

Part 1

Kentucky's New Partnership and Limited Partnership Acts

An Introduction

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The 2006 Kentucky General Assembly adopted new partnership and limited partnership acts. These new acts, each based upon a uniform act, significantly modernize their respective area of law as contrasted with the prior law. In Part 1 of this two-part article, the Kentucky Revised Uniform Partnership Act is discussed. Part 2 of the article, addressing the new Kentucky Uniform Limited Partnership Act, will appear in the next issue of the Bench & Bar. The article in its entirety is available on the Kentucky Bar Association's website at www.kybar.org.

The following Frequently Asked Questions (FAQs) are not intended to be a complete exegesis of the new laws. Rather, they serve to address what are likely to be first questions that will occur to the practitioner upon the first reading of the statutes.

The Kentucky Revised Uniform Partnership Act Frequently Asked Questions (FAQ)

Q. Upon what is the former partnership law based?

A. Kentucky's former general partnership law (set forth in KRS ch. 362 at §§ 362.150 through 362.360) was based on the Uniform Partnership Act (1914) ("UPA"), and was adopted by Kentucky in 1954 ("KyUPA"). But for amendments made in 1994 to address the election of a general partnership to be a limited liability partnership (KRS §§ 362.555 through 362.605), KyUPA was minimally revised since its adoption.

Q. Why is the New Uniform Act called "RUPA"?

A. The technically correct name for the new uniform act is the "Uniform Partnership Act (1997)." Through most of its drafting and consideration by the National Conference of Commissions of Uniform State Laws ("NCCUSL"), it was referred to as the Revised Uniform Partnership Act. In 1994, the "Revised" was dropped. Nonetheless, "RUPA" has become firmly fixed as the colloquial name of the act, and "RUPA" is in fact used in NCCUSL's prefatory note to the act. The official name of the Kentucky adoption is the "Kentucky Revised Uniform Partnership Act (2006)".¹ This distinguishes it from the official name of KyUPA, being the "Uniform Partnership Act."²

Q. How was RUPA drafted, and by whom?

A. RUPA was a project of NCCUSL, undertaken in response to a call for a revision of UPA set forth in *Should the Uniform Partnership Act Be Revised?*, a 1986 report of the UPA Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations of the American Bar Association.³ Members of the American Bar Association Committee on Partnerships and Unincorporated Business Organizations reviewed and advised on the draft act throughout its development.

After a number of drafts, the Uniform Partnership Act (1994) was finalized and approved that year by both NCCUSL and the ABA. However, shortly thereafter, the decision was made to reopen the act to address limited liability partnerships. With the LLP amendments,⁴ the Uniform Partnership Act (1997) was completed.⁵

NCCUSL maintains a website at <http://www.nccusl.org> from which all of the uniform acts can be accessed and downloaded. The copy of RUPA available at the NCCUSL website also contains the prefatory note and the reporter's comments.

A listing of other states that have adopted RUPA also can be found on the NCCUSL website.

Q. What was the effective date of the new partnership law, and what is its effect on partnerships formed before then?

A. The effective date of KyRUPA was July 12, 2006. As of that date, all newly formed partnerships are formed under and governed by KyRUPA.⁶ KyRUPA will not govern partnerships formed prior to July 12, 2006 unless the partnership makes an affirmative election to be so governed.⁷

The election by a KyUPA partnership to be governed by KyRUPA will be by a vote of the partners sufficient to amend the current partnership agreement.⁸ Filing a statement of partnership authority or a statement of qualification is an affirmative election to be governed by KyRUPA.⁹

Q. Must partnerships file organizational documents with the Secretary of State?

A. RUPA does not mandate any filings for partnerships. However, a partnership cannot elect limited liability partnership ("LLP") status without a filing with the Secretary of State. Certain "statements" may be filed on a voluntary basis.

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Q. What is the relationship of a LLP to a general partnership?

