extensive vicarious liability is considerably broader than that provided for in the Model Professional Corporation Act.[31]

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27. "Except as otherwise provided by statute, the personal liability of a shareholder of a professional corporation shall be no greater in any respect than that of a shareholder of a corporation organized under the ——— Business Corporation Act." MODEL PROFESSIONAL CORPORATION ACT, § 11(d) (Alternate 1)(1977).

Of course, creditors should be able to "pierce the corporate veil" pursuant to the same set of rules as would apply with ordinary business corporations. *See* Ize Nantan Bagowa, Ltd. v. Scalia, 118 Ariz. 439, 577 P.2d 725 (1978); Cleveland v. Williams, 441 S.2d 919 (Ala. Civ. App. 1983).

28. "Except as otherwise provided by statute, if any corporation is liable under the provisions of subsection (c) of this section, every shareholder of the corporation shall be liable to the same extent as though he were a partner in a partnership and the services giving rise to liability had been rendered on behalf of the partnership." MODEL PROFESSIONAL CORPORATION ACT, § 11(d)(Alternative 2)(1977).

29. (1) Except as otherwise provided by statute, if any corporation is liable under the provisions of subsection (c) of this section, every shareholder of that corporation shall be liable to the same extent as though he were a partner in a partnership and the services giving rise to liability had been rendered on behalf of the partnership, unless the corporation has provided security for professional responsibility as provided in paragraph (2) of this subsection and the liability is satisfied to the extent contemplated by the insurance or bond which effectuates the security.

(2) A professional corporation, domestic or foreign, may provide security for professional responsibility by procuring insurance or a surety bond issued by an insurance company, or a combination thereof, as the corporation may elect. The minimum amount of security and requirements as to the form and coverage provided by the insurance policy or surety bond may be established for each profession by the licensing authority for the profession, and the minimum amount may be set to vary with the number of shareholders, the type of practice, or other variables deemed appropriate by the licensing authority. If no effective determination by the licensing authority is in effect, the minimum amount of professional responsibility security for the professional corporation shall be the product of —— dollars multiplied by the number of shareholders of the professional corporation.

MODEL PROFESSIONAL CORPORATION ACT, § 11(d) (Alternative 3)(1977).

30. *See supra* note 27.

31. The MODEL BUSINESS CORPORATION ACT § 11(a)(1977), has two sentences. The first states, "Every individual who renders professional services as an employee of a professional corporation shall be liable for any negligent or wrongful act or omission in which he personally participates

For several reasons, this Article does not recommend specific statutory language. First, the principal purpose of this Article is to set up a conceptual framework for discussion and analysis. Second, even without specific statutory language, courts should, where possible, interpret existing legislation and rules consistent with the model proposed here. Third, if this proves impossible, then there are many ways to amend existing statutes and rules to achieve this end. A particular suggestion might play havoc with any given state's over-all approach and terminology.

In defending this clear model, this Article will focus separately on the lawyer-owner and the lawyer-employee. It will discuss, where relevant, some existing statutory schemes and judicial interpretations. Moreover, this Article will endeavor to show how this recommendation is consistent with the mandates of Formal Opinion 303, as well as the Code of Professional Responsibility and the Model Rules of Professional Conduct. Since the principal purpose of this Article is to advance a model for understanding and application, it is irrelevant here whether the court or legislature has the final authority to adopt the model. Therefore, this Article will not address the frequent judicial claim that the court has the inherent and exclusive authority to determine these issues.

This Article will accept certain assumptions. Regardless of whether lawyers practice law as sole proprietors, partners or members of professional corporations, the actual person rendering the legal services must always be a licensed lawyer.[32] Moreover, this Article will not challenge the proposition that the owners of a law firm must always be lawyers.[33] Finally, the Article accepts the basic tenets of respondeat superior. A principal entity, whether this principal is a sole proprietorship, a partnership or a professional corporation, will be vicariously liable for the acts of its agents and partners done within the ordinary course of business.[34] A partner will be personally liable for all the debts of the partnership.[35]

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to the same extent as if he rendered such services as a sole practitioner." This sentence is consistent with the model recommended here. However, as the paper illustrates, this sentence, properly understood, means that each individual should be vicariously liable for the negligence of persons who the individual directly supervises and for the negligence of colleagues with whom the individual participates as if they were partners.

The second sentence of this section denies this, and insists that the employees of a professional corporation be treated as the employees of a regular business corporation. The second sentence is: "An employee of a professional corporation shall not be liable for the conduct of other employees unless he is at fault in appointing, supervising, or cooperating with them."

32. *See generally* MODEL PROFESSIONAL CORPORATION ACT § 6(1977).

33. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY D.R. 5-107(c)(1979); MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(d)(1984). This requirement that the owners of a professional legal corporation must be lawyers is not as firmly established as the requirement that all the practitioners must be licensed lawyers. *See* MODEL RULES OF PROFESSIONAL CONDUCT, 5.4 (Proposed Final Draft).

In Street v. Sugerman, 202 S.2d 749 (Fl. Sup. Ct. 1967), the court permitted a lay creditor to attach a lawyer's shares in his professional corporation. Not to permit this would have meant that there would have been a no-man's land in which a lawyer's property was exempted from attachment.

34. "Every corporation whose employees perform professional services within the scope of their employment or of their apparent authority to act for the corporation shall be liable to the same extent as its employees." MODEL PROFESSIONAL CORPORATION ACT § 11(c)(1977).

35. UNIFORM PARTNERSHIP ACT §§ 13-15, 6 U.L.A. 1 (1969).

## LAWYER-OWNERS AND LIMITED LIABILITY

This section defends the proposition that lawyer-owners should be able to incorporate and to limit their liability for professional and non-professional debts. In this section, judicial and professional committee opinions are discussed where relevant. Relevant statutory language is also examined.

The reasons for permitting incorporation fall into two categories. First, there are factors that relate to the relationships between and among lawyers. It will be argued here that without the opportunity to elect limited liability, lawyer-owners may (1) unduly interfere with the professional work of lawyer-employees; (2) be unwilling to innovate with new and different forms of business organizations; (3) be placed at a competitive disadvantage; and (4) be unable to raise the capital they need to operate effectively.

Second, there are factors which relate to the relationships between lawyers and their clients and the public. It will also be argued here that limited liability by incorporation will not jeopardize any person's reasonable expectations and will not injure the legal profession's reputation.

### *Factors That Relate to the Relationship Between and Among Lawyers*

#### 1. *Undue Interference With Lawyer-Employees*

It is a basic principle of professional practice that the lawyer providing professional services must be independent of outside control.[36] Independent professional judgment is an important hallmark of professionalism. On the other hand, lawyer-owners ought to monitor, regulate, train, and control the lawyer-employees, particularly the junior lawyers, within their law firms. The key is to encourage the proper amount of lawyer-owner control without jeopardizing the independence of the practicing lawyer. Not to permit lawyer-owners to incorporate and to limit their liability may ironically result in jeopardizing the appropriate balance. If the lawyer-owner is vicariously liable for the professional conduct of all the firm's lawyer-employees, then the lawyer-owner may be unduly motivated to inject himself into the direct, personal relationship between practicing lawyer and client.

The resolution of this dilemma is not an either-or matter. There are currently many forces other than vicarious liability which appropriately inform a lawyer-owner to monitor and to regulate the legal services provided by the members of her firm. The lawyer-owners, even without personal liability, have much at stake. Not only are the firm's assets subject to liability under ordinary respondeat superior principles, but the owner's professional reputation is also at stake. Moreover, the lawyer-owners may feel that professional responsibility, referred to in Formal Opinion 303, will encourage them to monitor lawyer-employees without the added stimulus of vicarious financial liability.

However, and this is often overlooked, there can be undue monitoring. This issue has not been raised with traditional law partnerships because it was assumed that in this mode of practice all of the partners would be ac-

36. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY D.R. 5-107(c)(1979); MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(c)(1984).

tively engaged in providing professional services to each client. Even if each partner were not on the particular case, it was expected that each might contribute from time to time. A partner's involvement would be a direct part of the professional work-product.

Law firms are no longer necessarily small organizations. The lawyer-owner in Denver may have no contact whatsoever with the lawyer-employees in New York. The Los Angeles tax lawyer-owner may know nothing about the bankruptcy practice of the lawyer-owners in Atlanta. In these circumstances, a partner's involvement would not be a direct part of the professional work-product. It would be officious interference. One way of discouraging this undue involvement would be to permit the Los Angeles lawyer-owner to limit his personal financial liability for the Atlanta lawyer's malpractice. For the reasons mentioned above, the Los Angeles lawyer-owner will never be totally indifferent to his firm's operation. On the other hand, he will not be encouraged to be unduly meddlesome.

Lawyers on the business and professional scene are probably in the best position to determine if lawyer-owner vicarious liability or lawyer-owner limited liability will strike the appropriate balance. In some situations, the lawyers may elect limited liability to provide the practicing lawyer-employees with more independence. In other situations, the lawyers may elect a partnership model to encourage more lawyer-owner involvement. Lawyer-owners will not always make the right choice, but there is a good chance that they will if they are given the opportunity.

Finally, owners will be reinforced in their choices by what their clients might want. It would be wrong to conclude that clients will always want the owners to remain personally liable. Sometimes they will. But at other times they will want "their" lawyers, the bankruptcy specialists they retained in Atlanta, to have substantial independence from the Los Angeles lawyer-owners. The clients may perceive that this is the best way to get the quality professional practice they want. They may feel this strongly if they are billed for what they perceive as "outsider" interference. At the least, they may not want the expense of the extra preventive monitoring. Although the Los Angeles lawyer-owners may not be totally oblivious to the Atlanta practice, they may be more likely to leave it alone if they won't be personally responsible for the Atlanta lawyers' acts and omissions.

