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No Good Deed Goes Unpunished: Pitfalls for Counsel to a Business Organization About to be Governed by a New Law

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NO GOOD DEED GOES UNPUNISHED: PITFALLS FOR COUNSEL TO A BUSINESS ORGANIZATION ABOUT TO BE GOVERNED BY A NEW LAW

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INTRODUCTION

The law of partnerships has in recent years gone through a remarkable metamorphosis as a majority of the states have adopted the Uniform Partnership Act (RUPA) (most typically the 1997 version),[1] repealed their prior adoptions of the Uniform Partnership Act (1914) (UPA),[2] and required that existing partnerships become subject to the new statutory scheme.[3] The same process is beginning anew as states consider and adopt the Uniform Limited Partnership Act (2001) (ULPA),[4] typically with the requirement, again, that existing limited partnerships become subject to the new statute,[5] and repealing the old limited

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[1] *See* UNIF. P'SHIP ACT, 6 pt. I U.L.A. 1 (1997). A note on the acronym "RUPA" and references to the "Revised" Uniform Partnership Act is in order. The correct name of the act is the "Uniform Partnership Act (1997)." Through much of its consideration by the National Conference of Commissioners of Uniform State Laws (NCCUSL), it was referred to as the Revised Uniform Partnership Act. In 1994, the "Revised" was dropped. Nevertheless, "Revised" and "RUPA" have become firmly fixed as the name of the act, and "RUPA" is used in NCCUSL's Prefatory Note to the Act.

[2] UNIF. P'SHIP ACT, 6 pt. I U.L.A. 373 (1914).

[3] *See* UNIF. P'SHIP ACT § 1206(b), 6 pt. I U.L.A. 267 (1997) (providing that, at a date certain, partnerships in existence prior to the adoption of RUPA will become subject to RUPA).

[4] UNIF. LTD. P'SHIP ACT, 6A U.L.A. 1 (2001). As of this writing, the Uniform Limited Partnership Act (2001) has been adopted in Arkansas, California, Florida, Idaho, Illinois, Iowa, Kentucky, Maine, Minnesota, New Mexico, and North Dakota. *See infra* note 23.

[5] *See id.* § 1206(b), 6A U.L.A. 120 (providing that, as of a date certain, limited partnerships in existence prior to the adoption of ULPA are subject to ULPA).

partnership act.[6] Similar issues have arisen as, for example, states have adopted new limited liability company[7] and business corporation acts.[8] As these new statutes have come into effect, attorneys have attended seminars, read articles, and bought new treatises, all in an effort to master (or at minimum attain some level of familiarity with) the new laws. With that newly acquired knowledge, many attorneys have no doubt made the following phone call:

> Our state legislature has just changed the [limited] partnership law, and we ought to sit down soon to review your partnership agreement and see what needs to be changed.

This seems to be just what Martha, our intrepid attorney, should be doing: staying abreast of changes in the law, keeping her clients informed of changes in the law,[9] and taking steps to represent her clients in that new legal environment—which, if Martha is not careful, will be exactly the good deed that is going to be (or might be) punished.

The problem, or at least one possible problem, is that our diligent legal counsel has forgotten half of the calculus which she needs to complete. She knows that she needs to be able to explain the altered laws to her clients, but what she has forgotten is that she must carefully determine who exactly is her client. The failure to properly make that determination could subject her to both bar sanction and a charge of malpractice.

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[6] *See id.* § 1205, 6A U.L.A. 120 (providing that, as of a date certain, the state's predecessor limited partnership act is repealed).

[7] For example, South Carolina adopted the Uniform Limited Liability Company Act (ULLCA) in 1996 with an initial effective date of June 1, 1996 and providing that effective January 1, 2001, South Carolina ULLCA will govern LLCs formed prior to June 1, 1996. S.C. CODE ANN. § 33-44-1206(b) (1996).

[8] For example, effective January 1, 1989, Kentucky adopted a new business corporation act that was applied to all corporations in existence at that effective date. *See* KY. REV. STAT. ANN. § 271B.17-050(1) (West 2006).

