

THE IMPLICATIONS OF FIDUCIARY RELATIONSHIPS IN REPRESENTING LIMITED LIABILITY COMPANIES AND OTHER UNINCORPORATED ASSOCIATIONS AND THEIR PARTNERS OR MEMBERS*

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Over the past half decade the landscape of business organization has changed dramatically. Not only are entirely new forms of business associations such as limited liability companies, limited liability partnerships and limited liability limited partnerships coming into existence, but the National Conference of Commissioners on Uniform State Laws has completed a decade-long project to revise the Uniform Partnership Act¹ and has promulgated a Uniform Limited Liability Company Act (ULLCA).² In addition, limited liability company legislation has been adopted in all but three states, with those three expected to enact legislation presently. This Article considers the ethical responsibilities and legal liability of attorneys representing various types of partnerships and limited liability companies ("associations"), partners in partnerships and members in limited liability companies ("owners"), particularly with respect to the implications for such representation of the fiduciary relationships among the owners and between the owners and the association.

Many aspects of associations are apparently contradictory, or at best, ambiguous. On one hand, a partnership has been characterized

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1. See UNIF. PARTNERSHIP ACT (1994), 6 U.L.A. 280 (Supp. 1995). The National Conference of Commissioners on Uniform State Laws (NCCUSL) titled the revised Act the "Uniform Partnership Act (1994)." However, the revised Act is commonly referred to as the "Revised Uniform Partnership Act" to avoid confusion with the original Uniform Partnership Act of 1914. In this Article, footnote references to the revised Act are styled "RUPA" and references to the original Act are styled "UPA."

2. UNIF. LTD. LIAB. CO. ACT (1994) (ULLCA), *reprinted in* 25 STETSON L. REV. 463 (1995). ULLCA was promulgated by NCCUSL at its annual meeting in Chicago in 1994 and has been revised in 1995.

as no more of an entity than a friendship. On the other, an association is at once a contract among its owners and a separate entity with its own legal identity.³ The owners are at once self-interested and fiduciaries to other owners and the association.⁴ As a result, the responsibility and liability of attorneys in representing these entities and their owners has been characterized by the same ambiguity and inconsistency.

In order to understand the appropriate conduct in representing an owner, association, or both, an attorney must understand the nature of the relationships and duties among the owners. The attorney should clearly determine whom he or she will represent and make that representation clear to both the clients and those who might mistakenly believe that the attorney is representing them. This disclosure should also make clear to the client, and probably to those who are not clients but may not understand the attorney's responsibility, what the representation entails. Finally, once the attorney has clearly identified his or her representation to all concerned, he or she must consider and understand the potential liability to those whom the attorney is not representing.

This Article will discuss the representation of unincorporated associations and the emerging area of an attorney's liability for aiding and abetting a breach of fiduciary duty. In this latter context, it is important to understand the fiduciary duties within limited liability companies, which vary considerably from state to state. Finally, this Article suggests some language which attorneys might consider using to clarify the representation that they are undertaking.

THE BASIC NATURE OF AN ASSOCIATION

An unincorporated association is a contractually based relationship among owners to conduct a business. Subject to the specific provisions of the contract, each owner has the right to participate in the financial success of the association, to participate in decisionmaking for the organization, and, in most cases, to act as

3. The uniform acts characterize both partnerships and limited liability companies as separate entities, distinct from their owners. RUPA § 201; ULLCA § 201.

4. The fiduciary nature of general partners and members in member-managed limited liability companies is clear. Limited partners as non-managing members of manager-managed limited liability companies are generally not considered to have fiduciary duties to the association or the other owners.

general agent for the association with the ability to bind the association to transactions in the ordinary course of business. This rule is not universal in that limited partners and nonmanaging members in a manager-managed limited liability company do not have the power to bind the association solely by reason of being owners. As discussed below, this lack of agency authority may have an impact on the fiduciary duties owed by such limited partners and members. Unlike directors and officers of a corporation, who coincidentally may own corporation stock, owners of an association manage and act as agents by virtue of their economic ownership in the association.

*THE ETHICAL FRAMEWORK OF REPRESENTATION OF AN
ASSOCIATION AND ITS OWNERS*

At the outset, an attorney representing those organizing or operating an association must determine who the client is. Among the possible clients are (1) one of the owners, (2) the association itself, (3) one owner and the association, or (4) more than one of the association's owners. If the attorney chooses to represent one of the owners, the attorney's duties are to the individual and the individual's confidences should be maintained. Nonetheless, even in this circumstance, the attorney may have liability if the attorney aids and abets the owner's breach of fiduciary duty.⁵ An attorney who is not representing any of the members separately should be able to limit the representation to the association alone, but some courts suggest that the attorney has a duty to the other owners of the association.⁶ If the attorney represents the association and one of its members, the attorney will have a duty to both the association and the owner, which may come into conflict. Finally, if the attorney undertakes to represent more than one of the organizers, the attorney will be acting as an "intermediary" and subject to an especially delicate set of ethical and legal liability rules.⁷

A lawyer who represents a partner or a member in that person's personal capacity should have no direct obligation to the organization, even though the partner or member may be in a fiduciary relationship with the organization. So long as it is clear to the client,

5. See *infra* notes 63–64 and accompanying text.

6. See *infra* text accompanying notes 14–25.

7. See *infra* text accompanying note 31.

and preferably to the organization, that the attorney is representing only the partner or member, there should be no direct ethical duty to the organization. Of course, at the critical time when the organization is being formed, there is a particularly delicate relationship, and the lawyer will probably be considered as representing one of the constituents rather than the entity.⁸

Under the *Model Rules of Professional Conduct (Model Rules)*, a lawyer who represents an organization "represents the organization acting through its duly authorized constituents."⁹ The *Model Rules* treat the organization as an entity separate and apart from the officer, employee, or other person acting on behalf of the organization.¹⁰ Under the *Model Rules*, if an attorney finds that a constituent of the organization is taking an action which is inconsistent with the organization's interest, the lawyer may go to higher authorities within the organization.¹¹ If the action is not reversed, the lawyer may quietly resign,¹² but need not disclose the situation to persons outside the organization unless required by the *Model Rules*.¹³

While the *Model Rules* discuss the situation in which the client is a corporation, an ABA Formal Ethics Opinion provides that a partnership is an organization within the meaning of Rule 1.13, and that an attorney representing the partnership does not represent the individual members unless the circumstances indicate otherwise.¹⁴ Under the *Model Rules*, representation of the partner

8. See GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 1.13:108 (2d ed. 1990 & Supp. 1994):

The premise that there is an entity being represented is most obviously inappropriate where separately represented parties are negotiating over the very creation of an entity such as a corporation or a partnership. The lawyer for each party represents that party, with corresponding duties of loyalty and confidentiality, and neither lawyer represents the entity in the full sense.

Id. But see *Buehler v. Sbardellati*, 41 Cal. Rptr. 2d 104 (Cal. Ct. App. 1995) (attorney who drafts the partnership agreement after parties have reached agreement does not have a duty to advise parties to obtain their own attorneys nor does he have a conflict of interest. Lawyer was to represent the partnership, not the individual partners).

9. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1994).

10. *Id.*

11. Rule 1.13(b)(3).

12. Rule 1.13(c).

13. Rule 1.6. The attorney-client privilege as applied to information received from a constituent of an organization is discussed in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). See HAZARD & HODES, *supra* note 8, § 1.13:107.

14. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 361 (1991). The Opinion states in part:

ship does not preclude the representation of parties who are adverse to individual partners.¹⁵ Even where the attorney is clearly representing the partnership rather than any of the partners, apparently all of the partners are entitled to information regarding the partnership from the attorney.¹⁶

The Opinion goes on to suggest that full disclosure will assist the attorney in making clear whom the attorney represents:

Lest the difficulties of representing both a partnership and one or more of its partners appear impossible to overcome, however, Rule 1.7(b)(2) and, to a lesser extent, Rule 1.13(d) suggest a procedure that may be helpful in many situations. If an attorney retained by a partnership explains at the outset of the representation, preferably in writing, his or her role as counsel to the organization and not to the individual partners, and if, when asked to represent an individual partner, the lawyer puts the question before the partnership or its governing body, explains the implications of the dual representation, and obtains the informed consent of both the partnership

The entity concept upon which Rule 1.13 is based, broadly stated, rests on two notions. The first is that an organization of persons, often in corporate form, is a separate jural entity having distinct rights and duties and capable, among other things, of entering into contracts and either bringing suit or being sued in its own name. Second, under the law of agency, a lawyer is an agent of the employing organization and it is the organization, as principal, to which the lawyer is professionally responsible, not its directors, officers, owners or other agents.

Id.

15. *Id.* Formal Opinion 361 further states, however, that: a lawyer undertaking to represent a partnership with respect to a particular matter does not thereby enter into a lawyer-client relationship with each member of the partnership, so as to be barred, for example, by Rule 1.7(a) from representing another client on a matter adverse to one of the partners but unrelated to the partnership's affairs.