The emphasis on striking an appropriate balance between lawyer-owner control and lawyer-employee professional independence is consistent with professional ethics codes. The Code of Professional Responsibility does not affirmatively mandate that lawyer-owners monitor and regulate the behavior of the firm's lawyers. However, Rule 5.1(a) of the Model Rules of Professional Conduct obligates the lawyer-owner, in either a partnership or a professional corporation, to assure that the lawyer-employees in the firm comply with the professional rules of ethics, including the duty to provide competent professional service.[37]

37. "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." MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1(a)(1984).

This new Model Rule is designed to cause owners to institute systems, such as continuing education, auditing, and general monitoring, to assure that the firm lawyers comply with the rules of professional conduct. The responsibility is one of general management. It is a useful addition to the professional codes, for it forces owners to confront, professionally, their responsibilities. The Rule is not designed, however, to guarantee compliance or competent service in every case. The Rule is certainly not designed to stimulate unwarranted interference. It remains a basic maxim that all lawyers, in their rendering of legal services, should be free to exercise their independent professional judgment.

Rule 5.1(a) is a new mandate of professional conduct. There is great uncertainty as to how, and when, it ought to apply. What might be appropriate for one organization will be wrong for another. At the moment, there are few guidelines.[38] If the Rule is applied too zealously, it might foster unnecessary interference in particular circumstances. It is better that the disciplinary authorities ought to have a monopoly on the enforcement of such a rule. They will not unduly focus on particular cases. They will be better able to fashion an appropriate enforcement pattern as they gain experience.

### 2. *Innovations With Different Forms of Business Organizations*

Lawyers have traditionally practiced law as solo practitioners or as small, local partnerships. Recently, there has been a growth in larger, more complex, firms. It is not obvious which format best facilitates efficient and effective practice. Law firm mergers, acquisitions and dissolutions represent the professional community's efforts to find the "right" combinations. The law ought not to discourage these experimental efforts.

There will always be problems associated with these structural changes. It may be good business and law practice for the Los Angeles tax firm to merge with the Atlanta bankruptcy firm, but it will not be a riskless adventure. If the law insisted upon unlimited liability, all the Los Angeles lawyer-owners would be financially responsible for the acts and omissions of the Atlanta bankruptcy lawyers. The Los Angeles owners would automatically be financially responsible for a mode of law practice about which they might know little.

This could result in an improper amount of control by the lawyer-own-

38. The Official Comment suggests the ambiguity. It reads:

> The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In 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. *** Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 comment (1984). *See also* H. HAZARD AND W. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 454-60 (1985).

ers. Moreover, the additional personal risk may curtail innovative forms of law practice. The law should encourage experimentation in law firm structure and organization as it does in other business endeavors.

### 3. *The Competitive Disadvantage*

In many jurisdictions, the legislature has provided that certain professionals, such as accountants, should have the chance to limit their personal liability by incorporation. This will reduce their costs of doing business. Since accountants frequently provide client services which are similar to the practice of law, they may be able to provide these services less expensively. This not only places lawyers at a competitive disadvantage, but it may also discourage members of the public from using legal services when, all things being equal, they would rather retain lawyers than accountants.[39] In order not to disadvantage lawyers, they should have a similar opportunity to control their costs.

State legislatures have frequently provided the same opportunities for all competitive professionals to elect incorporation and limited liability.[40] This guarantees that the cost of service will not vary because of the available organizational forms. At the least, state courts should not, on their own, deny lawyer-owners this legislatively granted opportunity. The judicial claim to inherent and exclusive regulatory control of the legal profession is myopic.[41] The courts do not see the big picture. By carving out an allegedly beneficial exception for lawyer-owners from the general professional opportunity to incorporate, the judiciary may improperly obstruct the market distribution of professional services. Finally, it is fair that all professionals, even if not competitors, be treated alike. Certainly, courts should be reluctant to make special rules for lawyers without giving careful consideration to general principles of equality.[42]

### 4. *The Raising of Capital*

Lawyers are in business. The recommended model provides business owners limited liability for the organization's liabilities. It therefore encour-

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39. The sometimes irrational patterns than can develop is illustrated by Fure v. Sherman Hospital, 55 Ill. App. 3d 572, 13 Ill. Dec. 448, 371 N.E.2d 143 (Ct. App. 1977). The court was faced with the issue of the personal liability of doctor-owners. The statute provided limited liability for the shareholders. The plaintiff argued that since the court rule had denied limited liability to attorneys, it also ought to deny it to other professionals. This is an argument based on fairness, consistency and equality. The court rejected this argument. The fact that the court had the authority to regulate attorneys did not impact on its ability, or inability, to regulate doctors.

40. *See supra* note 22.

41. *See supra* note 6.

42. The court in We're Associates Company v. Cohen, Stracher & Bloom, 103 A.D.2d 130, 478 N.Y.S.2d 670 (Sup. Ct. App. Div. 1984) made this point. At the time of that decision, Schnapp, Hochberg & Sommers v. Nislow, 106 Misc.2d 194, 431 N.Y.S.2d 324 (Sup. Ct. 1980) had decided that dentist-shareholders were not financially liable on their corporation's lease. However, the court in Infosearch, Inc. v. Horowitz, 117 Misc.2d 774, 459 N.Y.S.2d 348 (Civ. Ct. 1982) had determined that lawyer-owners were. To avoid irrational line-drawing, the *We're Associate* court refused to carve out special lawyer liability and it refused to follow *Infosearch*. The court stated, "We disagree with the reasoning of the Infosearch court, for, otherwise, we would be compelled to read into article 15 of the Business Corporation Law a special exception for professional corporations involving attorneys." *We're Associates*, 103 A.D.2d at 136, 478 N.Y.S.2d at 675.

ages investment and the accumulation of capital. In spite of assertions made by a few courts, law practice in the 1980s is big business.[43] Law firms own buildings, libraries and equipment. They employ large staffs. They often have many branches in several jurisdictions. Law firms need capital, and, as other businesspersons, lawyer-owners should be entitled to shield their personal assets.

At the very least, lawyer-owners should be able to choose, through incorporation, limited liability for the business, as opposed to the professional, debts of the organization. When lawyers rent space, hire secretaries and purchase equipment, they act like any other businessperson. There is nothing peculiarly professional about these endeavors. This is the ordinary stuff of business. A lawyer-owner should not subject himself to any greater risk in contracting for these goods and services than would any other businessperson.

The person who contracts with a corporation should know that when the professional corporation makes a contract, its owners are not personally liable for its debts. Usually these persons will be corporations themselves, with limited liability. These persons can easily protect themselves against the risks of a defaulting corporation which has inadequate assets to cover its obligations. They can insist on the personal guarantees of all, or some, of the lawyer-owners. For example, a Los Angeles-Denver law firm may wish to lease office space in Denver. A distrusting lessor may insist on the personal guarantees of only the Denver lawyer-owners. In this way, both the remote owners and the lessor are properly protected.

The lower New York courts wrestled with this problem for several years. The New York statute provided for limited liability except "while rendering professional services."[44] In *Schnapp, Hochberg & Sommers v. Nislow*,[45] a New York supreme court held that dentist-owners were not personally, financially liable on their professional corporation's lease. The court defined professional service in terms of the nature of the work and client expectations. If the engagement required a special and confidential relationship or if a client might reasonably expect that normal professional practice infused the obligation, then the owner might remain liable. The court stated that only in the last two situations should the owner be penalized with unlimited liability. The concept of penalty illustrates the court's reluctance to impose this extraordinary liability on businesspersons. The court said it de-

43. In South High Development Ltd. v. Weiner, Lippe & Cromley Co., 4 Ohio St. 3d 1, 445 N.E.2d 1106 (1983), the Ohio Supreme Court, in establishing a rule which denied lawyers the opportunity to limit their liability by incorporation, announced that the purpose of a professional corporation was to provide for the practice of law and not for the purpose of accumulating capital. However, this assertion was not intended as a finding of fact. A state constitutional provision that provided that all private Ohio corporations had to assure their shareholders limited liability. The court circumvented this constitutional provision by asserting that incorporated law practices were not private, and therefore the constitutional provision did not limit the supreme court's authority to regulate the practice of law. The court denied the lawyer-owners limited liability.

44. "Each shareholder, employee or agent of a professional service corporation shall be personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation." NEW YORK BUSINESS CORPORATIONS ACT, § 1505(a)(1986).

45. 106 Misc.2d 194, 431 N.Y.S.2d 324 (Sup. Ct. 1984).

fied logic to claim that there needed to be such a penalty with respect to lease payments.[46]

This logic, however, was defied two years later. In *Infosearch, Inc. v. Horowitz*,[47] the Civil Court of the City of New York held the lawyer-owners of a professional corporation personally liable on their corporation's lease. The court emphasized what it apparently believed to be the *only* purpose of professional incorporation statutes, certain tax advantages. From that perspective, the court concluded that to permit limited liability would relieve the lawyer-owners of their just debts.[48]

There are two main difficulties with this opinion. First, the court unduly emphasized one statutory purpose as the legislation's exclusive purpose.[49] Second, the court had to torture the statutory language to achieve its end. How could a lease be a "professional service" obligation? The court answered:

> Furthermore, it is to be noted that the statutory qualification "while rendering professional services on behalf of such corporation" may be construed to apply to debts incurred *ancillary* to the rendering of professional services, and that this is a reasonable construction. The only limited liability of partners that would then remain in professional corporation would be that based on the *private*, as distinguished from *corporate* acts, of the *de facto* partners. Thus, partner A would not be liable for partner B's private debts.[50]

Effectively, this interpretation would make the statutory language a nullity. The court's interpretation gives the lawyer-owner no additional protection whatsoever. Under ordinary principles of respondeat superior, neither the owner nor the professional corporation would be liable for its agent's private debts. These debts would clearly be outside the ordinary course of law business.