A. Every LLP is a general partnership, and is the same partnership both before and after the election to be an LLP.¹⁰

Q. What are the statements that a partnership may file with the Secretary of State?

A. RUPA provides for various voluntary filings to facilitate notice of authority to act on behalf of a partnership as well as record certain transactions. Those filings, the relevant KyRUPA sections, and the purpose of each filing are as follows:

Statement of	KRS § 362.1-	Purpose
Partnership Authority	303	Filed to record existence of partnership, identify partners and state which partners have authority to transfer partnership real property
Denial	304	Filed to deny one is a partner or another fact in a statement of partnership authority
Dissociation	704	Filed to record the dissociation of a partner
Dissolution	805	Filed to record that a partnership has dissolved and is winding up its business
Merger	907	Filed to record a merger
Qualification	1001	Qualification of a partnership as a limited liability partnership
Amendment to Qualification	1001	Amendment of the registration as a limited liability partnership
Foreign Qualification	1102	Qualification of a foreign limited liability partnership to transact business in Kentucky

Forms are available from the Secretary of State's office. KyRUPA does not mandate the use of certain forms. However, the Secretary of State has the discretion to make the use of certain forms mandatory.¹¹

Q. Is a partnership required to have a registered office and agent for service of process?

A. A general partnership that has filed a statement of qualification (thereby electing to be an LLP) must maintain a registered office and agent for service of process.¹² A foreign LLP that has qualified to transact business is likewise required to maintain a registered office and agent.¹³ Partnerships that have not elected to be an LLP do not have a registered office/agent.

Q. What is the hierarchy of the statements?

A. There is no hierarchy of the statements in the manner of corporate/LLC filings, which begin with the articles and subsequent filings modify that initial filing. Rather, RUPA statements should be thought of as similar to filings under the Uniform Commercial Code. The RUPA statements regimen is voluntary, and while the various statements are effective for their respective purposes, it is possible for transactions/events to take place without any statement having been filed.

Q. Must statements be filed with the county clerk?

A. There is no requirement that statements be filed with the county clerk. However, such filings are permitted, and a statement of partnership authority will not, with respect to real estate transfers, have its full effect without a county level filing.¹⁴

Q. Must partnerships file an annual report?

A. General partnerships that file a statement of qualification (thereby electing to be an LLP) are required to file an annual report.¹⁵ Foreign LLPs that file a statement of foreign qualification also are required to file an annual report.¹⁶ If a general partnership has not made one of these filings, it is not required to file an annual report.

Q. What is the consequence of not filing an annual report?

A. A domestic LLP that fails to file an annual report will have its statement of qualification administratively dissolved.¹⁷ The administrative dissolution of the statement of qualification may be cured, and the cure relates back to the date of dissolution.¹⁸ A foreign LLP that fails to file its annual report will have its statement of foreign qualification revoked.¹⁹ The revocation of a statement of foreign qualification cannot be cured - a new statement must be filed.

Q. Who is an agent of the partnership and the partners, and who can sign statements on behalf of the partnership?

A. Each partner is an agent for the partnership in its ordinary course of business.²⁰ As KyRUPA adopts an entity treatment for partnerships,²¹ partners are not agents for other partners. Statements filed on behalf of the partnership must be signed by two partners, while statements filed on behalf of a partner need be signed only by that partner.²²

Q. Has the rule of partner liability been altered?

A. Assuming the partnership has not filed a statement of qualification and elected to be an LLP, partners are jointly and severally liable for the debts and obligations of the partnership.²³ The rule that a person admitted to a previously existing partnership is not personally liable for pre-admission partnership obligations is preserved.²⁴

Q. What changes have been made to the limited liability partnership (LLP)?

A. Under the 1994 amendments to KyUPA, LLPs were authorized, and general partners are afforded a "partial shield" from personal liability. That partial shield protects a partner from personal liability from claims involving negligence, malpractice, wrongful acts or misconduct, but not from contract-based claims.²⁵ Under KyRUPA, general partners in an LLP are afforded a complete shield from liability - the protection is not dependent upon whether the claim arises in tort or in contract.²⁶ Of course, this liability protection relates only to vicarious liability as a partner, and does not protect a partner from personal liability for their own actions.²⁷

Note that the broader liability protection afforded a KyRUPA LLP is available to partnerships formed prior to July 12, 2006 only after the partnership elects to be governed by KyRUPA. The LLP electing to be governed by KyRUPA needs to notify its existing customers and creditors of that election in order to have the immediate benefit of the broader liability shield.²⁸

Q. How has KyRUPA impacted partnership names?

A. The name of a partnership filing a Statement of Qualification or of Foreign Qualification must be distinguishable.²⁹ Distinguishability is not a prerequisite to filing other statements. The statute sets forth certain terms that may not be used in the name of a general partnership, as well as the required endings for a domestic or foreign LLP.³⁰