Id. *But see* Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985) (noting that where the individual interests of the parties are directly involved in a particular matter, an attorney-client relationship may exist).

16. Thus, information thought to have been given in confidence by an individual partner to the attorney for a partnership may have to be disclosed to other partners, particularly if the interests of the individual partner become antagonistic to those of the partnership or other partners. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 361 (1991) (citing Wortham & Van Liew v. Superior Ct., 233 Cal. Rptr. 725 (1987) (holding that under California Joint Client Rule of Evidence "the attorney must divulge all partnership information to all partners")); Fassih v. Sommers, 309 N.W.2d 645 (Mich. Ct. App. 1981). The ruling cites numerous cases on both sides of the issue of whether an attorney has a duty to disclose information to limited partners. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 361, at n.1 (1991).

and the individual partners, the likelihood of perceived ethical impropriety on the part of the lawyer should be significantly reduced.¹⁷

Assuming the lawyer is representing the organization and none of the constituents or owners, there should be no formal duty owed to these constituents *as clients*. Nonetheless, the lawyer may be required to ensure that the constituents know that they are not being represented,¹⁸ and, to the extent that a constituent becomes adverse to the organization, the lawyer should proceed with the best interests of the organization *without involving unreasonable risks of disrupting the organization*.¹⁹ This limitation involves consideration of both the seriousness of the constituent's violation (adverseness) and the potential disruption resulting from the lawyer's proceeding with remedial actions.²⁰

New York City Bar Association Formal Opinion 1986-2 applies this rule to the situation in which the attorney representing the limited partnership becomes aware of wrongdoing by the general partner.²¹ If the general partner refuses to disclose the wrongdoing to the limited partners, the attorney may do so.²² This opinion is somewhat troubling as it contains the language: "an attorney represents the partnership interest of each individual partner of a partnership when he represents the entity of a partnership."²³ As noted above, the ABA interpretation of the *Model Rules* reaches the opposite result by holding that the attorney who represents an association does not represent any of the constituents.²⁴ The Colorado Bar Association Ethics Committee has acknowledged that the attorney organizing a partnership represents the entity rather than individual partners, but states that the lawyer should not represent the partnership in drafting the partnership agreement unless the attorney feels confident that the partners perceive the "differing interests and [acknowledge] the possibility that if a dispute arises, the lawyer

17. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 361 (1991).

18. Rule 1.13(d).

19. Rule 1.13(b).

20. Rule 1.13(b); *see also* HAZARD & HODES, *supra* note 8, § 1.13:305.

21. New York City Bar Ass'n Comm. on Professional and Judicial Ethics, Formal Op. 1986-2 (1986).

22. *Id.*

23. *Id.* (quoting Alaska Bar Ass'n, Op. 84-2 (1984)).

24. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 361 (1991).

may be unable to represent either the individual partners or the partnership.²⁵

Even where the attorney is representing the partnership, it is also possible, particularly in closely held enterprises, for the attorney to also represent one or more of the owners. While the *Model Rules* recognize this situation,²⁶ there are still problems that arise in the representation of clients in business transactions such as organization and ongoing business representation. In 1994, the New York City Bar Association considered the situation in which an attorney represented both the individual general partner and the limited partnership.²⁷ The opinion notes that the attorney represented the general partner with respect to the partnership.²⁸ Nonetheless, when the attorney learned (from persons other than the general partner) about misdeeds of the general partner, she was obligated to notify the limited partners.²⁹ The opinion blurs the distinction between representation of the limited partnership and the limited partners, but is quite explicit that any conflict between the representation of the general partner and of the partnership must be resolved in favor of the partnership.³⁰

The *Model Rules* also contemplate an attorney's representation of more than one client in the organization, operation, or dissolution of an association. In this circumstance, the attorney is acting as an "intermediary" within the meaning of Rule 2.2. This rule imposes significant limitations on the representation of any of the clients.³¹ Under the rule, an attorney is required to clearly explain the scope of the representation and must notify the client that the lawyer does not anticipate mediating or arbitrating any disputes between the parties. Because the attorney has a duty to each of the clients, there is probably no attorney-client privilege as among the clients, but the

25. Colorado Bar Ass'n Ethics Comm., Op. 68 (1985).

26. See Rules 1.7, 1.13(e).

27. New York City Bar Ass'n Comm. on Professional and Judicial Ethics, Op. 1994-10 (1994).

28. *Id.*

29. *Id.*

30. *Id.*

31. For a thorough review of the history of the "lawyer for the situation" and issues that arise when an attorney acts as an "intermediary," see John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741.

attorney may not reveal confidential information to third parties.³² Hence, it must be assumed that if a dispute arises between clients, the attorney-client privilege will not attach to prior communications. The clients should be advised that any request that the attorney act as intermediary may result in “additional cost, embarrassment, and recrimination.”³³ Obviously such representation should be approached very carefully and never considered when discussions among the clients are antagonistic and contentious. Finally, the clients should be advised that, to the extent they are not able to resolve any differences among themselves, the attorney may have to withdraw from the representation of any or all of them, depending on the circumstances. Further, if the attorney determines that he or she is incapable of complying with the *Model Rules*, or upon request of either client, the attorney may be required to withdraw and is prohibited from representing any of the clients regarding the association matters.³⁴

Before undertaking this type of representation, the lawyer must be satisfied (1) that the matter can be resolved in a manner compatible with the best interests of the clients, (2) that the clients can make informed decisions regarding the matter, (3) that if the representation is unsuccessful, the clients will not be prejudiced, and (4) that the lawyer's prior representation of clients outside of the transaction will not adversely impact the lawyer's representation as intermediary.³⁵ In acting as intermediary, the lawyer is attempting to “establish or adjust a relationship between clients on an amicable and mutually advantageous basis”³⁶ In this situation, the lawyer has a duty to keep each client informed and to protect each client's interest.

While representation of intermediaries appears to be fraught with peril, it is nonetheless a common situation in the organization of businesses and the formation of contracts. In those cases, attorneys, even those who have made full disclosure of the conflict, may find themselves liable if the transaction fails.

Generally, the attorney must maintain information received in

32. See New York City Bar Ass'n Comm. on Professional and Judicial Ethics, Formal Op. 1994-10 (1994).

33. Rule 2.2 cmt.

34. Rule 2.2(c).

35. Dzienkowski, *supra* note 31, at 764-66.

36. Rule 2.2 cmt.

the course of representing the client confidential.³⁷ When the lawyer represents both the organization and the owner, the lawyer is required to keep both clients fully informed, but must otherwise maintain the confidentiality of information received in the representation. This obligation to make certain information available supersedes the attorney-client privilege when the client owes a fiduciary duty to another, such as the obligation owed by directors to shareholders,³⁸ or the obligations owed by owners to associations.³⁹ In addition, when a dispute arises among the owners concerning the association, the association's attorney may be required to refrain from representing any of the owners.⁴⁰ When the lawyer represents the partnership or limited liability company, the lawyer may be required to disclose certain relevant information to all partners or members.⁴¹ As noted above, as among clients being represented by an attorney as intermediary, confidentiality does not attach.⁴²

Although similar, the rules governing the liability of lawyers for malpractice and breach of fiduciary duty differ from the rules setting forth ethical responsibility of an attorney. The legal profession has long regulated its own activities through ethical rules and malpractice litigation.⁴³ Although ethical rules are designed to provide professional disciplinary guidance,⁴⁴ there is little question that

37. Rule 1.6.

38. See *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied sub nom. Garner v. First Am. Life Ins. Co.*, 401 U.S. 974 (1971); *Valente v. Pepsico, Inc.*, 68 F.R.D. 361 (D. Del. 1975); and numerous other cases cited in Alvin K. Hellerstein, *A Comprehensive Survey of the Attorney-Client Privilege and Work Product Doctrine*, in *CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE* 1994, at 579 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5183 (1994)). *Contra Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989). For an extensive list of cases discussing this issue, see 17 PROF. LIAB. REP. 105 (April 1992).

39. *Ferguson v. Lurie*, 139 F.R.D. 362 (N.D. Ill. 1991).

40. *Prisco v. Westgate Entertainment, Inc.*, 799 F. Supp. 266 (D. Conn. 1992); *Griva v. Davison*, 637 A.2d 830 (D.C. 1994).

41. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 361 (1991).

42. Rule 2.2 cmt.

43. The *Model Rules* have been adopted in 35 states, in some instances with very little amendment; California has developed its own rules; Illinois based its new rules on both the *Model Rules* and the earlier *Model Code of Professional Responsibility*; New York uses primarily the *Model Code* incorporating certain matters from the *Model Rules*; North Carolina uses both substantive provisions from the *Model Rules* and the *Model Code*; Oregon uses the *Model Code* incorporating some *Model Rules*; and Virginia uses the *Model Code* adopting some of the *Model Rules*.