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46. The court stated:

> [The statute] does not exist to shield the individual professional corporate shareholders from liability or accountability for his wrongful act of misconduct arising out of the rendition of "his" professional services. That because of the "special and confidential relationship" existing between the professional and his client (or patient), together with the reliance placed by the layman in such professionalism, logic dictates the professional to be held to a high standard in rendering his or her professional services, and the seriousness of a negligent or wrongful act or misconduct to result in being "penalized" by vulnerability to personal liability. That this personal liability should be extended to include non-professional activities such as business debts or miscellaneous obligations of the corporation as is involved in the case at bar, on the other hand defies logic and lacks support in statute or at law.

*Id.* at 196-97, 431 N.Y.S.2d at 326.

47. 117 Misc.2d 774, 459 N.Y.S.2d 348 (Civ. Ct. 1982).

48. The court wrote:

> [The statute] was not to shield lawyers from the payment of just debts. Any such latter purpose would be clearly contrary to public policy. When one extends credit to a law firm, one expects that his debt is secured by the legal and moral obligations of the members of that firm, notwithstanding that it is a professional corporation.

*Id.* at 775, 459 N.Y.S.2d at 349.

49. There is no doubt that the most important purpose of the professional corporation statute was to permit professionals to take advantage of certain tax laws. However, it was not the only purpose. Moreover, the tax law does not even require that the shareholders have limited liability to achieve corporate status. *See* Paas, *supra* note 3, at 378.

50. *Infosearch*, 117 Misc.2d at 774, 459 N.Y.S.2d at 350.

In *We're Associates v. Cohen, Stracher & Bloom*,[51] the New York Court of Appeals resolved the issue. It determined that the lawyer-owners of a professional corporation would not be personally liable for the corporation's business lease. The court argued that the plain language of the statute provided limited liability, except in narrow circumstances, and that there was nothing in the legislative history to indicate that this was not an important legislative purpose. The court rejected the argument that limited liability was only for passive shareholders. And finally, the court held that there was nothing inconsistent with its position and the Code of Professional Responsibility.[52]

On the central issue of the appropriate interpretation of professional services, the court endorsed the Appellate Division's holding that there should be shareholder liability only for the "direct" rendition of professional services. The Appellate Division's reading of the legislative history and the entire statutory scheme did not lead to an expansive *Infosearch* reading of "professional services." The court was aware that an interpretation which would include all ancillary services within the definition of professional services would effectively eliminate the legislatively decreed option of limited liability.[53]

The court stated that its conclusion would result in no injustice. Any person who did business with the incorporated law firm could seek the personal, financial commitment of its owners.[54]

All state supreme courts have not, however, followed the *We're Associ-*

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51. 65 N.Y.2d 148, 480 N.E.2d 357, 490 N.Y.S.2d 743 (Ct. App. 1985).

52. The court's language on this last point was too broad. The court stated:

> The Code of Professional Responsibility provides no basis for the imposition of personal liability in this case. Plaintiff does not suggest, and indeed no authority has been brought to our attention which has held, that an attorney may be held personally liable for the debts of any business corporation of which he is a shareholder simply because he is an attorney and is thus subject to the strictures of the code.

*Id.* at 152, 480 N.E.2d at 360, 490 N.Y.S.2d at 746.

By saying that a lawyer need not be liable for the debts of *any* business corporation of which he is a shareholder is, in general, a truism. Such a statement does not directly address the issue of the lawyer-owner's responsibility for a professional corporation. One obvious point of this discussion is that limited liability is consistent with appropriate professional restrictions.

53. The court wrote:

> We disagree with the reasoning of the Infosearch court, for otherwise, we would be compelled to read into article 15 of the Business Corporation Law a special exception for professional corporations involving attorneys. There is absolutely no basis in the legislative history or otherwise to create such an exception and we decline to do so. The clear intent of the Legislature, as indicated above, is that, except for the specific statutory provisions regarding liability arising from the rendition of professional services, the members of professional corporations are to enjoy the same benefits of limited liability afforded to shareholders of any other form of corporation. We find that those benefits, which include insulation from ordinary corporate business debts, were intended to be available to the members of any professional corporation, regardless of the nature of the profession involved [*see Nislow supra* note 45]. There is, therefore, no basis for concluding that attorneys who practice in a professional corporation have some exceptional legal obligation over and above that of other professionals simply by virtue of their particular profession. Any analysis of the possible ethical considerations or moral obligations of attorneys in this situation is a separate matter and does not bear upon the substantive legal issue of the scope of liability under the statute.

We're Associates v. Cohen, Stracher & Bloom, 103 A.D.2d 130, 132, 478 N.Y.S.2d 673, 675 (1983).

54. The court stated, "Our decision should work no injustice on those who enter into leases or any other contracts with professional service corporations, who are free to seek the personal assur-

*ates* rationale. The Ohio Supreme Court, in *South High Development Ltd. v. Weiner, Lippe & Cromley Co.*,[55] argued that limited liability with respect to *all* corporate obligations, as an inducement to investment, ought only to be available to passive investors.[56] The court suggested that a basic principle supporting limited liability is that in exchange for giving up control of the enterprise, the passive owner is granted limited liability. The court argued that since all the owners are participants in a law firm situation, none should be entitled to choose limited liability.

There are several problems with this line of argument. First, the assertion is not true in practice. In many businesses the owners are active participants, and they are allowed to choose limited liability. Lawyer-owners should be treated similarly. Second, not all lawyer-owners are actively involved in managing the law practice. Some successful lawyer-owners abdicate all responsibility for firm management and elect to concentrate on professional practice. In many firms this practice is formally agreed to, and lawyer-owners contractually relinquish their management rights to other partners.

*Factors That Relate to the Relationship Between Lawyers and Their Clients*

1. *No One's Reasonable Expectations Will Be Jeopardized*

Limited liability is not unfair to business contractors, clients or the public. As has been discussed, this is certainly true for business creditors. They should know with what they are dealing and they can take steps to protect themselves. As to others who may be damaged by the professional corporation's acts and omissions, it is true that if lawyer-owners are not financially responsible, these injured persons may have fewer sources for compensation than if there were no limited liability. However, this will not be a severe

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ances of the shareholders that the commitments of the professional service corporation will be honored." *Id.* at 153, 480 N.E.2d at 360, 490 N.Y.S.2d at 746.

The Ohio Supreme Court, in South High Development Ltd. v. Weiner, Lippe & Cromley Co., 4 Ohio St. 3d 1, 445 N.E.2d 1106 (1983), disagreed with this reasoning. In 1983, it insisted on its constitutional authority to make rules governing the conduct of lawyers. Its rule, section 4, Governing Rule III, provided: "The participation by an individual as a shareholder of a legal professional association shall be on the condition that such individual shall, and by such participation does, guarantee the financial responsibility of the association for its breach of any duty, whether or not arising from the attorney-client relationship." Section 4, Rule 3 of the Supreme Court Rules for the Government of the Bar of Ohio.

55. 4 Ohio St. 3d 1, 445 N.E.2d 1106 (1983).

56. The court stated:

> A professional corporation is organized in order to carry out or practice a profession. On the other hand, a private corporation's sole purpose is to accumulate capital so that the owners, those contributing capital, may get a return on their capital. Thus, it may reasonably be concluded that the rationale behind the constitutional protection for shareholders applies only toward private corporations and not professional ones. The shareholders of a professional corporation, whether legal, medical, or other, will be the professionals who actually practice the profession. However, the shareholders of a private corporation will in most instances not be employees of the corporation. Therefore, there is a logical need for shareholders of a private corporation to be insulated from corporate debts since they will have no practical participation in the management of the corporation. The shareholders of the professional corporation will have direct contact with the running of the corporation, so limited liability is not necessary for them.

*Id.* at 3, 445 N.E.2d at 1108.

disadvantage. First, the corporate assets, under the principle of *respondeat superior*, will be available.[57] Second, although the victim, in seeking compensation or reimbursement, will have a more limited number of owners to look to, she will have an increased number of employees. As will be developed later under the model proposed here, the working group, that is the lawyers who in fact participate in the rendering of professional service and who directly supervise and cooperate as partners or joint venturers, are vicariously liable for each other's involvement. This increases the number of persons who will be financially responsible, and will encourage this more limited working group to monitor each other's activites and perhaps to purchase insurance tailored to their particular needs.