Q. May partnerships merge under KyRUPA?

A. Partnerships mergers are expressly provided for under KyRUPA.³¹

Q. May partnerships convert under RUPA?

A. KyRUPA permits a partnership to convert into a limited partnership.³² The existing mechanism for the conversion of a general partnership into an LLC remains in place.³³

Q. Does KyRUPA define fiduciary duties among the partners?

A. In this area KyRUPA is not uniform to RUPA,³⁴ adopts a non-exclusive statutory description of the fiduciary obligations of the partners,³⁵ and also addresses non-fiduciary obligations such as good faith and fair dealing. The KyRUPA formula for the duty of care is non-uniform and is unique to Kentucky.³⁶ These provisions are complex and go to the core of the partnership and the relations among the partners, and as such must be carefully studied by all practitioners who would counsel clients as to the formation, operation, and/or dissolution of partnerships.

Q. Is a KyRUPA partnership treated as an aggregate or an entity?

A. KyRUPA adopts an entity, as contrasted with an aggregate, treatment for all partnerships.³⁷

Q. What freedom exists to customize the relationship amongst the partners in the partnership agreement?

A. KyRUPA sets forth comprehensive default rules that subject to certain safeguards and limitations³⁸ may be modified

by the partners.³⁹ This is a marked clarification as contrasted with the prior law.⁴⁰

Q. May a foreign partnership qualify to transact business in Kentucky?

A. A foreign partnership that is an LLP in its jurisdiction of organization may qualify to transact business in Kentucky by filing a statement of foreign qualification.⁴¹ A foreign partnership that is not an LLP is not required to qualify to transact business, and there is no mechanism for it to do so.

Q. How are filing procedures with the Secretary of State addressed?

A. Filing procedures with the Secretary of State are based upon practices already in place with respect to corporations and limited liability companies. For example, the provisions addressing requirements for documents to be filed,⁴² effective time and date,⁴³ and appeal of a refusal to file⁴⁴ are all closely patterned on the corresponding provisions under the Business Corporation and Limited Liability Company Acts.

Q. Has the assumed name statute been revised to address KyRUPA?

A. The assumed name statute⁴⁵ has been revised⁴⁶ to:

- (i.) provide that the "real name" of a partnership that is not an LLP and that has filed a statement of partnership authority is the name set forth on that statement;⁴⁷
- (ii.) clarify that if a partnership is not an LLP and has not filed a statement of partnership authority, its "real name" is a name that includes the name of each of the general partners;⁴⁸ and
- (iii.) provide that the "real name" of an LLP is the name set forth on its statement of qualification or the LLP registration filed under KRS § 362.555.⁴⁹

Q. Must a partnership identify all of its partners if adopting an assumed name?

A. Under current law, a partnership, as such, is not obligated to make a public filing identifying all of the partners. How-

ever, if the partnership is to do business under an assumed name, it must name all of the partners in the application for certificate of assumed name.⁵⁰ Under KyRUPA and the revised assumed name statute, the same rule will apply unless the partnership files a statement of partnership authority or a statement of qualification. If the partnership files either of those statements, the name on the statement becomes the "real name" of the partnership for assumed name purposes.⁵¹ ■

Part II of this article will appear in the March 2007 issue of Bench & Bar.