44. In the comments describing the scope of the *Model Rules*, the drafters state:

Violation of a Rule should not [in and of itself] give rise to a cause of action

these may indeed form the basis for legal liability.⁴⁵ At the least, violation of the ethical rules is probative of a violation of the standard of care.⁴⁶ While the *Model Rules of Professional Conduct* may provide a starting point, attorneys' responsibilities are also governed by various regulatory agencies before whom they practice.⁴⁷

An attorney representing a limited liability company or other association owes duties to the association. The duty owed to the

nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. *They are not designed to be a basis for civil liability.*

Id. at Preamble (emphasis added).

For a thorough exposition of the growth of liability of attorneys (both for malpractice and otherwise) in the context of regulated clients, see American Bar Association Working Group on Lawyers' Representation of Regulated Clients, *Laborers in Different Vineyards? The Banking Regulators and the Legal Profession* (Discussion Draft, January 1993) [hereinafter *Laborers*]; Emily Couric, *The Tangled Web: When Ethical Misconduct Becomes Legal Liability*, A.B.A. J., Apr. 1993, at 64. Couric states: "In sum, the lawyers who are at greatest risk of finding themselves on the wrong end of a malpractice suit are those who are reasonably competent, practicing in larger firms, handling larger matters, with adequate insurance protection." *Id.* at 67-68. Attorney liability has also been a focus of the American Law Institute's RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 4 (Tentative Draft No. 7, 1994). Section 74, comment f states, "[e]ven when proof of violation of or compliance with a statute or rule is admissible under this Section, it is not conclusive proof of the standard of care to which lawyers must conform for purposes of liability." *Id.* At its annual meeting on May 20, 1994, the ALI voted to return many of the provisions of the *Restatement (Third) of the Law Governing Lawyers* to the reporters for further consideration. Thus, many of the positions expressed in that document may be reversed or modified.

45. See Couric, *supra* note 44, at 68 (quoting Allen Snyder, former chairman of the District of Columbia's Board on Professional Responsibility: "[a] lot of the complicated malpractice cases today are based upon allegations that lawyers failed to fill their ethical responsibilities. . . . In some instances violations of the code are automatically malpractice"); see also *Laborers*, *supra* note 44, at 141.

46. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74(2) (Tentative Draft No. 7, 1994):

(2) Proof of a violation of a rule or statute regulating the conduct of lawyers does not irrebuttably prove negligence or give rise to an implied cause of action for negligence; but a trier of fact applying the standard of care of Subsection (1) may be informed, by instruction and through expert testimony, of the content and construction of such a rule or statute that was intended for the protection of persons in the position of the claimant, and an expert witness may rely on such a rule or statute in forming an opinion as to that application.

Id.

47. See, e.g., Remarks of Harris Weinstein, Chief Counsel, Office of Thrift Supervision, United States Dep't of the Treasury, before the Pennsylvania Association of Community Bankers (March 23, 1992), cited in *Laborers*, *supra* note 44, at 144; I.R.S. Circular 230, 31 C.F.R. pt. 10 (as amended in 1994).

association's owners is less clear. The Utah Supreme Court has ruled that an attorney representing a limited partnership has an implied attorney-client relationship or fiduciary duty with respect to the individual limited partners who reasonably believed the firm was acting for their individual interests as well as those of the partnership.⁴⁸ The court went on to suggest that problems resulting from this implied relationship might have been resolved through disclosure.⁴⁹ In a recent Ohio case involving an attorney who represented a partnership, the court extended the attorney-client relationship to the individual limited partners.⁵⁰

California courts have held that an attorney representing a partnership does not necessarily have an attorney-client relationship with an individual partner for purposes of applying conflict of interest rules; whether such a relationship exists depends on whether there is an express or implied agreement that the attorney also represents the partner.⁵¹ Recent cases have followed the entity rule recognizing that an attorney could represent a limited partnership without representing the limited partners.⁵² The sound result is

48. *Margulies v. Upchurch*, 696 P.2d 1195 (Utah 1985).

49. *Id.* at 1203.

50. *Arpadi v. First MSP Corp.*, 628 N.E.2d 1335, 1339 (Ohio 1994). The court stated that:

whether the duty arising from an attorney-client relationship is owed to the limited partnership itself or to the general partner thereof, it must be viewed as extending to the limited partners as well. Inasmuch as a limited partnership is indistinguishable from the partners which compose it, the duty arising from the relationship between the attorney and the partnership extends as well to the limited partners. Where such duty arises from the relationship between the attorney and the general partner, the fiduciary relationship between the general partner and the limited partners provides the requisite element of privity . . . Such privity, in turn, extends the duty owed to the general partner to the limited partners regarding matters of concern to the enterprise.

Our determination that the duty owed by an attorney to a partnership extends to the individual partners thereof is in accord with other jurisdictions which have considered the issue. . . . We therefore hold that appellees herein owed a duty of due care to appellants arising from the attorney-client relationship between appellees and the general partner and the limited partnership.

Id.

51. *Kapelus v. State Bar*, 745 P.2d 917 (Cal. 1987); *Responsible Citizens v. Superior Ct.*, 20 Cal. Rptr. 2d 756, 765 (Cal. App. Dep't Super. Ct. 1993).

52. See *Hopper v. Frank*, 16 F.3d 92 (5th Cir. 1993) (discussing Mississippi limited partnership); *Hackett v. Village Ct. Assoc.*, 602 F. Supp. 856 (E.D. Wis. 1990); *Quintel Corp. v. Citibank*, 589 F. Supp. 1235 (S.D.N.Y. 1984); *Responsible Citizens v. Superior Ct.*, 20 Cal. Rptr. 2d 756 (Cal. App. Dep't Super. Ct. 1993); *Holmes v. Young*, 885 P.2d 305 (Colo. Ct. App. 1994); *Alpert v. Shea*, 559 N.Y.S.2d 312 (N.Y. App. Div. 1990);

that stated in the *Model Rules*, that the attorney for the organization does not represent the owners. Although the attorney may not represent the owners individually, the attorney may owe a duty to the owners by virtue of fiduciary duties owed to the owners by the attorney's client (either the association or an individual owner). Similarly, a recent Wyoming case has held that an attorney retained to form a closely held corporation may have an attorney-client relationship with the incorporators.⁵³

An attorney generally is not liable or responsible to third parties for errors and omissions in performing services for a client.⁵⁴ The cases appear split on whether an attorney owes a duty to nonclients for negligent misrepresentation of facts to third parties, where the attorney is aware that the third party will rely on the attorney's statement.⁵⁵ An attorney may not have a duty to non-clients provided the attorney's actions are not fraudulent or malicious,⁵⁶ but the attorney may be liable for any intentional conduct.⁵⁷ The rule has

Rendler v. Markos, 453 N.W.2d 202 (Wis. Ct. App.), *rev. denied*, 454 N.W.2d 805 (Wis. 1990). *But see* Ronson v. Superior Ct., 29 Cal. Rptr. 2d 268 (Cal. App. Dep't Super. Ct. 1994) (not officially published); Rose v. Summers, Compton, Wells & Hamburg, P.C., 887 S.W.2d 683 (Mo. Ct. App. 1994).

53. Meyer v. Mulligan, 889 P.2d 509 (Wyo. 1995); *see also* Hager-Freemen v. Spiroff, 593 N.E.2d 821 (Ill. App. Ct.), *app. denied*, 602 N.E. 2d 451 (1992). For cases holding that an attorney for a corporation does not represent minority shareholders, see Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627 (Cal. Ct. App. 1991); Brennan v. Ruffner, 640 So. 2d 143 (Fla. 4th Dist. Ct. App. 1994); Felty v. Hartweg, 523 N.E.2d 555 (Ill. App. Ct. 1988); Goerlich v. Courtney Indus., 581 A.2d 825 (Md. Ct. Spec. App. 1990), *cert. denied*, 586 A.2d 13 (Md. 1991); TJD Dissolution Corp. v. Savoi Supply Co., 460 N.W.2d 59 (Minn. Ct. App. 1990); Bowen v. Smith, 838 P.2d 186 (Wyo. 1992).

54. *See, e.g.*, Baxt v. Liloia, 656 A.2d 835 (N.J. Super. Ct. App. Div. 1995) (attorney not liable to adverse party for breach of rules of professional conduct). *But see* Fire Ins. Exchange v. Bell, 643 N.E.2d 310 (Ind. 1994).

55. Fox v. Pollack, 226 Cal. Rptr. 532 (Cal. Ct. App. 1986); Adams v. Chenowith, 349 So. 2d 230 (Fla. 4th Dist. Ct. App. 1977); Legacy Homes, Inc. v. Cole, 421 S.E.2d 127 (Ga. Ct. App. 1992); Bloomer Amusement Co. v. Eskenazi, 394 N.E.2d 16 (Ill. App. Ct. App. 1979); Hacker v. Holland, 570 N.E.2d 951 (Ind. Ct. App. 1991); Brooks v. Zebre, 792 P.2d 196 (Wyo. 1990). *But see* Petrillo v. Bachenberg, 655 A.2d 1354 (N.J. 1995).