Lawyer-owner's limited liability also does not jeopardize any person's reasonable expectations.[58] First, the lawyer-owners must disclose the fact of incorporation. This should be an adequate signal to most clients. Second, it is probable that clients perceive the business of law practice as they do other businesses. They are aware that sometimes the firm's lawyer-owners will be shielded from personal liability. It would be a rare client who would choose a law firm based on the personal wealth of its owners. Third, and most important, the practice of law is an intensely personal one. Clients frequently perceive the lawyer, or lawyers, who work on their case as "their" lawyers. The firm's lawyer-owners, if not engaged in their work, are outsiders. Clients simply do not perceive the entire business organization as their personal lawyer. It would be a windfall to the client to discover that all lawyer-owners would be personally, financially responsible for the acts and omissions of one of the lawyer-employees. Finally, this windfall aspect is particularly acute for those damaged persons who have no contact with the firm. It would be a mere fortuity if they were damaged by an individual with few assets, a large firm with many partners, or a professional corporation in which the lawyer-owners had elected limited liability.

### 2. *The Bar's Reputation for Integrity Will Not Be Injured*

To permit lawyer-owners to elect limited liability will neither reduce an appropriate standard of professionalism nor diminish public perception of the bar's integrity. First, the model here does not relieve the lawyer from her personal obligation to stand financially behind her own work. There is no suggestion here that an individual lawyer should be able to enter into an exculpatory contract with respect to her malpractice. Both the Code[59] and,

57. For example, in Birt v. St. Mary Mercy Hosp. of Gary, Inc., 370 N.E.2d 379, 383 (Ind. Ct. App. 1977), the court stated:

> Apprehension has also been expressed concerning the ability of an injured patient to collect a damage award without the existence of vicarious liability. Again, however, we believe the fear is overstated. Of course, the malpracticing physician is liable to the extent of his personal assets and such malpractice insurance as he, or the corporation may possess. In addition, it is beyond question that the corporate entity is liable for malpractice committed by one of its members.

58. One commentator has suggested that to permit limited liability is inconsistent with the theory of lawyer licensing, which assures a certain level of quality. *See* B. WOLFRAM, MODERN LEGAL ETHICS § 16.2.4 (1986).

59. MODEL CODE OF PROFESIONAL RESPONSIBILITY D.R. 6-102(b)(1980).

less extensively, the Model Rules,[60] prohibit this. In fact, by extending personal liability to all members of the working group, the proposal here reinforces the professional principle of no exculpatory clause.

Finally, all arguments based on professionalism and public reputation are suspect. It is difficult to determine what set of rules will best enhance the legal profession's reputation. For example, it is plausible that to treat lawyers as the businesspersons they are, will do more for the legal profession's general reputation than the insistence that lawyers are somehow special and different. The public probably sees the latter as hypocritical cant.

## SECURITY SHOULD NOT BE A CONDITION OF LIMITED LIABILITY

A few states have insisted that if lawyer-owners are to be permitted to limit their personal liability, the professional corporation should have appropriate security for the acts and omissions of all of its agents. This scheme primarily responds to the compensation issue. It roughly replaces partnership liability in which each of the lawyer-owners remains vicariously liable for the professional malpractice of firm members. The rare person who relied on the wealth of the lawyer-owners would not be able to attach their assets, but she would at least be certain that the corporation, which would be vicariously responsible, had adequate funds for compensation.

One commentator has argued that to require mandatory insurance as a condition of limited liability is the preferred Model Professional Corporation Act alternative.[61] The commentator's main argument is that since lawyer-owner liability often will not deter accidents, it is unnecessary. Once having disposed of the general utility of lawyer-owner liability, the commentator concludes that required insurance, as a condition of limited liability, will reduce the social costs of accidents.

There are at least two problems with the commentator's argument. It is probable that in at least some circumstances the threat of liability will cause lawyer-owner monitoring which may result in fewer instances of malpractice. Lawyers are regularly becoming more involved with monitoring and supervising colleagues and subordinates. The Model Rules of Professional Conduct made this monitoring an essential part of good lawyering.[62] At least in marginal cases, the fear of liability should result in fewer accidents.[63] This Article argues that lawyer-owners should be able to shift this personal liability to the working group because this group can most effectively and cheaply reduce the level of malpractice.

Once the commentator minimized the deterrence function of personal liability, he shifted his focus to the need for reducing the costs of accidents. To understand the commentator's argument one must remember, however, that he was examining the Model Professional Corporation Act. This model

60. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(h)(1983).

61. *See* Comment, *Accident and Malpractice Liability of Professional Corporation Shareholders*, 10 MICH. J.L. REF. 364 (1977).

62. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 (1983).

63. Indeed, an important point in this Article is that lawyer-owner liability may even result in too much accident avoidance by encouraging a too expensive monitoring system.

statute provides that each lawyer-employee is liable for his own negligence, but not vicariously liable for his subordinate's or his colleague's negligence. Thus, the commentator's choices were (1) lawyer-owner liability for all corporate agent's malpractice, or (2) the acting lawyer's liability for his own negligence. Given this choice, the commentator claimed that mandatory insurance would best spread the costs and therefore result in the least social dislocation.[64] The choice between the limited liability of a corporation and the personal liability of a single individual is, however, not the only choice. This Article's recommendation that the entire working group of lawyers be personally liable for their colleague's negligence will provide a sufficient number of fund sources to assure minimal social dislocation. Of course, where appropriate, this working group can choose to spread the costs of accidents by purchasing insurance.

In reality, the commentator's principal point was an argument in favor of mandatory insurance. Several states are currently focusing on the issue of whether all lawyers must carry liability insurance.[65] To date, only one state has such a mandated insurance program.[66] It is uncertain what will come from the debate. In such a state of uncertainty, it is irrational to require insurance for only some lawyers in each state. This will lead to a confusing additional pattern that may mislead clients and the public. Moreover, by forcing additional costs on only some lawyers, such a scheme may cause inefficiencies in the market for professional services.

Mandatory insurance does not resolve the issue of how much control the lawyer-owners should exercise over lawyer-employees. Rather, it makes the choice expensive. If the firm wants little lawyer-owner control, then it must purchase insurance. This Article contends that this decision is best left freely in the hands of the firm's lawyer-owners. In some cases, they will opt for limited liability, resulting in less control by the owners. In other cases, they will choose personal liability, resulting in more control. They may choose, as many currently do, broad insurance coverage. To limit or to restrict their choices will interfere with their ability to make the "right" choice. To permit them to incorporate only if they are secured is such a restriction.

Mandatory insurance for a law firm limits the insurance industry's ability to differentiate insurance coverage within the firm. A mandatory insurance rule may require that the entire firm be covered in the same way. This discourages the more exacting examinations of particular situations which could lead to more efficient resource allocation. The low-risk New York branch of the firm will by necessity have the same coverage as the high-risk St. Louis branch.[67]

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64. *See* Comment, *supra* note 61, at 382.

65. *See* Mahan, *Uninsured and Insecure*, 7 CAL. LAW. 59 (1987).

66. OR. REV. STAT. § 9.080(2)(a)(1985).

67. A multi-branched firm, with vicarious liability for all owners, might carry insurance to cover the costs of the most risky, and most distant, lawyer. If there were limited liability for lawyer-owners, the insurance company could offer one policy for the high risk Denver office, while providing another policy for the relatively safer law practice of the Cleveland office. This ability to unbundle the vicarious liability protection, and to offer just what the acting lawyers need, will result in less expensive insurance, and the more efficient allocation of resources.

The imposition of mandatory insurance may be affirmatively misleading. Clients, in dealing with law firms, might feel more secure than the actual insurance coverage warrants. For example, many of the existing statutes define the amount of insurance a law firm must carry to assure limited liability. To the extent these amounts are out of date, or unrealistic, the client will be misled. Moreover, the insurance amount is frequently tied to the number of firm owners. The more lawyers, the more the insurance coverage. On the one hand, this formula seems to replicate partnership liability. The more owners there are, the more funding sources. But it can also be misleading. Two owners, with total assets worth $1,000,000, could incorporate and insure their law firm for the required amount. The rare client who cared about these matters might be surprised to discover that the insurance coverage was only $100,000.[68]

Finally, there are several technical interpretive objections to the security requirement as an alternative approach. For example, the Hawaii rule states that security should be provided by insurance or otherwise.[69] The Model Professional Corporation Act does not specify when the corporation must post the security.[70] The South Dakota provision calls for reasonable provisions with respect to policy period, territory, claims and conditions.[71] These complexities are not insurmountable, but the ambiguities will, of course, generate their own problems.

## LAWYER-EMPLOYEE AND BROAD VICARIOUS LIABILITY

The lawyer-employee will be financially responsible as if she were a sole practitioner.[72] Most obviously, this implies that she will be personally, financially responsible for her own negligent acts or omissions.[73] First, personal liability for one's own acts will deter negligent work. Second, this principle is consistent with Formal Opinion 303, the Model Code, and the Model Rules. All require that a particular lawyer act competently, and stand behind her own work.[74] Third, this result is consistent with ordinary agency principles.[75] All things being equal, the law governing the business of law practice ought to be consistent with the law governing other businesses. Fourth, this potential liability should encourage each lawyer to purchase her own insurance for professional malpractice. This may not only

68. *See* In re Rhode Island Bar Association, 263 A.2d 692 (R.I. Sup. Ct. 1970).

69. *See* In re Bar Ass'n of Hawaii, 55 Hawaii 121, 124, 516 P.2d 1267, 1269 (1973).

70. *See* Comment, *supra* note 61, at 368 n.23.

71. *See* S.D. CODIFIED LAWS ANN. § 47-13A-7 (1983).

72. The MODEL PROFESSIONAL CORPORATION ACT § 11(a)(1977), provides that a lawyer-employee will be liable for "any neglect or wrongful act or omission in which he personally participates to the same extent as if he rendered such [professional] services as a sole practitioner."