ENDNOTES

1. KRS § 362.1-1202.
2. KRS § 362.150.
3. 43 BUS. LAW. 121 (November, 1987).
4. See generally Carter G. Bishop, *The Limited Liability Partnership Amendments to the Uniform Partnership Act (1994)*, 53 BUS. LAW. 101 (1997).
5. For commentary generally on RUPA, see generally ROBERT W. HILLMAN, ALLAN W. VESTAL AND DONALD J. WEIDNER, *THE REVISED UNIFORM PARTNERSHIP ACT* (Thomson-West, 2006).
6. KRS § 362.1-1204(1)(a).
7. KRS §§ 362.1-1204(1)(b); 362.1-1204(2).
8. KRS § 362.1-1204(2).
9. KRS § 362.1-1204(2).
10. KRS § 362.1-201(2). Accord KRS §§ 362.155(7); 362.175(1).
11. KRS § 362.1-105(11). Accord KRS §§ 271B.1-210(2); 275.050(2).
12. KRS § 362.1-117.
13. KRS §§ 362.1-117; 362.1-1102(1)(c).
14. KRS § 362.1-303(4)(B).
15. KRS § 362.1-121(1).
16. KRS § 362.1-121(1).
17. KRS § 362.1-122. As such, the partnership, while no longer a limited liability partnership, remains a valid partnership that may carry on the full range of business activities, and it is not constrained to only those appropriate to dissolution and winding up. Contrast KRS §§ 271B.14-210(3); 275.300(2) (administratively dissolved corporation or LLC restricted to activities appropriate for its winding up and dissolution).
18. KRS §§ 362.1-122(5), 362.1-122(6). Accord KRS §§ 271B.14-220(3); 275.295(3)(e).
19. KRS § 362.1-123. Accord KRS §§ 271B.15-310; 275.440; 275.449.
20. KRS § 362.1-301(1). Accord KRS § 362.190(1).
21. KRS § 362.1-201(1).
22. KRS § 362.1-105(3).
23. KRS § 362.1-306(1). Contrast KRS § 362.220(1) (joint and several liability for claims arising in tort, joint liability for other claims).
24. KRS § 362.1-306(2). Accord KRS § 362.230.
25. KRS § 362.220(2). See also Rutledge & Hester, *Practical Guide to Limited Liability Partnerships, 5 STATE LIMITED LIABILITY COMPANY AND PARTNERSHIP LAWS* (Arthur J. Jacobson, Scott E. Ludwig, Elizabeth S. Miller and Thomas E. Rutledge, eds. (Aspen 2006)).
26. KRS § 362.1-306(3).
27. KRS § 362.1-306(4).
28. KRS § 362.1-1204(2). KyUPA partnerships that have elected LLP status by registering under KRS § 362.555 may continue to do so, and KyUPA partnerships may elect LLP status with a KRS § 362.555 filing even after July 12, 2006.
29. KRS § 362.1-114(1). Accord KRS § 362.565(2). See also KRS § 362.1-116.
30. KRS § 362.1-114(2).
31. KRS §§ 362.1-905 through 362.1-908. Prior law allowed a partnership to convert into a limited liability company (see KRS § 275.370), but not to merge into another partnership or other business entity.
32. KRS § 362.1-902.
33. KRS § 275.370.
34. Contrast RUPA § 404.
35. KRS § 362.1-404(1) ("The fiduciary duties ... include") (emphasis added).
36. KRS § 362.1-404(3). See also J. William Callison, "The Law Does Not Perfectly Comprehend...."; *The Inadequacy of the Gross Negligence Duty of Care Standard in Unincorporated Business Organizations*, 94 KY. L. J. 451 (2005-06).
37. KRS § 362.1-201(1).
38. KRS § 362.1-103(2).
39. KRS § 362.1-103.
40. For example, UPA § 18 (KRS § 362.235) expressly states that the rights and duties of the partners in relation to the partnership "shall be determined, subject to any agreement between them." In contrast, UPA § 20 (KRS § 362.245), regarding the obligation to provide information, is silent regarding the ability to modify the obligation by agreement. In *re Estate of Bennett*, 205 N.Y.S.2d 50 (1960), involved a permissible modification of the rule of UPA § 25(b) (KRS § 362.270(2)) despite the fact that the provision did not expressly provide for its modification. *Labovitz v. Dolan*, 545 N.E.2d 304, 310 (Ill. App. 1989) involved a court not accepting the ability, in the context of a general partnership, to modify the fiduciary obligations among the partners.
41. KRS § 362.1-1102. Foreign LLPs also may qualify in Kentucky under KRS § 362.585.
42. KRS § 362.1-108. Accord KRS §§ 271B.1-200; 275.045.
43. KRS § 362.1-110. Accord KRS §§ 271B.1-230; 275.060.
44. KRS § 362.1-112. Accord KRS §§ 271B.1-260; 275.075.
45. KRS § 365.015.
46. See generally Maryellen B. Allen and Thomas E. Rutledge, *The 2006 Amendments to the Assumed Name Statute: The Ongoing Task of Modernization and Clarification*, 70 BENCH & BAR 62 (May, 2006).
47. KRS § 365.015(1)(b)2.
48. KRS § 365.015(1)(b)1.
49. KRS § 365.015(1)(b)3.
50. KRS § 365.015(1)(b)1.
51. KRS §§ 365.015(1)(b)2, 365.015(1)(b)3.