56. *See* Hill v. Boatright, 890 P.2d 180 (Colo. Ct. App. 1994); Berger v. Dixon & Snow, P.C., 868 P.2d 1149 (Colo. Ct. App. 1993); Weigel v. Hardesty, 549 P.2d 1335, 1337 (Colo. Ct. App. 1976) (holding that attorney for wife in divorce not liable to husband for releasing deed without obtaining a lien to protect husband and, "[w]hile fulfilling this obligation to his client, he is liable for injuries to third parties only when his conduct is fraudulent or malicious").

57. *See* Havens v. Hardesty, 600 P.2d 116, 118 (Colo. Ct. App. 1979) (holding attorney for creditor liable for enforced collection activity against wrong judgment debtor) (citing Pomeranz v. Class, 257 P. 1086 (Colo. 1927)). The *Havens* court stated:

been applied to hold that an attorney who drafted estate planning documents is not liable to beneficiaries.⁵⁸ On the other hand, attorneys have been held liable to non-clients who relied on attorneys' representations.⁵⁹ This rule has been applied to hold attorneys for partnerships liable to limited partners for misrepresentations.⁶⁰

Generally, if the lawyer is representing only a partner or member, there should be no direct responsibility to the organization. Thus, the information obtained during such representation should be maintained in confidence from the organization and the other owners.

As discussed above, the *Model Rules* adopt the entity approach to the representation of organizations and provides that the organization, rather than the owners or managers, is the client.⁶¹ Nonetheless, some have suggested that the attorney who represents a person in a fiduciary capacity to another may owe duties to the beneficiary of the client's duties. Section 73 of the proposed *Restatement (Third) of the Law Governing Lawyers* provides in part that an attorney has the duty "to prevent or rectify the breach of a fiduciary duty owed by a client to a non-client, when the non-client is not reasonably able to protect its rights and such a duty would not sig-

an attorney may be liable for his intentional torts even if performed for his client's benefit, we hold that, although an attorney's good faith and his acting in his client's behalf may be factors to be considered by the fact finder when determining whether and to what extent exemplary damages will be awarded to a plaintiff, they do not exonerate the attorney or release him from liability for any injuries to plaintiff caused by the attorney's intentional acts.

Id. at 119.

58. *Shriners Hosp. for Crippled Children, Inc. v. Southard*, 892 P.2d 417 (Colo. Ct. App. 1994):

An attorney has a duty to act in the best interests of his or her client and is liable to third parties only for injuries caused by the attorney's fraudulent, malicious, or intentionally tortious conduct.

Colorado courts have held that an attorney's liability to third parties should be limited because of the attorney's duty of loyalty and effective advocacy to his or her client, the nature of the potential for adversarial relationships between the attorney and other parties, and because of the attorney's unlimited potential liability if attorney liability is extended to third parties.

Id. at 418 (citations omitted).

59. *Central Bank Denver v. Mehaffy, Rider, Windholz & Wilson*, 865 P.2d 862 (Colo. Ct. App. 1993), *aff'd*, 892 P.2d 230 (Colo. 1995); *Bohn v. Cody*, 832 P.2d 71 (Wash. 1992). *Contra Krawczyk v. Bank of Sun Prairie*, 496 N.W.2d 218 (Wis. Ct. App. 1993).

60. *Pucci v. Santi*, 711 F. Supp. 916 (N.D. Ill. 1989); *Adell v. Sommers, Schwartz, Silver & Schwartz, P.C.*, 428 N.W.2d 26 (Mich. Ct. App. 1988).

61. Rule 1.13(a).

nificantly impair the performance of the lawyer's obligations to the client."⁶² Although this section of the *Restatement* is still under consideration, the concept of a lawyer's liability for aiding and abetting a breach of fiduciary duty has been recognized, albeit in dicta, in Colorado⁶³ and California.⁶⁴ To the contrary, a recent New York

62. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73(4) (Tentative Draft No. 7, 1994).

63. In *Holmes v. Young*, 885 P.2d 305 (Colo. Ct. App. 1994), the court addressed a lawyer's liability when representing a partnership stating, "[i]n jurisdictions which have recognized the tort of aiding and abetting a breach of fiduciary duty, the plaintiff must prove each of the following elements: (1) breach by a fiduciary of a duty owed to plaintiff, (2) defendant's knowing participation in the breach, and (3) damages." *Id.* at 308-09 (quoting *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 281-82 (2d Cir. 1992)). The court stated, "[w]e perceive no reason why the tort of aiding and abetting a breach of fiduciary duty should not be recognized in a limited partnership situation." *Id.* at 309; see also *Terrydale Liquidating Trust v. Barness*, 611 F. Supp. 1006 (S.D.N.Y. 1984). The gravamen of a claim of aiding and abetting a breach of fiduciary duty is the defendant's "knowing participation" in the fiduciary's breach of trust; wrongful intent is not necessary as the factfinder is required only to "find that the [defendant] knew of the breach of duty and participated in it." *S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 848 (2d Cir. 1987). A general partner owes a fiduciary duty to a limited partner not to misappropriate partnership assets, and this fiduciary duty continues past the dissolution of a partnership through the winding up period until the division of partnership assets is complete. See *Steeby v. Fial*, 765 P.2d 1081 (Colo. Ct. App. 1988); *Gundelach v. Gollehon*, 598 P.2d 521 (Colo. Ct. App. 1979).

64. In *Ronson v. Superior Ct.*, 29 Cal. Rptr. 2d 268 (Cal. App. Dep't Super. Ct. 1994) (not officially published), the court stated:

As to the factors of whether the individual partners sought professional advice or attempted to establish an attorney-client relationship with the partnership's attorneys, of course there was no such direct contact here. However, it is alleged that the attorney defendants prepared the draft documents in order to induce the limited partners to rely on them. This case is thus distinguishable from *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104, 110-111, 128 Cal.Rptr. 901, and *Courtney v. Waring* (1987) 191 Cal.App.3d 1434, 237 Cal.Rptr. 233 because in those cases the attorneys' names were evidently on the opinion letter or prospectus which was sent out to induce third party reliance. Here, the attorneys ghost-wrote the documents for the general partner, and thus did not intentionally induce *knowing* reliance on their participation in the transaction. Even so, if there are other factors leading to an implied attorney-client relationship, where the attorney has knowledge regarding the purpose of his or her work product, a duty may be established to those whose conduct has been influenced. (*Id.* at p. 1444, 237 Cal.Rptr. 233.) In such a case, an attorney may owe a plaintiff a duty of care where the "end and aim" of the attorney's advice, even to another, is to induce the plaintiff's reliance on it. (*Goodman v. Kennedy, supra*, 18 Cal.3d at p. 343, fn. 4, 134 Cal.Rptr. 375, 556 P.2d 737.)

Similarly, since the attorney defendants advised the fiduciary about his duty of disclosure to the limited partners, they may have undertaken some kind of duty to protect those interests. (See *Morales v. Field, DeGoff, Huppert*

opinion has stated that a partner lacked standing to sue the partnership's receiver and the receiver's attorney for breach of fiduciary duty,⁶⁵ although another New York case has held that attorneys could be held liable to a group that acquired a corporation where attorneys issued opinions and assisted in causing the corporation to issue debentures in violation of covenants with creditors.⁶⁶ Other cases have held that an attorney does not have a duty to disclose a client's fraud to persons to whom the attorney does not have a fiduciary relationship.⁶⁷ Obviously, it is essential that the attorney have a clear understanding of the fiduciary relationships of the owners and the association.

Fiduciary Relationships Among Owners of Various Business Entities

Under the Uniform Partnership Act of 1914⁶⁸, partners owe a fiduciary duty to each other and the partnership to account for any gains made in the formation, operation, and winding-up of the partnership.⁶⁹ In addition, partners, as agents of the partnership,⁷⁰ owe the fiduciary duties owed by agents to principals.⁷¹ Finally, partners owe each other an obligation to disclose information concerning the

& *MacGowan* (1979) 99 Cal.App.3d 307, 316, 160 Cal.Rptr. 239 [holding that in the trust context an attorney undertaking a relationship as advisor to a trustee also assumes a relationship with the trust beneficiary akin to that between trustee and beneficiary].)

Id. at 279.

65. *Lubitz v. Mehlman*, 591 N.Y.S.2d 839 (N.Y. App. Div. 1993). The *Lubitz* court held that:

[a]lthough part of Fellner's [the attorney] job was to counsel Grossman [the receiver] in safeguarding Heather's [the limited partnership] interests, and, as a court-appointed lawyer, Fellner was under court supervision, he was still Grossman's counsel rather than Heather's. Accordingly, only Grossman could sue Fellner for malpractice and complain of his having violated his fiduciary duties.