73. It also means that the individual will be responsible for intentional acts. In Perl v. St. Paul Fire and Marine Ins., 345 N.W.2d 209 (Minn. Sup. Ct. 1984), the issue was whether an attorney, and then his firm, could recover on a liability insurance policy for the payment of punitive damages. The court held that to allow the individual to recover would be contrary to public policy. It was not contrary to public policy to permit the firm to recover.

74. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY D.R. 6-102(A)(1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8 (1983).

75. *See* Paas, *supra* note 3, at 374. *See also* RESTATEMENT (SECOND) OF AGENCY § 343 (1958).

provide a fund to secure client compensation, but it may also facilitate the differentiation in insurance rates among firm members.

There are, however, at least three lurking problems associated with the concept that the individual lawyer should be accountable as a sole practitioner for negligence in the rendition of professional service. The wording of the extant statutes, and the fact that the lawyer is also a corporate employee, cause interpretation problems. First, what is meant by professional service? Second, should liability be extended to non-clients? Third, under what circumstances should a lawyer, without any individual fault, be vicariously liable for a colleague's negligence? This last question can be subdivided into the issues of whether a lawyer, without any individual fault, should be vicariously responsible for those who she in fact supervises, and whether such a lawyer, who participates in the rendering of legal services, should be liable for her colleague's negligence?

*The Meaning of Professional Service*

This Article focuses on the lawyer-owner's or the lawyer-employee's liability for acts and omissions related to the providing of professional services. Courts usually address the problem as one of statute or rule interpretation. Many states directly impose liability on the lawyer for acts and omissions related to these services. Frequently, the general savings clause provides that nothing in the professional corporation act will change the law as it relates to the rendering of professional service.[76]

In *We're Associates*, the New York Court of Appeals held that a lawyer-owner would not be liable for the corporation's ancillary business debts.[77] The debts had to be directly related to the rendering of legal services. The court correctly decided the case before it, but it did not define professional services. Situations in which professional and non-professional obligations are intertwined are particularly difficult. What is the proper result in a case in which the statute or rule states that the lawyer should be responsible for her negligence in the rendition of professional service?

One approach would be simply to accept a statutory definition of professional service. For example, the Model Professional Business Corporation Act defines professional service as meaning any "service which may lawfully be rendered only by persons licensed. . . ."[78] This approach, however, would be inappropriate. First, the definition serves a number of purposes in the statutory scheme, and it is not directly related to the issue of liability.

Second, at least with respect to those lawyers who are engaged in providing the service, this approach is inconsistent with the proposed model that the lawyer should be responsible as a sole practitioner.[79] The client

76. *See supra* note 23.

77. *We're Associates*, 65 N.Y.2d at 152, 480 N.E.2d at 360, 490 N.Y.S.2d at 746.

78. MODEL PROFESSIONAL CORPORATION ACT § 2(1)(1977).

79. The answer to the question of what is professional service may vary with the consequences of the answer. It makes sense to have a narrower definition for professional service if the consequences of the answer relate to the liability of lawyer-owners rather than lawyer-employees.

frequently expects her lawyer to do many things. Lawyers will not have a monopoly on all these services. Nevertheless, clients can reasonably expect competent service in whatever a lawyer obligates herself to do, and the law generally imposes liability on the sole practitioner for any and all negligence. Therefore, the participating lawyer should be liable for all commitments, as if she were a sole practitioner, regardless of whether her acts fall within a narrow definition of professional service tied to the licensing scheme.

Moreover, if the statutory or rule scheme requires a finding of professional service before liability can be imposed, it is preferable that this be defined in terms of the lawyer's ordinary course of business and reasonable client expectations. Liability should not be limited to negligence with respect to services that can only be done by lawyers.

In *Heckert v. Stauber*,[80] the Wisconsin Supreme Court examined a situation in which the professional corporation's commitments were such that some could only be done by the professional, while others could legally be done by laypersons. The architect's professional corporation had agreed with Heckert, in an Owner-Builder Agreement, to provide certain design services and to assist in the securing of government financing and local government approval for the project. Heckert sued the corporation and its owners for an illegal breach of its agreement to assist in the securing of financing. The statute provided that the architects would be responsible only if there were a wrongful act with respect to "professional services."[81]

In defining the term, the court used a two-part test, focusing on definition and expectation, to determine that the promise to assist in securing financing was not professional service. First, the statute defined professional service to include only service which required a license as a condition precedent.[82] The securing of financing and governmental approval did not require a professional license. One commentator concluded that this was the

80. 106 Wis. 2d 545, 317 N.W.2d 834 (1982).

81. The professional corporation was a Michigan corporation engaged in Wisconsin practice. The court stated that it did not have to address the issue of which state's law should apply since the result would be the same. The Michigan statute provided:

> Nothing contained in this act shall be interpreted to abolish, repeal, modify, restrict or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service and to the standards for professional conduct. Any officer, shareholder, agent or employee of a corporation organized under this act shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional service on behalf of the corporation to the person for whom such professional services were being rendered. The corporation shall be liable up to the full value of its property for any negligent or wrongful acts or misconduct committed by any of its officers, shareholders, agents or employees while they are engaged on behalf of the corporation in the rendering of professional services.

MICH. COMP. L. ANN. § 450.226 (West 1973). The Wisconsin statute provided:

> No firm, partnership or corporation may be relieved of responsibility for the conduct or acts of its agents, employees or officers by reason of its compliance with this chapter, nor may any individual practicing architecture or professional engineering services performed by reason of his or her employment relationship with the firm, partnership or corporation.

WIS. STAT. ANN. § 443.08(4)(a)(West Supp. 1985).

82. " 'Professional service' means any type of personal service to the public which requires as a condition precedent to the rendering of the service the obtaining of a license or other legal authorization. . . ." MICH. COMP. L. ANN. § 450.222(2)(West 1973).

extent of the court's analysis, and approved of the result as a workable test.[83]

The court, however, did not rely only on this statutory definition test. It was aware that sometimes clients reasonably expect their professional to provide services which the professional can provide without a license and which are so directly related, by custom and practice, to the professional work, that the firm professionals should be financially responsible. The court stated that its judgment "[preserved] the personal responsibility of a professional for services within his expertise and which the client has every right to expect will be performed in a professional manner."[84]

The court therefore addressed the correct issues of what was the ordinary course of the firm's business and what were reasonable client expectations. In this case, however, the court found that the securing of financing was neither within "the common conception"[85] of professional service nor within the "normal practice"[86] of professional architects. Moreover, there was no evidence that Heckert believed that the securing of finances was a professional service.[87]

*Liability to Non-Clients*

Traditionally, individual lawyers and law firms were liable only to clients. They were not financially responsible to third persons.[88] Courts have carefully examined this citadel of privity. In some jurisdictions, they have retained the defense. In other states, the courts have extended a lawyer's duty to third-party beneficiaries or to foreseeable victims determined by a balancing test. Many decisions on both sides of the issue have been well-reasoned. In making their decisions, the courts have wrestled with questions of the unpredictability of consequences, the enormity of damages and the problems inherent in imposing a third-party duty on a lawyer who ought to be primarily responsible to his client.

Regardless of how the courts resolve this issue, there is no reason to consider the employed status of the lawyer as relevant to the policy issue. If the courts of a particular jurisdiction have determined that certain third-parties, such as intended beneficiaries under a will, could sue a sole practitioner for negligence, this rule should apply even though the acting lawyer is

83. Comment, *Shareholder Liability in Professional Legal Corporations: A Survey of the States*, 47 U. PITT. L. REV. 817, 834 (1986). Of course it is workable, but it achieves its workability by being too narrow and not providing the client adequate protection.

84. *Herkert*, 106 Wis. 2d at 568, 317 N.W.2d at 845.

85. *Id.* at 565, 317 N.W.2d at 843.

86. *Id.* at 570, 317 N.W.2d at 845.

87. In light of the fact that plaintiff failed to prove that the services of assisting in securing financing and body politic approval are part of the accepted architect-client relationship or within the legal definitions of professional architectural expertise and the fact that the record is devoid of any evidence establishing that the general practice among architects is to assist a party to secure financing, we hold that the plaintiff has not proved by a preponderance of the evidence that the breach of the contract related to "professional services." Thus, we hold that the trial court erred in imposing personal liability upon the individual defendants for contractual obligations beyond their field of expertise as professional architects.

*Id.* at 571, 317 N.W.2d at 846.

88. For a general discussion of malpractice and privity see B. WOLFRAM, *supra* note 58, at 206-42.

employed by a professional corporation. Individual lawyers should not be able to negate unilaterally the state's general policy.