[9] For purposes of this discussion, we assume we are dealing exclusively with current clients, and we are not here also considering the questions of counsel's obligations with respect to those who are or may likely be characterized as former clients. With respect to obligations to former clients, see, for example, Thomas E. Rutledge & Allan W. Vestal, *Making the Obvious Choice Malpractice: LLPs and the Lawyer Liability Timebomb in Kentucky's 2005 Tax Modernization*, 94 KY. L.J. 17 (2005–06); Robert R. Keatinge & David C. Little, *The Former and Quiescent Client*, 33 COLO. LAW. 79 (Aug. 2004); and Thomas E. Rutledge & Allan W. Vestal, *'Former' Clients and Changes in Law—Just One More Place Where Something May Go Wrong*, BUS. ENTITIES, July–Aug. 2006, at 40.

We will begin with a discussion of the process by which the various states are adopting RUPA and ULPA and how the drag-in dates affect existing partnerships. Next, we will turn to a review of certain zero sum issues that arise upon the adoption of new business organization laws. We will then focus on the issue of "who is the client?" and on the potential ethical exposures of counsel who attempt to assist their current clients in conforming the agreement among the constituent owners to the new legal environment.

I. EFFECTIVE DATE REGIMES[10]

The most modern uniform business organization statutes, namely RUPA and ULPA,[11] provide that they will govern pre-existing business organizations. This is done through a two-step effective date process. First, for all partnerships or limited partnerships formed after a particular date,[12] the new act will govern.[13] Second, generally at a later date, all partnerships or limited partnerships existing prior to the initial effective date will be required to be governed by the new act,[14] and the former governing law will cease to apply.[15] It also is provided that on the drag-in effective date the prior law is repealed.[16] Between the initial effective date and the drag-in effective date, partnerships and limited

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[10] Whether new business organization statutes should be retroactive and therefore be applied to preexisting business organizations is a matter that has been separately debated, and is not herein considered. *See, e.g.*, Allan W. Vestal, *Should the Revised Uniform Partnership Act of 1994 Really Be Retroactive?*, 50 BUS. LAW. 267 (1994); Allan W. Vestal, *"Wide Open": Nevada's Emerging Intra-State Partnership Law Market*, 35 HOFSTRA L. REV. 275 (2006).

[11] As of this writing, the National Conference of Commissioners of Uniform State Laws is drafting a Uniform Statutory Trust Act and has recently completed and approved a Revised Uniform Limited Liability Company Act. One of the authors (Rutledge) is/was an American Bar Association Section of Business Law advisor to each of these projects. However, all views expressed herein are those of the authors and may not be ascribed to either of these projects or their various participants. As neither of these acts has been adopted in any jurisdiction, they are considered only in passing in this article. That said, the analytical issues raised herein will need to be considered as each is one day adopted in a state or jurisdiction and then applied to pre-existing organizations.

[12] This date being referred to as the "initial effective date."

[13] UNIF. P'SHIP ACT §1206(a)(1), 6 pt. I U.L.A. 266 (1997); UNIF. LTD. P'SHIP ACT § 1206(a)(1), 6A U.L.A. 120 (2001).

[14] This second date being referred to as the "drag-in effective date."

[15] UNIF. P'SHIP ACT § 1206(b), 6 pt. I U.L.A. 267 (1997); UNIF. LTD. P'SHIP ACT § 1206(b), 6A U.L.A. 120 (2001).

[16] UNIF. P'SHIP ACT § 1205, 6 pt. I U.L.A. 266 (1997); UNIF. LTD. P'SHIP ACT § 1205, 6A U.L.A. 120 (2001).

partnerships formed under the prior law may elect to be governed by the new law.[17]

The states have adopted a variety of approaches to the phase-in of RUPA.[18]

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[17] UNIF. P'SHIP ACT § 1206(a)(2), 6 pt. I U.L.A. 266 (1997); *id.* § 1206(c); UNIF. LTD. P'SHIP ACT § 1206(a)(2), 6A U.L.A. 120 (2001).