Id. at 843.

66. *Massachusetts Fin. High Income Trust v. Playing Card Corp.*, N.Y.L.J. Feb. 27, 1995, at 28 (N.Y. Sup. Ct. 1995).

67. *Camp v. Dema*, 948 F.2d 455 (8th Cir. 1991); *Schatz v. Rosenberg*, 943 F.2d 485 (4th Cir. 1991), *cert. denied sub nom. Schatz v. Weinberg & Green*, 503 U.S. 936 (1992); *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490 (7th Cir. 1986).

68. UNIF. PARTNERSHIP ACT (UPA), 6 U.L.A. 5 (1969 & Supp. 1995).

69. UPA §§ 9(1), 21(1).

70. *Id.* § 9.

71. *Id.* § 4(3) (stating that the law of agency applies to partnerships).

partnership business.⁷² The Revised Uniform Partnership Act takes these duties, which are stated tersely in the original Uniform Partnership Act, and amplifies them to reflect what the drafters understood the common law to be. It sets forth the fiduciary duties⁷³ and the duty to render information (which it does not characterize as fiduciary).⁷⁴ In a limited partnership, the general partners have the same fiduciary duties as they would in a general partnership.⁷⁵ However, limited partners, who are not statutory agents of the part-

72. *Id.* § 20.

73. RUPA § 404. This section specifically spells out the fiduciary duties in a partnership as follows:

(a) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in Subsections (b) and (c).

(b) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(1) to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use or appropriation by the partner of partnership property, including the appropriation of a partnership opportunity;

(2) to refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

(3) to refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

(c) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(d) A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(e) A partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the partner's conduct furthers the partner's own interest.

(f) A partner may lend money to and transact other business with the partnership, and as to each loan or transaction, the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law.

(g) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.

Id.

74. *Id.* § 403.

75. REVISED UNIF. LTD. PARTNERSHIP ACT (RULPA) § 403, 6 U.L.A. 407 (Supp. 1995).

nership and with respect to which there is no statutory statement of duties, are not generally considered to be fiduciaries of the limited partnership.

The states' limited liability company (LLC) statutes vary widely in their description of management rights and fiduciary and other duties owed by the members and managers to the limited liability company and its members. Many of the LLC statutes draw heavily on corporate statutes, which are more specific than the original Uniform Partnership Act, and the general tendency has been toward greater explicitness in statutory drafting as exemplified by the Revised Uniform Partnership Act.

The LLC statutes, other than the Minnesota, Tennessee, and possibly North Dakota statutes, permit the LLC to be managed either by the members themselves or by managers who may be selected by the members in any manner.⁷⁶ This approach is followed in both the American Bar Association Business Law Section Prototype Limited Liability Company Act⁷⁷ and the ULLCA.⁷⁸ The Oklahoma

76. Management is by the members unless the articles of organization or operating agreement provide for management by managers. ALA. CODE § 10-12-21(b) (Supp. 1993); ARIZ. REV. STAT. ANN. § 29-681(A) (Supp. 1994) (articles of organization are required to state either that the management is by the members or that management is by the managers); ARK. CODE ANN. § 4-32-401(a) (Michie Supp. 1993); CAL. CORP. CODE § 17150 (West Supp. 1995) (articles of organization); CONN. GEN. STAT. ANN. § 34-130(b) (West Supp. 1995); DEL. CODE ANN. tit. 6, § 18-402 (1993) (limited liability company agreement); FLA. STAT. § 608.422 (1993); IDAHO CODE § 53-621 (1994); ILL. ANN. STAT. ch. 805, para. 180/15-1 (Smith-Hurd Supp. 1995); IND. CODE ANN. § 23-18-4-1 (West 1994); IOWA CODE ANN. § 490A.702(1) (West Supp. 1994); KAN. STAT. ANN. § 17-7612 (Supp. 1993); LA. REV. STAT. ANN. § 12:1311 (West 1994); MD. CODE ANN., CORPS. & ASS'NS § 4A-401 (West 1993); MICH. COMP. LAWS ANN. § 450.4401 (West Supp. 1995); MO. ANN. STAT. § 347.039 (Vernon Supp. 1995); MONT. CODE ANN. § 35-8-401(1) (1994); NEB. REV. STAT. § 21-2615 (Supp. 1994); NEV. REV. STAT. ANN. § 86.291 (Michie 1994); N.H. REV. STAT. ANN. § 304-C:26 (Supp. 1994); N.J. STAT. ANN. § 42:2B-27 (West Supp. 1995); N.Y. LTD. LIAB. CO. LAW §§ 401, 408 (McKinney Supp. 1995); OHIO REV. CODE ANN. § 1705.25 (Anderson Supp. 1994); OR. REV. STAT. § 63.130 (Supp. 1994); 15 PA. CONS. STAT. § 8941(a) (Supp. 1995); R.I. GEN. LAWS § 7-16-14 (1992); S.D. CODIFIED LAWS ANN. § 47-34-16 (Supp. 1993); UTAH CODE ANN. § 48-2b-125(1) (1994); VA. CODE ANN. § 13.1-1022(A) (Michie 1993 & Supp. 1995); W. VA. CODE § 31-1A-20 (Supp. 1994); WIS. STAT. ANN. § 183.0401(1) (West Supp. 1994); WYO. STAT. § 17-15-116 (1989). For a full discussion of management, see LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES ch. 8 (1992).

77. American Bar Association Business Law Section Committee on Partnerships and Unincorporated Business Organizations, Working Group on Prototype Limited Liability Company Act, PROTOTYPE LIMITED LIABILITY COMPANY ACT (Nov. 1992) [hereinafter PROTOTYPE].

78. PROTOTYPE § 401; ULLCA § 301.

and Texas statutes provide for governance by managers unless the members elect to reserve management to themselves.⁷⁹ The Colorado statute originally required elected managers, but has been amended to provide for either member management or elected management.⁸⁰ The Minnesota, North Dakota, and Tennessee statutes require that the LLC have managers or persons performing the functions of managers,⁸¹ and the North Dakota statute suggests the same.⁸² The Minnesota, North Dakota, and Tennessee statutes require an additional level of management: *governors* who serve a function similar to that served by directors in corporations.⁸³

As in limited partnerships, the same people who have management authority in the LLC can enter into contracts and bind the LLC.⁸⁴ Thus, in an LLC in which management is reserved to the members, members can bind the LLC to contracts and alienate the LLC's property. But if the LLC is operated by managers, only managers may bind the LLC, and members, unless they are acting in some other agency capacity, do not have such authority.⁸⁵ The LLC

79. OKLA. STAT. ANN. tit. 18, § 2013 (West Supp. 1995); TEX. REV. CIV. STAT. ANN. Art. 1528n, art. 2.12 (West Supp. 1995).

80. COLO. REV. STAT. ANN. § 7-80-401 (West Supp. 1994).

81. MINN. STAT. ANN. § 322B.67 (West 1995) (a limited liability company must have one or more natural persons exercising the functions of the offices, however designated, of chief manager and treasurer); N.D. CENT. CODE § 10-32-88 (Supp. 1993). The managers *must* consist of a president, a vice president, a secretary, and a treasurer. If no such persons are elected, the persons serving those functions are deemed elected. N.D. CENT. CODE § 10-32-92 (Supp. 1993); TENN. CODE ANN. § 48-241-101 (Supp. 1994).

82. N.D. CENT. CODE § 10-32-88 (Supp. 1993) (requiring that the managers of an LLC consist of a president, one or more vice presidents, and a treasurer).

83. MINN. STAT. § 322B.606 (West 1995); N.D. CENT. CODE § 10-32-69 (Supp. 1993); TENN. CODE ANN. § 48-238-101 (Supp. 1994).

84. For a discussion of the requirements for ownership and transfer of property including real estate, see RIBSTEIN & KEATINGE, *supra* note 76, ch. 7.