Unfortunately, certain statutory schemes invite an interpretation which interferes with the proper determination of this privity issue. These statutes suggest that the lawyer-employee will be liable only to a client, not to third persons, for her malpractice. Some states impose liability on the lawyer-employee of a professional corporation in the rendition of professional services "to a client."[89] Most jurisdictions have adopted the general savings clause which provides that the lawyer will remain liable as before only "to a person receiving the service."[90]

ABA Formal Opinion 303 could be interpreted to suggest this limitation on a lawyer-employee's personal financial liability.[91] The Ethics Committee said limited liability for lawyers was permissible if the lawyer rendering the service remained personally liable to the client. However, there is no good reason to interpret this to mean that the lawyer should be liable only to the client, and not to a third party, in jurisdictions which generally permit third parties to sue sole practitioners. First, at the time the Formal Opinion was written, there were few exceptions to the rule that lawyers were only liable to clients. Second, the opinion does not preclude the desirability of making lawyers liable to third persons. Third, it would reinforce modern trends in ethics to make the lawyer liable. The Model Rules of Professional Conduct are especially attentive to these third party concerns.[92]

Several courts have wrongly interpreted legislation and rules to permit this limitation. In *Cleveland v. Williams*,[93] the court examined an Alabama professional corporation statute which provided that shareholders of a professional corporation would be entitled to limited liability except that the law between the "person furnishing professional service and the person receiving such service" would not be changed.[94]

Mr. Williams retained the law firm of Clifford W. Cleveland, P.C. to represent him in his divorce and in connection with a claim to recover fire insurance proceeds on his house. Prior to the divorce trial, the insurance company paid the professional corporation a sum of money and, at the divorce trial, Cleveland promised to obtain necessary endorsements and to distribute the funds in accordance with the court's order. The court ordered that Williams' wife be awarded a portion of this fund. On appeal, Cleveland argued that the court improperly made him personally liable for this amount. He argued that because Mrs. Williams was a judgment creditor of his firm, he was shielded from liability as a stockholder.

The court agreed with Cleveland. It wrongly interpreted the statute to mean that the definition "person receiving professional services" could only mean a lawyer's clients. Since Mrs. Cleveland was not a client, she could not

89. *See supra* note 22.
90. *Id.*
91. ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 303, 49 A.B.A. J. 159 (1962).
92. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.3 (1983).
93. 441 S.2d 919 (Ala. Civ. App. 1983).
94. ALA. REV. STAT. § 10-4-236 (1975).

recover against the wrongdoing lawyer.[95] This interpretation unduly limited Cleveland's obligation. When the court ordered him to distribute certain funds to Mrs. Cleveland, he was under an obligation to do so. If he were a sole practitioner, Mrs. Cleveland could certainly have sustained this action against him. The court should not have allowed him to shield himself from this commitment by incorporation.[96]

Although this point was dictum, the court in *Zagoria v. Dubose Enterprises, Inc.*[97] made a similar misinterpretation. The Georgia statute also provided that the lawyer-owners would have limited liability except that there should be no change in the law with respect to the person providing professional services and "the person receiving such service."[98]

Zagoria and Stoner were co-shareholders of Zagoria & Stoner, P.C. Zagoria participated in two real-estate closings, and issued a check drawn on the firm's escrow accounts to two nonclients for fees and commissions. In both cases, the checks bounced, and the nonclients sued Zagoria, Stoner and the professional corporation. With respect to Stoner's and Zagoria's liability, the judge stated:

> In the context of a professional corporation engaged in the practice of law, the reference . . . to "person receiving such service" can only be to the client for whom the attorney is rendering professional services. Any other interpretation would be contrary to the Code of Professional Responsibility requirement that obligates an attorney "to exercise professional judgment solely on behalf of his client. . ." and not on behalf of third parties who may also participate in a given transaction. . . .[99]

The judge's focus was on an important question had the issue before him had been whether the Georgia courts would permit third parties to sue an attorney for professional malpractice. The second sentence of the quotation above is a sound reason, for example, for not renouncing the defense of privity. However, the argument was misplaced here. Regardless of how this privity issue is resolved, it is not germane to the proper interpretation of "person receiving such service."

It is obvious that this kind of statutory or rule language does not dictate this result. Courts could interpret "person receiving such service" to mean all persons who could sue the lawyer if she were a sole practitioner. In a very real sense, although these persons are not clients, they are the recipients

95. However, ALA. REV. STAT. § 10-4-236 (1975), states that the corporate form does not protect the professional in rendering service to a client. *Cleveland*, 441 S.2d at 921.

96. The court stated that "the check from the insurance company came into the hands of the professional corporation and was not handled by Clifford W. Cleveland in his individual capacity." *Cleveland*, 441 S.2d at 921. This explanation is fatuous. Cleveland not only participated in the actions, he was the individual who represented to the court that he would distribute the funds. It was not another person employed by the law firm of Clifford W. Cleveland, P.C. It thus seems apparent that Cleveland should have been held responsible for injuries resulting from his personal professional activities. The Alabama law was subsequently amended to hold persons who personally participate in professional work financially responsible for their work. *See* ALA. REV. STAT. § 10-4-390 (1985).

97. 163 Ga. App. 880, 296 S.E.2d 353 (Ct. App. 1982).

98. *Id.* at 882, 296 S.E.2d at 356.

99. *Id.*

(or victims) of the professional services. In the cases being examined here, they were directly injured by the negligent rendition of these services.[100]

*The Issue of Vicarious Liability*

1. *The Liability of the Direct Supervisor*

Ordinary agency principles hold that a corporate employee who directly supervises another employee will not be vicariously liable for the negligence of her subordinate.[101] On the other hand, if the supervisor were in business as a sole proprietor, the employer would be vicariously liable for the negligence of all its employees, including those under her direct supervision.

This Article, as do most state statutes, insists that the lawyer is vicariously liable for the negligence of those persons in fact under her direct supervision. There are several reasons for this result. First, it is consistent with the client's reasonable expectations. The client expects supervision as an aspect of professional service. This expectation does not change because the lawyer works for a professional corporation.

Second, an important rationale for not holding the supervisor liable in a non-professional business organization is that the supervisor will have little or no control over the choice of the subordinate. Therefore, it seems unjust to hold her vicariously liable. This fact, however, is not true in law practice. Lawyer supervisors, even if they are employees of a professional corporation, certainly will have a substantial say about who works for and with them. It is hard to imagine a senior lawyer insisting that an associate serve as a colleague's subordinate. It may indeed be an aspect of the supervisor's duty to resist such an imposition. It would be unprofessional, for example, to continue on a case when the inability to work with co-counsel indicates that the best interests of the client will not be served.[102]

Finally, such a rule of vicarious liability will not encourage officious interference or the imposition of additional expense by unwarranted outside

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100. First Bank & Trust Company v. Zagoria, 250 Ga. 844, 302 S.E.2d 674 (1983) reversed this case on another point. The Georgia Appellate Court held to its interpretation on this point. Zagoria v. Dubose Enterprises, Inc., 167 Ga. App. 120, 306 S.E.2d 433 (Ct. App. 1983).

Other commentators have not noticed this. The author of Note, *Professional Legal Corporations: Limited or Unlimited Liability for Shareholders in Missouri after First Bank & Trust Co. v. Zagoria?*, 28 ST. LOUIS U.L.J. 297 (1984), approved of the holding believing that the deficient checks had been issued to clients.

101. Justice Traynor, in Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (Sup. Ct. 1951), made the leading statement of this position:

> The doctrine of respondeat superior is not applicable to the relationship between a supervisor and his subordinate employees. The supervisor occupies an economic and legal position quite different from that of the employer. It is not the supervisor's work that is being performed, nor does he share in the profits which the employees' conduct is designed to produce. In the usual situation, furthermore, he, like his subordinates, is a wage earner, and he is seldom able to respond in damages to an appreciably greater extent than they. For these reasons, the law has shifted financial responsibility from the supervisor, who exercises immediate control, to the employer, who exercises ultimate control and for whose benefit the work is done. Section 2351 of the Civil Code codifies this principle and has been uniformly interpreted to exempt superior employees from vicarious liability to third persons for the tortious conduct of subordinates.

*Id.* at 378-79, 231 P.2d at 254-55.

102. MODEL CODE OF PROFESSIONAL RESPONSIBILITY D.R. 2-110(c)(3)(1980).

control. All owners are not supervisors. The principle here is that those who are in fact supervisors, who are already engaged in the matter, will be vicariously liable for the subordinate's negligence. This should encourage an appropriate and inexpensive degree of supervision and control.

Vicarious liability is consistent with modern notions of professional ethics. Although the Model Rules do not explicitly tie the civil liability rules to the ethics rules, the civil liability rule should at least reinforce the spirit of the ethics rule. Model Rule 5.1(b) provides: "A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct."[103] Admittedly, this is not a principle of vicarious liability. The Rule's legislative history makes this clear.[104] The Reporter for the Model Rules agrees with this position. In fact, he asserts that vicarious responsibility would be "draconian."[105]

Although it might be draconian to disbar, or to discipline a lawyer for the unordered, unratified, and unknown acts of a subordinate, vicarious liability in tort law for a subordinate's negligence would not be too severe.[106] A vicarious imputation of a disciplinary violation could result in disbarment and a substantial loss of reputation. Civil vicarious liability will only result in the loss of money. This would properly reinforce the idea that the supervisor should learn about a subordinate's conduct in order to take reasonable steps to ensure compliance with the Rules. Civil vicarious liability will encourage the monitoring of a subordinate's rendering of legal services. It will not put the supervisor at any risk for a subordinate's violation of any other professional rules that are not related to the providing of competent, negligence-free service.

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103. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1(b)(1980).

104. Some decisions are not clear as to whether negligent supervision is an independent violation, *see* In re Neimark, 13 A.D.2d 676, 214 N.Y.S.2d 12 (1961), or a basis for imputing another's misconduct to the lawyer and mitigating the penalty under the circumstances. *See* Vaughn v. State Bar, 6 Cal. 3d 847, 494 P.2d 1257, 100 Cal. Rptr. 713 (1972); In re Kiley, 22 A.D.2d 527, 256 N.Y.S.2d 848 (1965). Under Rule 5.1 a failure to provide reasonable supervision is a distinct transgression of professional obligations.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1, Official Comments, Legal Background (Proposed Final Draft 1981).