[18] The states that have adopted RUPA, the statutory citation of those adoptions, the effective date for newly created partnerships (UNIF. P'SHIP ACT § 1206(a)(1), 6 pt. I U.L.A. 266 (1997)) and the effective date for partnerships existing prior to the adoption of RUPA (UNIF. P'SHIP ACT § 1206(b), 6 pt. I U.L.A. 267 (1997)), are as follows: Alabama, ALA. CODE §§ 10-8A-101 to 10-8A-1109 (2007) (January 1, 1997) (December 31, 2000); Alaska, ALASKA STAT. §§ 32.06.201 to 32.06.997 (2007) (January 1, 2001) (January 1, 2004); Arizona, ARIZ. REV. STAT. ANN. §§ 29-1001 to 29-1111 (2006) (July 20, 1996) (January 1, 2000); Arkansas, ARK. CODE ANN. §§ 4-46-101 to 4-46-1207 (2006) (January 1, 2000) (January 1, 2005); California, CAL. CORP. CODE §§ 16100 to 16962 (West 2006) (January 1, 1997) (January 1, 1999); Colorado, COLO. REV. STAT. § 7-64-101 to 7-64-1206 (2006) (January 1, 1998) (January 1, 1998); Connecticut, CONN. GEN. STAT. §§ 34-300 to 34-434 (2005) (July 1, 1997) (January 1, 2002); Delaware, DEL. CODE ANN. tit. 6, §§ 15-101 to 15-1210 (2006) (January 1, 2000) (January 1, 2002); District of Columbia, D.C. CODE §§ 33-101.01 to 33-112.04 (2006) (April 9, 1997) (January 1, 1998); Florida, FLA. STAT. §§ 620.8101 to 620.9902 (2006) (January 1, 1996) (January 1, 1998); Hawaii, HAW. REV. STAT. §§ 425-01 to 425-145 (2006) (July 1, 2000) (July 1, 2000); Idaho, IDAHO CODE ANN. §§ 53-3-101 to 53-3-1205 (2006) (January 1, 2001) (July 1, 2001); Illinois, 805 ILL. COMP. STAT. 206/100 to 206/1299 (2006) (January 1, 2003) (January 1, 2008); Iowa, IOWA CODE §§ 486A.101 to 486A.130 (2007) (January 1, 1999) (January 1, 2001); Kansas, KAN. STAT. ANN. §§ 56a-101 to 56a-1305 (2006) (January 1, 1999) (July 1, 1999); Kentucky, KY. REV. STAT. ANN. §§ 362.1-101 to 362.1-1205 (West 2006) (July 12, 2006) (n/a); Maine, ME. REV. STAT. ANN. tit. 31, §§ 281 to 323 (2006) (n/a); Maryland, MD. CODE ANN. CORPS. & ASS'NS §§ 9A-101 to 9A-1205 (West 2006) (July 1, 1998) (December 31, 2002); Minnesota, MINN. STAT. §§ 323A.101 to 323A.1203 (2006) (January 1, 1999) (January 1, 2000); Mississippi, MISS. CODE ANN. §§ 79-13-101 to 79-13-1206 (2006) (January 1, 2005) (January 1, 2007); Montana, MONT. CODE ANN §§ 35-10-101 to 35-10-710 (2005) (October 1, 1993) (October 1, 1993); Nebraska, NEB. REV. STAT. §§ 67-410 to 67-467 (2006) (January 1, 1998) (January 1, 2001); Nevada, NEV. REV. STAT. §§ 87.4301 to 87.560 (2005) (July 1, 2006) (July 1, 2006); New Jersey, N.J. STAT. ANN. §§ 42:1A-1 to 42:1A-56 (2007) (Dec. 8, 2000) (Dec. 8, 2000); New Mexico, N.M. STAT. 1978 §§ 54-1A-101 to 54-1-1005 (2006) (July 1, 1997) (January 1, 2001); North Dakota, N.D. CENT. CODE §§ 45-13-01 to 45-21-08 (2006) (January 1, 1996) (July 1, 1997); Oklahoma, OKLA. STAT. tit. 54, §§ 1-100 to 1-1207 (1999) (November 1, 1997) (November 1, 1998); Oregon, OR. REV. STAT. §§ 67.005 to 67.815 (2005) (January 1, 1998) (January 1, 2003); South Dakota, S.D. CODIFIED LAWS §§ 48-7A-101 to 48-7A-1208 (2006) (July 1, 2001) (July 1, 2001); Tennessee, TENN. CODE ANN. §§ 61-1-101 to 61-1-1208 (2006) (January 1, 2002) (January 1, 2002); Texas, TEX. REV. CIV. STAT. ANN. §§ 6132b-1.01 to 6132b-11.04 (2006) (January 1, 1994) (December 31, 1998); United States Virgin Islands, V.I. CODE ANN. tit. 26, §§ 1 to 274 (2004) (May 1, 1998) (January 1, 2000); Vermont, VT. STAT. ANN. tit. 11 §§ 3201 to 3313 (2006) (January 1, 1999) (January 1, 1999); Virginia, VA. CODE ANN. §§ 50-73.79 to 50-73.149 (2006) (July 1, 1997) (January 1, 2000);