85. Under the Prototype and the ULLCA, members are agents of a member-managed LLC and managers are general agents of a manager-managed LLC. PROTOTYPE § 301; ULLCA § 301; *see* ALA. CODE § 10-12-21 (Supp. 1993); ARIZ. REV. STAT. ANN. § 29-654 (Supp. 1994); ARK. CODE ANN. § 4-32-301 (Michie Supp. 1993); CAL. CORP. CODE § 17157 (West Supp. 1995); COLO. REV. STAT. ANN. §§ 7-80-407, 408 (West Supp. 1994) (manager has authority to contract debts and deal with property, members have no authority; modified in 1994 to provide that in a member-managed LLC, members have the authority of managers); CONN. GEN. STAT. ANN. § 34-130(a) (West Supp. 1995); FLA. STAT. §§ 608.424, 425 (1993); GA. CODE ANN. § 14-11-301(a) (1994); IDAHO CODE § 53-616 (1994); ILL. ANN. STAT. ch. 805, para. 180/15-1 (Smith-Hurd Supp. 1995); IND. CODE ANN. § 23-18-3-1 (West 1994); KAN. STAT. ANN. § 17-7614 (Supp. 1993); LA. REV. STAT. ANN. § 12:1317 (West 1994) (members or managers are mandataries for all matters in the ordinary course of its business other than the alienation, lease, or encumbrance of its

statutes of Delaware (prior to recent amendments), Iowa, New Jersey, Washington, Pennsylvania, and Virginia have no express statement of the agency authority of either members or managers, but suggest that members and managers have equal general authority to bind the LLC.⁸⁶ In 1994, Delaware's LLC statute was amended to set forth the authority of members and managers.⁸⁷ Pennsylvania's statute expressly addresses the authority of members to bring suit

immovables, unless such mandate is restricted or enlarged in the articles of organization or unless such member or manager lacks the authority to act for the limited liability company and the person with whom he is dealing has knowledge of the fact that he lacks such authority); MD. CODE ANN., CORPS. & ASSN'S § 4A-401 (West 1993) (member is always an agent of the LLC if apparently carrying on the business in the usual way); MICH. COMP. LAWS ANN. § 450.4406 (West Supp. 1995); MINN. STAT. ANN. § 322B.115.4(8) (West 1995) (authorizing the delegation of the authority to sign certain documents by other than the chief manager, thereby suggesting that the chief manager at least has authority to sign documents); MO. ANN. STAT. § 347.065 (Vernon Supp. 1995); MONT. CODE ANN. § 35-8-301 (1994); NEB. REV. STAT. §§ 21-2616 (contracting debts), -2617 (transferring property) (Supp. 1994); NEV. REV. STAT. ANN. § 86.301 (Michie 1994) (managers if managed by managers, otherwise as provided in the articles of organization); N.H. REV. STAT. ANN. § 304-C:26(I) (Supp. 1994); N.Y. LTD. LIAB. CO. LAW § 412 (McKinney Supp. 1995); N.D. CENT. CODE § 10-32-89 (Supp. 1993) (authority of managers and agents as set forth in operating agreement and resolutions of the board of governors); OHIO REV. CODE ANN. § 1705.25 (Anderson Supp. 1994); OKLA. STAT. ANN. tit. 18, §§ 2015, 2019 (West Supp. 1995); OR. REV. STAT. ANN. § 63.140 (Supp. 1994); R.I. GEN. LAWS §§ 7-16-14, 15 (1992); S.D. CODIFIED LAWS ANN. § 47-34-18 (Supp. 1993); TENN. CODE ANN. §§ 48-238-103 (member-managed), 238-104 (board-managed) (Supp. 1994); TEX. REV. CIV. STAT. ANN. Art. 1528n, art. 2.02 (West Supp. 1995); UTAH CODE ANN. § 48-2b-125 (1994); W. VA. CODE § 31-1A-21 (Supp. 1994) (deals with contracting debts, no similar provision for property); WIS. STAT. ANN. § 183.0301 (West Supp. 1994); WYO. STAT. § 17-15-117 (1989).

86. DEL. CODE ANN. tit. 6, § 18-402 (1993) (describing who is entitled to manage the LLC but not describing authority); IOWA CODE ANN. §§ 490A.303(2) (West Supp. 1994) ("articles of organization may set forth . . . a statement of whether there are limitations on the authority of members to bind the limited liability company"), .202 ("unless its articles of organization provide otherwise, a [LLC] has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs"); 15 PA. CONS. STAT. § 8942(b)(2) (Supp. 1995) (requiring a vote to allow member or manager to do any act that contravenes certificate of organization or operating agreement); VA. CODE ANN. § 13.1-1019 (Michie 1993) (no express authority to bind; this section, dealing with liability, speaks of "member, manager or other agent," suggesting that members and managers may be agents); WASH. REV. CODE ANN. § 25.19.190 (West Supp. 1995).

87. S. Res. 312, 137th Gen. Assem. (1994) added the following language to DEL. CODE ANN. tit. 6, § 18-402: "Unless otherwise provided in a limited liability company agreement, each member and manager has the authority to bind the limited liability company." *Id.* The legislation also confirms that members and managers have the authority to delegate the member's or manager's rights and powers to manage the LLC. DEL. CODE ANN. tit. 6, § 18-402.

on behalf of the limited liability company.⁸⁸

Like a general partner in a general partnership governed by the Revised Uniform Partnership Act, a member in a member-managed or a manager in a manager-managed limited liability company has duties which are often characterized as “fiduciary.” As discussed below, members of a member-managed limited liability company are similar to general partners in that they are general agents of the association, but they differ in that their actions do not create liabilities that are individually binding on the other owners. The owners of an association therefore owe each other a duty to perform under the contract that establishes the relationship and will often incorporate statutory default provisions where owners have not agreed otherwise. Furthermore, owners also owe to each other fiduciary duties that arise from the agency relationship, and, possibly, from the control that a majority member exercises over the business.

The statutes vary in their description of the duties owed by members and managers.⁸⁹ Roughly half of the statutes require the manager to act in good faith, with the care of an ordinary prudent person, and in a manner the manager believes to be in the best interests of the LLC, while allowing the manager to rely on information provided by employees, managers, or experts.⁹⁰ The Washington and Wisconsin statutes set forth a series of partnership-based du-

88. 15 PA. CONS. STAT. § 8992 (Supp. 1995).

89. For a discussion of the fiduciary duties of managers and members, see RIBSTEIN & KEATINGE, *supra* note 76, ch. 9.

90. ALA. CODE § 10-12-22(a) (Supp. 1993) (allowing members to enlarge or restrict duties); COLO. REV. STAT. § 7-80-406 (West Supp. 1994); CONN. GEN. STAT. ANN. § 34-141 (West Supp. 1995); GA. CODE ANN. § 14-11-305(1) (1994 & Supp. 1995); IOWA CODE ANN. § 490A.706 (West Supp. 1994); LA. REV. STAT. ANN. § 12:1314 (West 1994); MICH. COMP. LAWS ANN. § 450.4404(1) (West Supp. 1995); MINN. STAT. §§ 322B.663.1 (governors), 322B.69 (managers) (West 1995); MO. ANN. STAT. § 347.088(1) (Vernon Supp. 1995); N.Y. LTD. LIAB. CO. LAW § 409 (McKinney Supp. 1995); N.D. CENT. CODE §§ 10-32-86 (governors), -89 (managers) (1993); OHIO REV. CODE ANN. § 1705.29(B) (Anderson Supp. 1994); OR. REV. STAT. ANN. § 63.155(1) (Supp. 1994); 15 PA. CONS. STAT. § 8943(a) (loyalty, but not care, of members in member-managed LLC described in same terms as those applicable to general partnership), 8943(b)(1) (managers have the duties of officers, directors and shareholders) (Supp. 1995); R.I. GEN. LAWS § 7-16-17 (1992); TENN. CODE ANN. §§ 48-239-1015 (duties of governors), -240-102 (duties of members of member-managed LLC), 241-102 (duties of managers) (Supp. 1994); VA. CODE ANN. § 13.1-1024.1 (Michie 1993); W. VA. CODE § 31-1A-20(h) (Supp. 1994). Neither the Virginia nor West Virginia statutes set forth the duty of care, and the Pennsylvania statute does not set forth a duty of care for members in a member-managed LLC.

ties.⁹¹ The California statute provides that managers owe the same fiduciary duties to the LLC and the members as partners owe a partnership and the other partners.⁹² The California and New York statutes provide that in a member-managed LLC, members have the duties of managers.⁹³ The Nebraska statute requires members to hold in trust property members were obligated to contribute, and property wrongfully distributed or returned by the company.⁹⁴ Nine other statutes have no specific provisions setting forth the duties of managers, but allow the LLC to define such duties.⁹⁵ ULLCA follows a theme similar to the Revised Uniform Partnership Act, imposing a gross negligence, reckless misconduct, intentional misconduct, or knowing violation of law standard.⁹⁶ Utah and Wyoming have no

91. WASH. REV. CODE ANN. § 25.19.155 (West Supp. 1995) (providing that members and managers are liable to the LLC for gross negligence, intentional misconduct, and knowing violation of law and imposing trust on any benefit derived in the conduct or winding up of the LLC or from the use of LLC property); WIS. STAT. ANN. § 183.0402 (West Supp. 1994).

92. CAL. CORP. CODE § 17153 (West Supp. 1995).

93. *Id.* § 17150; N.Y. LTD. LIAB. CO. LAW § 401(b) (McKinney Supp. 1995).