105. However, these new duties do not impute or impose vicarious liability upon supervisory lawyers for the acts of their subordinates. Nor do Rules 5.1(a) and (b) require partners and supervisory lawyers to guarantee the professional conduct of their subordinates, which would be a draconian form of vicarious liability.

G. HAZARD & W. HODES, *supra* note 38, at 454.

106. Model Rule 5.1(c) does not articulate a principle of pure vicarious responsibility as a matter of professional discipline. It does, however, state a broad responsibility. A supervisor could be disciplined if he knows of a subordinate's conduct and fails to take available remedial action. Model Rule 5.1(c) states:

> A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if:
>
> 1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>
> 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.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1(c)(1980).

Second, although Rule 5.1(c) holds that a supervisor will not be vicariously liable as a matter of disciplinary law, in certain circumstances the Rule imposes an affirmative obligation to prevent damages which the subordinate might cause.[107] The Reporter has referred to this as going "beyond those traditional principles [liability for conduct ordered and ratified] of accessorial liability."[108] It is therefore not a large step from this extension in disciplinary law to the imposition of vicarious liability in civil law.

As always, the judicial decisions which must wrestle with different statutes and rules are contradictory. The Kentucky Supreme Court's 1977 opinion in *Boyd v. Badenhausen*[109] illustrates the problem. The patient secured an appointment with Dr. Badenhausen. She was actually seen by Dr. Lang, one of Dr. Badenhausen's professional corporation's employees. Dr. Lang referred her to a third party for tests. The tests were returned to Dr. Badenhausen's office, but were misfiled by his clerical staff. The patient sued Dr. Badenhausen for the resulting damages.

The Kentucky statute was not atypical. The professional corporation law stated that the entire statutory scheme could not result in any change in "the fiducial, confidential, or ethical relationship between a person rendering professional services and a person receiving such services."[110] The issue for the court was what this relationship entailed.

The clerical staff's negligence caused the damages. Although the court does not explicitly make the finding of fact, Dr. Badenhausen was apparently the secretary's direct supervisor. The court referred to the negligent subordinate as "the girl in Dr. Badenhausen's office." Moreover, there were only three owners of the business, and it is therefore likely that Dr. Badenhausen was a staff supervisor. Thus the question became: Could Dr. Badenhausen, a professional employee of a professional corporation, be held vicariously liable for the negligence of supervised staff? The court's answer was an emphatic yes. It stated:

> Just as a surgeon is responsible for the negligence of a nurse or surgical attendant employed by a hospital to assist him in cutting open and sewing up a patient, so is a physician responsible for the derelictions of persons employed by a corporation to carry out for him the clerical details that are necessary to the successful performance of his duty to render skillful care and attention to whomever he accepts as a patient.
>
> If Dr. Badenhausen had been an old-fashioned country doctor without any office help and had mislaid his notes on this lady's care and then put her off and forgotten her, there can be little doubt that he could have been held responsible had she died as a consequence of that neglect. *Placing a layer of other people, by whomsoever they may be employed, between a physician and his patient does not alter the situation, because the physician's professional duties are not susceptible of being delegated or diffused.*[111]

107. *Id.*
108. G. HAZARD & W. HODES, *supra* note 38, at 454.
109. 556 S.W.2d 896 (Ky. Sup. Ct. 1977).
110. 10A KY REV. STAT. 274.055 (1980).
111. *Boyd*, 556 S.W.2d at 898-99 (emphasis added).

The court's result was correct because Dr. Badenhausen was a direct supervisor. It was this fact that made the analogy to the doctor in the operating room or to the country practitioner appropriate. However, as a general matter, "placing a layer of other people . . . [should] alter the situation." The professional lawyer in Chicago may delegate the supervision of professional and non-professional staff to a colleague in another city. The Chicago lawyer will not be a direct supervisor. It would be unfair to hold him liable for the acts of these subordinates. Large firm management requires different liability rules and the layers of other people, some of whom in fact do the supervision, may be to the client's and public's best interest.[112]

As the *Boyd* case properly interpreted general statutory language to entail a supervisor's vicarious responsibility for a subordinate's negligence, the New York Supreme Court, Appellate Division, in *Connell v. Hayden*,[113] incorrectly interpreted as denying vicarious liability an explicit statute which imposed liability on a doctor-owner of a professional corporation for the negligence "by any person under his direct supervision and control." After some difficult procedural wrangles, the court was faced with the following question: If the patient first sued and properly served Dr. Hayden for negligence, and subsequently sued and served the professional corporation (owned by Dr. Hayden and Dr. Jonassen) and Dr. Jonassen, could the professional corporation and Dr. Jonassen claim that the statute of limitations had run against them?

As to Dr. Jonassen, the court answered yes, the statute would have run unless he were vicariously liable for Dr. Hayden's negligence. On the other hand, if he were vicariously liable, then he could be served with process, for there would be no additional significant defenses to prepare.

The court treated Dr. Jonassen as Dr. Hayden's supervisor. Although the relevant statute seemed to make him liable for his subordinate's negligence, the court insisted that this was not based on a principle of vicarious liability. The court believed that the common law of business enterprises, not the law of sole practitioners, should apply. The court reasoned that the supervisor, in this case Dr. Jonassen, did not have the ability to select, control and discharge Dr. Hayden,[114] and that there was nothing in the statu-

112. Consistent with this interpretation of general language is Birt v. St. Mary Mercy Hosp. of Gary, Inc., 370 N.E.2d 379 (Ind. Ct. App. 1977). The court stated:

> We turn then to the express language of our statute. IC 1971, 23-1-14-14 provides: 'This act does not modify any law applicable to the relationship between a person furnishing professional medical service and a person receiving such service, including liability arising out of such professional service.'
>
> It is, thus, apparent that our legislature intended that the IMPCA should not destroy the traditional relationship between a professional and his patient through the creation of a corporate shield. *** It has been argued that such provisions must be construed to preserve more than the personal liability of a corporate employee for his own negligent tort existing under general corporations law. We agree. However, it does not necessarily follow that the statute imports the vicarious liability of the Uniform Partnership Act to apply to associating physicians. *Without deciding, we note that the statute may impose personal liability on contracts to cure and liability for the negligence of assistants acting under the physician's direction.*

*Id.* at 383 (emphasis added).

113. 83 A.D.2d 30, 443 N.Y.S.2d 383 (App. Div. 1981).

114. The court stated:

tory scheme which suggested that the legislative purpose was to change the law of business enterprise.[115] The court was wrong on both counts. The professional does have the power, even the obligation, to select and control his colleagues. Professionals are not employees like the employees of other business organizations. Moreover, the statute evinces an intent to retain the professional's liability as if she were a sole practitioner. The court unduly emphasized the general law of business organization.

Finally, although it probably came to the right result, the Kansas Supreme Court, in *Galvan v. McCollister*,[116] did not properly focus on the fact of actual supervision. In a "corporate" situation in which the professional corporation statute didn't apply, the court used, as did the *Connell* court, ordinary agency principles of the business enterprise.

The client sought legal assistance from the Kansas Legal Aid Society. A staff attorney represented her. She allegedly gave money to the Society's secretary. Plaintiff's claim was that the money was negligently lost, apparently by the secretary. She sued McCollister, the chief staff attorney and executive director. It was conceded that he had not been personally involved in this case.

If the allegations were true, the question was whether McCollister could be vicariously liable for the negligence of his subordinates. The court woodenly applied general agency principles. It held that a corporate employee, who was also a supervisor, was not ordinarily liable for a subordinate's acts. The case would have been better decided if the court had made a finding with respect to McCollister's actual supervisory role. If he had directly supervised the secretarial staff, then he should have been vicariously accountable for the subordinate's negligence. This would have been the result if he were a sole practitioner. On the other hand, if the Legal Aid Society were run in such a way that he did not directly supervise the staff, then he should

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The doctrine of respondeat superior does not apply to impose vicarious liability upon supervisors (*see* Yorston v. Pennell, 397 Pa. 28, 153 A.2d 255, 260, 85 A.L.R.2d 872, 880). The employer of both is liable under respondeat superior, but the supervisor is not because he lacks the right to select, control, and discharge the employee which is essential to the imposition of vicarious liability under that doctrine (57 C.J.S. Master & Servant, § 563). This does not mean that a supervisor may not be liable for the injuries caused by the conduct of one of his subordinates. It does mean that his liability is not vicarious, that is, without fault on his part.

*Id.* at 50-51, 443 N.Y.S.2d at 397.

115. The court concluded:

The purpose of subdivision (a) of section 1505 was to clearly indicate that, by incorporating, a professional could not insulate himself from personal liability to his clients for injuries sustained due to his own fault. Thus the subdivision states that a shareholder, employee or agent of a professional service corporation is liable for his own negligent or wrongful acts and for those of others only when committed "under his direct supervision and control." In this latter respect the liability is not vicarious but rather merely reflects the common law rule discussed above, that a supervisor is liable if he directs or permits tortious conduct by those under his supervision or fails to exercise proper control over them (RESTATEMENT, AGENCY 2D, § 358, Comment on subsection [1]). The section does permit professionals, by incorporating, to avoid the vicarious liability to which they would be exposed if they practiced as partners (*see 1970 Survey of N.Y. Law*, 22 SYRACUSE L. REV. 252; *cf.* Rotgin, *The Professional Corporation for Lawyers*, 52 N.Y.C.B.J., 634, 634-635).

*Id.* at 58-59, 443 N.Y.S.2d at 402.