Some states made RUPA effective for new and for existing partnerships on the same day, in effect providing no transition period for existing partnerships.[19] Other states, such as Alabama, Connecticut, and Nebraska, have provided for fairly lengthy phase-in periods.[20] Colorado and Kentucky determined to retain UPA in place, providing that newly formed partnerships will be governed by RUPA but that existing partnerships would remain under UPA unless they individually elect to be governed by the new act.[21] Uniquely, Nevada has adopted a system under which existing partnerships may continue to be governed by UPA as well as permitting partnerships formed after the effective date of RUPA to elect to be governed by the Nevada adoption of UPA.[22]

States are also putting in place effective date regimes for ULPA,[23] providing generally for a phase-in period of several years or, in the case of Kentucky

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Washington, WASH. REV. CODE §§ 25.05.005 to 25.05.907 (2007) (June 11, 1998) (January 1, 1999); West Virginia, W. VA. CODE §§ 47B-1-1 to 47B-11-5 (2006) (June 9, 1995) (July 1, 1995); Wyoming, WYO. STAT. ANN. §§ 17-21-101 to 17-21-1003 (2006) (January 1, 1994) (January 1, 1994). While the NCCUSL website lists Puerto Rico as a jurisdiction that has adopted RUPA, that adoption is restricted to the LLP provisions with most of UPA retained, and for that reason Puerto Rico is not here listed.

[19] *See, e.g.*, N.J. STAT. ANN. §§ 42:1A-1 to 42:1A-56 (2007); S.D. CODIFIED LAWS §§ 48-7A-101 to 48-7A-1208 (2006); TENN. CODE ANN. §§ 61-1-101 to 61-1-1208 (2006). Washington provided a transition period of less than seven months. *See* WASH. REV. CODE § 25.05.901(1)(a) (2007); *id.* § 25.05.901(2).

[20] *See* ALA. CODE § 10-8A-1106 (2007) (three years); CONN. GEN. STAT. § 34-398 (2005) (four and a half years); NEB. REV. STAT. § 67-464 (2006) (three years).

[21] *See* COLO. REV. STAT. § 7-64-1205 (2006); KY. REV. STAT. ANN. § 362.1-1206 (West 2006).

[22] *See* NEV. REV. STAT. § 87.025.1 (2005); *id.* § 87.025.2; *see also* Vestal, *"Wide Open": Nevada's Emerging Intra-State Partnership Law Market*, *supra* note 10, at 285.