94. NEB. REV. STAT. § 21-2620(2) (Supp. 1994).

95. ARIZ. REV. STAT. ANN. § 29-681 (Supp. 1994); FLA. STAT. § 608.422 (1993); ILL. ANN. STAT. ch. 805, para. 180/1-30(10) (Smith-Hurd Supp. 1995); KAN. STAT. ANN. § 17-7604(h) (Supp. 1993); MD. CODE ANN., CORPS. & ASS'NS § 4A-203(10) (West 1993); NEV. REV. STAT. ANN. § 86.281(a) (Michie 1994); S.D. CODIFIED LAWS ANN. § 47-13B-6(9) (Supp. 1993); UTAH CODE ANN. § 48-2b-105(1)(i) (1994); WYO. STAT. § 17-15-104(a)(ix) (1989).

96. Section 409 of the ULLCA, which addresses members' and managers' conduct, states:

SECTION 409. GENERAL STANDARDS OF MEMBER'S AND MANAGER'S CONDUCT.

(a) The only fiduciary duties a member owes to a member-managed company and its other members are the duty of loyalty and the duty of care imposed by subsections (b) and (c).

(b) A member's duty of loyalty to a member-managed company and its other members is limited to the following:

(1) to account to the company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the company's business or derived from a use by the member of the company's property, including the appropriation of a company's opportunity;

(2) to refrain from dealing with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company; and

(3) to refrain from competing with the company in the conduct of the company's business before the dissolution of the company.

(c) A member's duty of care to a member-managed company and its other members in the conduct of and winding up of the company's

statutory provision governing the duties of members or managers. The Delaware and New Hampshire statutes do not set forth any specific duties, but provide for them to the extent there are any duties imposed by law or equity.⁹⁷ Several of the statutes expressly recognize the freedom to contract⁹⁸ and provide that a member or manager who relies in good faith on the language of the agreement will not be liable for breach of fiduciary duties.⁹⁹ A recent case in-

business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(d) A member shall discharge the duties to a member-managed company and its other members under this [Act] or under the operating agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(e) A member of a member-managed company does not violate a duty or obligation under this [Act] or under the operating agreement merely because the member's conduct furthers the member's own interest.

(f) A member of a member-managed company may lend money to and transact other business with the company. As to each loan or transaction, the rights and obligations of the member are the same as those of a person who is not a member, subject to other applicable law.

(g) This section applies to a person winding up the limited liability company's business as the personal or legal representative of the last surviving member as if the person were a member.

(h) In a manager-managed company:

(1) a member who is not also a manager owes no duties to the company or to the other members solely by reason of being a member;

(2) a manager is held to the same standards of conduct prescribed for members in subsections (b) through (f);

(3) a member who pursuant to the operating agreement exercises some or all of the rights of a manager in the management and conduct of the company's business is held to the standards of conduct in subsections (b) through (f) to the extent that the member exercises the managerial authority vested in a manager by this [Act]; and

(4) a manager is relieved of liability imposed by law for violation of the standards prescribed by subsections (b) through (f) to the extent of the managerial authority delegated to the members by the operating agreement.

ULLCA § 409.

97. DEL. CODE ANN. tit. 6, § 18-1101(c) (1993); N.H. REV. STAT. ANN. § 304-C:78(III) (Supp. 1994); N.J. REV. STAT. ANN. §§ 42:2B-22(a), -29 (West Supp. 1995).

98. DEL. CODE ANN. tit. 6, § 18-107 (1993); N.H. REV. STAT. ANN. § 304-C:8 (Supp. 1994); N.J. REV. STAT. ANN. § 42:2b-66(a) (West Supp. 1995); WASH. REV. CODE ANN. § 25.15.035 (West Supp. 1995).

99. DEL. CODE ANN. tit. 6, § 18-1101(c) (1993); N.H. REV. STAT. ANN. § 304-C:8

interpreting a similar provision in Delaware's limited partnership act has held that good faith reliance on the partnership agreement will provide a defense to a claim of breach of fiduciary duty.¹⁰⁰

Under ULLCA, the ability to waive or modify duties is limited.¹⁰¹ The Prototype and five other statutes also allow the members to modify duties in the operating agreement.¹⁰² If the duties are not modified, members and managers are not liable to the LLC or to the members for any act or omission that does not constitute gross negligence or willful misconduct. Nonetheless, members and managers must account for any profit or benefit derived without the consent of a majority of the disinterested managers, members, or other persons participating in the management of the business or affairs of the limited liability company from transactions connected with the con-

(Supp. 1994); N.J. REV. STAT. § 42:2b-66(b)(1) (West Supp. 1995); WASH. REV. CODE ANN. § 25.19.040 (West Supp. 1995).

100. *United States Cellular Inv. Co. v. Bell Atl. Mobile Sys., Inc.*, C.A. No. 12984, 1994 WL 116207 (Del. Ch. March 11, 1994).

101. Under ULLCA § 103(b), the operating agreement may not:

(1) unreasonably restrict a right to information or access to records under Section 408;

(2) eliminate the duty of loyalty under Section 409(b) or 603(b)(3), but the agreement may:

(i) identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; and

(ii) specify the number or percentage of members or disinterested managers that may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;

(3) unreasonably reduce the duty of care under Section 409(c) or 603(b)(3);

(4) eliminate the obligation of good faith and fair dealing under Section 409(d), but the operating agreement may determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;

(5) vary the right to expel a member in an event specified in Section 601(6);

(6) vary the requirement to wind up the limited liability company's business in a case specified in Sections 801(b)(4) or (b)(5); or

(7) restrict rights of a person, other than a manager, member, and transferee of a member's distributional interest, under this [Act].

Id.

102. PROTOTYPE § 402; ARK. CODE ANN. § 4-32-402 (Michie Supp. 1993); GA. CODE ANN. § 14-11-305(4) (1994 & Supp. 1995); IDAHO CODE § 53-622 (1994); IND. CODE ANN. § 23-18-4-2(a) (West 1994); MO. ANN. STAT. § 347.088(3) (Vernon Supp. 1995).

duct or winding up of the limited liability company, or use by the member or manager of its property including, but not limited to, confidential or proprietary information of the LLC or other matters entrusted to the person as a result of his status as manager or member.

Some of the statutes allow the articles of organization to contain a provision eliminating or limiting the personal liability of a manager to the limited liability company or its members for monetary damages for breach of fiduciary duty other than the breach of the duty of loyalty, acts not taken in good faith, or transactions from which the manager derives personal benefit.¹⁰³ Other statutes permit the members and managers to engage in transactions with the LLC to the same extent as third parties.¹⁰⁴ Arkansas, Connecticut, Indiana, Iowa, Louisiana, Minnesota, North Dakota, Oklahoma, Oregon, Rhode Island, and Texas allow members in member-managed LLCs and managers to earn profit in transactions connected with conduct or winding up of an LLC with the consent of a majority of the disinterested members or managers.¹⁰⁵

103. ARK. CODE ANN. § 4-32-404(a) (Michie Supp. 1993) (written operating agreement may limit or eliminate personal liability for breach of duties); CONN. GEN. STAT. ANN. § 34-143 (West Supp. 1995); IND. CODE ANN. § 23-18-4-2 (West 1994); IOWA CODE ANN. § 490A.707 (West Supp. 1994); MINN. STAT. ANN. § 322B.663(4) (West 1995) (duties may be limited or eliminated in articles of organization); N.D. CENT. CODE § 10-32-86(5) (Supp. 1993); OKLA. STAT. ANN. tit. 18, § 2017 (West Supp. 1995); OR. REV. STAT. § 63.160 (Supp. 1994); R.I. GEN. LAWS § 7-16-18 (1992); VA. CODE ANN. § 13.1-1025 (Michie 1993) (does not provide for elimination, but sets a ceiling on recovery).

104. ARIZ. REV. STAT. ANN. § 29-608 (Supp. 1994); COLO. REV. STAT. ANN. § 7-80-409 (West Supp. 1994); DEL. CODE ANN. tit. 6, § 18-107 (1993); ILL. ANN. STAT. ch. 805, para. 180/1-45 (Smith-Hurd Supp. 1995); IND. CODE § 23-18-4-12 (West 1994); MD. CODE ANN., CORPS. & ASS'NS § 4A-405 (1993); MO. ANN. STAT. § 347.093 (Vernon Supp. 1995); N.H. REV. STAT. ANN. § 304-C:8 (Supp. 1994); N.J. STAT. ANN. § 42:2b-9 (West Supp. 1995); VA. CODE ANN. § 13.1-1026 (Michie 1993); WASH. REV. CODE ANN. § 25.15.035 (West Supp. 1995); W. VA. CODE § 31-1A-22 (Supp. 1994). WIS. STAT. ANN. § 183.0402(1)(a) (West Supp. 1994) provides that a member must deal fairly with the LLC if the member has a conflicting interest, but section 183.0905(1) allows members who are creditors, like limited partners, to share on a par with creditors in distributions.