116. 224 Kan. 415, 580 P.2d 1324 (Sup. Ct. 1978).

not be liable. In the latter case, the secretary, and her employer, the Legal Aid Society, would be proper defendants.

### 2. *Liability of the Lawyer Who Participates*

Lawyers within a firm in fact participate together on discrete projects. They often do so without there being clear supervisor-subordinate lines of authority. This Article posits that each lawyer who in fact participates in the project should be vicariously liable for a colleague's negligence to the same extent as if they were joined together as partners or engaged in a joint venture.[117] Although the existing statutory schemes are clearer on vicarious liability for supervisors, there are a number of states which would make the participant vicariously liable for a colleague's negligence.[118] Normally this must be inferred from the general savings clause which provides that the law will not be changed for the person rendering professional service. Since the participating lawyers will not necessarily share profit or loss, the question of whether they acted as if they were partners or joint venturers will be determined by the degree of control each has with respect to the work product.[119]

This will lead to equitable results.[120] If two senior lawyers and one junior lawyer in fact worked together on a project, each senior lawyer would be vicariously liable for the individual negligence of the other two. The junior lawyer would only be responsible for his own negligence. The first two could control the project; the subordinate couldn't.

Vicarious liability in this situation serves several functions. First, it deters individual negligence, and it encourages monitoring and assistance among lawyers in the working group. Second, since vicarious liability is premised on actual participation, remote owners will have no incentive to interfere with the working group. The potentially liable will already be engaged.

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117. The joint venture is an ad hoc partnership. The rules of liability are essentially the same as they would be if this were a partnership. *See* H. REUSCHLEIN & W. GREGORY, AGENCY AND PARTNERSHIP 340-344 (1979). There is no need to insist that the cooperating lawyers are in a "joint enterprise." This legal category has frequently been criticized, and is not necessary when the participants are clearly engaged in a commercial activity. *See* W. PROSSER, THE LAW OF TORTS § 72 (4th ed. 1971).

The Kansas City, Missouri Court of Appeals, in Baird v. National Health Foundation, 235 Mo. App. 594, 144 S.W.2d 850 (Ct. App. 1940), had an analogous situation before the passage of the professional corporations acts. In this case, the court properly found participation. Several doctors were employed by a Voluntary Unincorporated Association to provide medical service. Several doctors participated in providing service to the plaintiff patient. Each was held vicariously liable for his colleague's negligence. The court said:

> But here they were acting concurrently and all were employed by the same agency for a joint purpose, namely to look after and treat plaintiff. They were associated in the same office, the office of their joint employer; and they each had knowledge of what the other had done and was doing.

*Id.* at 606, 144 S.W.2d at 856.

In Note, *Professional Corporations and Associations*, 75 HARV. L. REV. 776, 781 (1962), the commentator suggested that the savings clause, properly interpreted, might imply vicarious liability for all participants in the project.

118. *See supra* note 22.

119. UNIFORM PARTNERSHIP ACT, § 6 (1969).

120. In Grayson v. Jones, 710 P.2d 76 (Nev. 1985), the Nevada Supreme Court granted a summary judgment for directors, officers, shareholders and employees of a professional corporation because there was no allegation in the complaint that they had personally participated in the alleged wrong.

As has been noted, this will not only exclude unwarranted interference, but it will also protect client costs from too much preventive monitoring. Third, this result is consistent with client expectations, since clients almost certainly look to the working group, rather than the owners of the firm, as their lawyers.[121] Given this common perception, it would be a "subterfuge" to permit the lawyers who actually rendered the professional service to limit their financial responsibility.[122] Furthermore, this approach is not too broad. It offers a fair and rational way of distinguishing between participants. It limits the group to only those participating lawyers who would be liable as partners or joint venturers if acting independently of the professional corporation. This is less harsh and extreme than one suggestion which is that if the firm were unwilling to distinguish precisely each lawyer's involvement in a client's case, then all the lawyer-owners should be liable.[123] This latter suggestion places too great a burden of proof on the law firm. It is unfair to the lawyers because it presumes participation and is virtually impossible to rebut.

The approach here is also consistent with the Model Rules. As has been noted, Rule 5.1(c) does not impose a concept of vicarious liability, as a matter of discipline, on either supervising lawyers or partners. To do this would be too severe. However, civil liability is not so severe and it will reinforce the monitoring among the working group in a way that will encourage compliance with the broad, affirmative associational liability mandated in Rule 5.1(c).

The cases, again interpreting different statutory language, confuse this issue. In *Fure v. Sherman Hospital*,[124] the issue was whether Dr. Feldman, an owner, was liable for the malpractice of a colleague when Dr. Feldman "was connected with the care of the patient only by signing a voucher form" for the patient's insurance carrier. The court held that this was not adequate "participation" to find that Dr. Feldman had rendered professional service. Just as in *We're Associates*,[125] in which the corporation's obligation had to be

121. In Birt v. St. Mary Mercy Hosp. of Gary, Inc., 370 N.E.2d 379 (Ind. Ct. App. 1977) the court stated:

> At least one commentator has suggested that vicarious liability is necessary to protect patient expectations that an entire firm will be engaged in his behalf rather than merely the associate with whom he deals. It appears to us that this overstates the case. While a patient may well expect to have the organization's entire expertise available to him, experience dictates that the physician-patient relationship is generally intensely personal, rather than collective.

*Id.* at 383.

122. Law firms, whether partnerships or corporations, will always act through their agents. The entity's authorized agents should never be individually liable for the firm's business, as opposed to professional, commitments. This is consistent with the general agency principle that an authorized agent is not liable for the debts of a known principal.

The corporation should be able to engage in ordinary business practices, such as leasing and purchasing, as would other business entities. This requires that the authorized agent, for example, the president, or the managing partner, should be able to act on the firm's behalf without risking personal liability. If the authorized agent were always held accountable, he would be reluctant to commit the firm to a contract. *See generally* RESTATEMENT (SECOND) OF AGENCY § 320 (1959).

123. *See* Comment, *supra* note 117, at 789.

124. 55 Ill. App. 3d 572, 13 Ill. Dec. 448, 371 N.E.2d 143 (Ct. App. 1977).

125. We're Associates Company v. Cohen, Stracher & Bloom, 65 N.Y.2d 148, 480 N.E.2d 357, 490 N.Y.S.2d 743 (Ct. App. 1985).

directly related to the professional service to hold the owners liable, the court here held that there was insufficient involvement to deem the lawyer a participant in the venture. Dr. Feldman did not participate in the actual medical service. Equally important, he exercised no control in this case over the doctor who did. Thus, the *Fure* case held that the factual absence of participation and control meant that the professional was not deemed to have participated in the rendering of the service.

In *Connell v. Hayden*,[126] the court held that Dr. Jonassen, as a supervisor of Dr. Hayden, would not be vicariously liable for the latter's negligence. The court also held that the fact that Dr. Jonassen had participated in the diagnosis would not change the result. The court wrongly concluded that, even in a situation where the participating doctors would be jointly liable if treated as partners or joint venturers, there was no vicarious liability if they were corporate employees.

The court recognized that to hold one vicariously liable for the negligence of the other rested on an analogy to partnership law. The court refused, however, to draw on this analogy. First, the principle of vicarious liability was an exception to the more general fault principle. The court was unwilling to extend it to co-employees without a clear legislative mandate. The court determined that the legislature intended that employees of a professional corporation were to be treated as the employees of other business enterprises.[127] This placed too great an emphasis on the legislature's decision to treat all businesspersons exactly alike.

Moreover, the court's rejection of "partnership-like" liability for participating professionals undervalued the client's reasonable expectations. If anything, clients look to the working group for responsible action. Finally, the court's decision does not encourage the appropriate level of monitoring among lawyers who work together. Instead, it encourages a "see-no-evil" attitude. The lawyer who knows nothing will not be responsible for the acts of colleagues.

Although the court's rationale is faulty, there is perhaps one plausible explanation for the result. The New York statute not only did not provide for the liability of participants, but it also did not have the general savings clause. There was, therefore, little opportunity for the court to interpret the statute in a way consistent with this Article's recommendation.

## CONCLUSION

The purpose of this Article has been to offer a model to understand and

126. 83 A.D.2d 30, 443 N.Y.S.2d 383 (App. Div. 1981).

127. The court stated:

> In any event, the doctrine is based upon analogy to the liability prevailing in cases of partnership, but as discussed *infra*, the Legislature in enacting provisions for the creation of professional corporations did not choose to impose broad vicarious liability upon professionals who so incorporate. To conclude that the defendant doctors who jointly diagnosed and treated the plaintiff could be vicariously liable for the negligence of their co-employees would improperly circumvent that limitation on liability. Such doctors must be considered co-employees engaged jointly upon the business of their employer, the corporation. They are not thereby transformed into joint venturers or partners.

*Id.* at 57-58, 443 N.Y.S.2d at 401.

to interpret professional corporation statutes and rules. The Article has recommended that lawyer-owners be permitted to limit their liability by incorporation and that lawyer-employees be treated as if they were sole practitioners engaged in the practice of law. As a result, these lawyer-employees will be personally liable for their own malpractice, and vicariously liable for the malpractice of persons whom they supervise and with whom they participate in the rendition of professional service as if they were partners or joint venturers. In sum, the lawyer, *qua* owner, is a businessperson, entitled to the same advantages as other businesspersons. The lawyer, *qua* employee, is a professional, and should be treated as if he were independent. The law firm is a collection of individual professionals, many of whom frequently join together in working groups.