105. ARK. CODE ANN. § 4-32-402(B) (Michie Supp. 1993) (members in manager managed LLC owe no duty); CONN. GEN. STAT. ANN. § 34-141(e) (West Supp. 1995); IND. CODE § 23-18-4-2(b) (West 1994); IOWA CODE ANN. § 490A.708 (West Supp. 1994) (managers only); LA. REV. STAT. ANN. § 12:1314(5) (West 1994); MINN. STAT. ANN. § 322B.666 (West 1995) (governor conflicts of interest must be approved by 2/3 or disinterested members or unanimous vote of members); N.D. CENT. CODE § 10-32-87 (Supp. 1993); OKLA. STAT. ANN. tit. 18, § 2016(5) (West Supp. 1995) (consent of the members); OR. REV. STAT. § 63.155(5) (Supp. 1994); R.I. GEN. LAWS § 7-16-17(e) (1992); TEX. REV. CIV. STAT. ANN. Art. 1528n, art. 2.17 (West Supp. 1995).

The Prototype, ULLCA, and several of the state statutes provide that members who are not managers of a manager-managed LLC, like limited partners, have no duties solely in the capacity of a member.¹⁰⁶

The significance of characterizing these duties as fiduciary rather than contractual may not be immediately clear. Nonetheless, to the extent an owner owes a fiduciary duty to the association, the attorney representing the owner may have a higher duty to the association and its members not to precipitate a breach of that duty.

The duties owed by a lawyer who represents a fiduciary to the beneficiary have been a source of considerable discussion in the estate and trust area.¹⁰⁷ In many respects this issue is somewhat simpler in the pure fiduciary context that exists in the estate and trust area in which the fiduciary is expected to be disinterested, than it is in the context of unincorporated associations in which each owner is anticipated to have an individual interest in the economic arrangement of the association.¹⁰⁸ Owners, in contrast to trustees, are not only agents of the association with the fiduciary duties attendant to that relationship, but they also have a personal financial interest in the association. Thus, unlike trustees, owners will have economic conflicts and will be expected to be self-interested. For this reason, the representation of an owner or the association must specifically address the effects of this conflict.

RESPONSES TO THE ISSUE

An attorney representing the organizers of a small unincorporated business should first clearly determine who the client is, clearly communicate this determination to the client and any non-clients who may be misled, and be cautious of potential actions on

106. PROTOTYPE § 402; ARK. CODE ANN. § 4-32-402(c) (Michie Supp. 1993); CAL. CORP. CODE § 17150 (West Supp. 1995); GA. CODE ANN. § 14-11-305(1) (1994 & Supp. 1995); IDAHO CODE § 53-622(3) (1994); IND. CODE ANN. § 23-18-4-2(c) (West Supp. 1994); LA. REV. STAT. ANN. § 12:1314(1) (West 1994); MO. ANN. STAT. § 347.088(3) (Vernon Supp. 1995); MONT. CODE ANN. § 35-8-402(3) (1994); N.Y. LTD. LIAB. CO. LAW § 401 (McKinney Supp. 1995); 15 PA. CONS. STAT. § 8943(b)(2) (Supp. 1995).

107. Special Study Comm. on Professional Responsibility of the Section of Real Property, Probate and Trust Law of the American Bar Association, *Counseling the Fiduciary*, 28 REAL PROP. PROB. & TR. J. 825 (1994); Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15 (1987).

108. See, e.g., ULLCA § 409(e); RUPA § 404(e) (owner's action not a breach of duty merely because it furthers owner's own interest).

the part of the client that may constitute a breach of fiduciary duty owed by the client to other owners. In determining who the client is, the attorney should determine whether the attorney is representing an owner, an owner and the association, or the association alone.

If the attorney is only representing an individual owner, the engagement letter should reflect that fact:

In doing our work for you, you will be our client, and we will not represent the Association or any other owner [or manager]. We assume these entities and individuals have independent counsel and do not look to us as their counsel. It is possible that your best interest may differ from what is in the best interests of the organization or of its other owners. In those situations the organization must seek and obtain advice from its own independent counsel and not look to us for advice as to what is in its best interest. Of course, you, as a partner, officer, or director may owe fiduciary duties to these organizations, and we will be happy to discuss those duties with you.

If, on the other hand, the attorney is representing both the association and an owner, that fact should be made clear in the engagement letter as should its effect on the attorney-client privilege:

In general, information learned by lawyers about their clients and communications between lawyers and their clients are privileged and confidential and may not be disclosed to third parties without the client's consent. Because both of you [the engagement letter would have been addressed to both the owner and the association] and each of you is our client, information we learn about either of you and confidential communications between us and either of you will be privileged and confidential and may not be disclosed to outside persons. However, as your lawyers, we may be ethically required to disclose to either of you any information or any problem concerning either of you which is disclosed to us or which we discover in the course of our work for either of you. For example, a matter disclosed by the Owner may have to be disclosed to the Association and its other owners.

At this time, neither you nor we perceive any conflicting or differing interests between you. Accordingly, it appears to be entirely proper for our firm to represent each of you in this case, and you have retained us to do so. If during the course of this representation, we perceive any conflicting or differing interests between you, we will advise you of that fact at once. Similarly, you will ad-

vise us at once if you come across differing or conflicting interests of which we are not aware, now or later, during the course of the representation. In that event, we may not participate in the resolution of any such conflict between you; rather, you will attempt to resolve your differences between yourselves in such manner as you determine to be proper. In the event you are unable to resolve such differences, it may be necessary for our firm to withdraw from the representation of either or both of you, depending on the circumstances.

Finally, if the attorney is representing all of the owners in the capacity of being an intermediary, the letter should be fairly explicit on the limitations imposed on the attorney:

As we discussed, we will represent all of you with respect to the Matter. In this capacity, we would be acting as “intermediaries” within the meaning of Rule [2.2] (the “Rule”) of the [] Rules of Professional Conduct. In particular, we anticipate that we will advise you with respect to the law applicable to the Matter, make suggestions as to the appropriate steps to be taken, and provide such additional advice with respect to the Matter as you request. We do not anticipate mediating or arbitrating any disputes between you. Because we have a duty as attorney for each of you, we do not anticipate that as between you, the attorney client privilege will attach with respect to communications from any of you. Hence, it must be assumed that if litigation or other dispute arises among you, the privilege will not attach to such communications. You understand that in such event, your request that we act as “intermediaries” may result in (as stated in the commentary to the Rule) “additional cost, embarrassment, and recrimination.” Nonetheless, because the assistance you are seeking is not in the nature of resolving differences among yourselves, and because your discussions among yourselves are neither antagonistic nor contentious, you have requested us to represent you both. We will endeavor to do so both impartially and efficiently, and we will consult with each of you so that each of you may make an adequately informed decision. Your interests on dissolution are, of course, different, and each of you understands that to the extent that you are not able to resolve differences between yourselves, it may be necessary for the firm to withdraw from the representation of any or all of you, depending on the circumstances. Further, if we determine that we are incapable of complying with the Rule, or if any of you requests, we are required to withdraw, in which event we are prohibited from repre-

senting any of you with respect to the matters described above.

Note that this provision reflects the obligation of Rule 2.2 that if a dispute arises and either party requests, the attorney must “quit the field.” If a dispute arises, it is probably a safe assumption that a nonrepresented client will request that the attorney withdraw.

Finally, the attorney should consider, under appropriate circumstances, an “unengagement” letter to persons who might believe that the attorney is representing them. While this may seem peculiar and antagonistic in the otherwise congenial atmosphere of the organization of the business, such a letter may not only clarify the attorney's position in any negotiations but also emphasize that the parties may have different interests that they should be considering. While this may make the negotiation more spirited at the outset, it is often easier to resolve differences that are considered in the abstract than when there are actual dollars at issue and each party has a financial stake in the outcome.

An “unengagement” provision might read as follows:

This letter is simply to formally inform you that we will be representing only [Client] in the Matter, and not either you or the Association. We made this determination based upon the potential complexity of trying to represent more than one party in a situation in which the interests of each of you may be quite different. I know that it is Client's desire, and I understand it is yours, that the resolution of the Matter be as beneficial and accompanied by as much goodwill as is possible. I hope you will not take our representing Client as reflecting in any way on you but simply as our desire to try to maintain a reasonably clear relationship with regard to confidentiality and advice. You should understand that any communication between Client and us will be privileged, and that we may not disclose such communication to either you or the Association without Client's authorization. You, the Association, or both may want to retain independent counsel for advice with respect to the Matter.

Obviously, this sort of letter should be carefully drafted, taking into account the non-client's level of understanding of the role of an attorney, and the dynamics of the transaction and the relationship of the client and the non-client.

CONCLUSION

The complex relationship that comprises unincorporated associations has not been clarified by the proliferation of specific limited liability company statutes. When superimposed on the ambiguous relationship of an attorney working in a nonadversarial relationship with multiple parties, this complexity mandates that counsel carefully consider the nature of the representation, the identity of the client, and the implication of those decisions on the attorney-client privilege and the ethical and legal responsibilities of the attorney. Once the attorney has a clear understanding of such representation, it is essential that the attorney communicate this relationship to the client and, where appropriate, to the non-client.