[23] The states that have adopted ULPA to date, the statutory citations of those adoptions, the effective date for newly created limited partnerships (UNIF. LTD. P'SHIP ACT § 1206(a)(1), 6A U.L.A. 120 (2001)), and the effective date for limited partnerships existing prior to the adoption of ULPA (UNIF. LTD. P'SHIP ACT § 1206(b), 6A U.L.A. 120 (2001)), are as follows: Arkansas, H.B. 1009, 86th Gen. Assem., Reg. Sess. (Ark. 2007) (September 1, 2007) (September 1, 2007); California, CAL. CORP. CODE §§ 15611 to 15723 (West 2006) (Jan. 1, 2008) (Jan. 1, 2010); Florida, FLA. STAT. §§ 620.1101 to 620.2205 (2006) (January 1, 2006) (January 1, 2007); Hawaii, HAW. REV. STAT. §§ 425E-101 to 425E-1205 (2006) (July 1, 2004) (December 31, 2004); Idaho, IDAHO CODE ANN. §§ 53-2-101 to 53-2-1205 (2006) (July 1, 2006) (July 1, 2006); Illinois, 805 ILL. COMP. STAT. 215/0.01 to 215/1402 (2006) (January 1, 2005) (January 1, 2008); Iowa, IOWA CODE §§ 488.101 to 488.1207 (2007) (January 1, 2005) (January 1, 2006); Kentucky, KY. REV. STAT. ANN. §§ 362.2-102 to 362.2-1207 (West 2006) (July 12, 2006) (n/a); Maine, ME. REV. STAT. ANN. tit. 31, §§ 1301 to 1461 (2006) (July 1, 2007) (July 1, 2008); Minnesota, MINN. STAT. §§ 321.0101 to 321.1208 (2006) (January 1, 2005) (January 1, 2007); New Mexico, H.B. 184, 48th Leg., 1st Sess. (N.M. 2007) (January 1, 2008) (n/a); and North Dakota, N.D. CENT. CODE §§ 45-10.2-01 to 45-10.2-117 (2006) (July 1, 2005) (January 1, 2006).

and New Mexico, not requiring that limited partnerships governed by the pre-existing limited partnership act become subject to the new act.[24]

While RUPA and ULPA each provide that its application to an existing partnership or limited partnership "does not affect an action or proceeding commenced or a right accrued before this [Act] takes effect,"[25] this language is significantly narrower than was the predecessor law. For example, UPA provides: "This act shall not be construed so as to impair the obligations of any contract existing when the act goes into effect, nor to affect any action or proceedings begun or right accrued before this act takes effect."[26] The newer acts have eliminated the language which states that their enactment has no impact on existing agreements, an instructive elimination since an examination of RUPA's and ULPA's terms and provisions, as contrasted with the prior law, shows that existing agreements will be impacted when the new laws are applied.[27]

II. ZERO SUM GAMES

When new law—whether the new partnership act, limited partnership act, limited liability company act, or otherwise—is applied to an existing business organization, it is often going to be a zero sum situation[28] in which there will be

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[24] KY. REV. STAT. ANN. § 362.2-1205 (West 2006); New Mexico, H.B. 184, 48th Leg., 1st Sess., § 1204 (N.M. 2007). Conversely, Idaho made ULPA effective for new and old limited partnerships on the same day (July 1, 2006) and, as well, provided that the new rules governing the liability of the partners (UNIF. LTD. P'SHIP ACT § 1206(c), 6A U.L.A. 120 (2001)) would apply that same day. *See* IDAHO CODE ANN. § 53-2-1204 (2006).

[25] UNIF. P'SHIP ACT § 1207, 6 pt. I U.L.A. 272 (1997); UNIF. LTD. P'SHIP ACT § 1207, 6A U.L.A. 123 (2001).

[26] UNIF. P'SHIP ACT § 4(5), 6 pt. I U.L.A. 386 (1914). See also Uniform Limited Partnership Act (1976) with 1985 Amendments (RULPA) § 1106, 6A U.L.A. 548 (1976):

> The repeal of any statutory provision by this [Act] does not impair, or otherwise affect, the organization or the continued existence of a limited partnership existing at the effective date of this [Act], nor does the repeal of any existing statutory provision by this [Act] impair any contract or affect any right accrued before the effective date of this [Act].

[27] Whether that impairment is subject to constitutional limitation (*see* U.S. CONST. art. I, § 10, cl. 1) is beyond the scope of this article. *See generally* ROBERT W. HILLMAN, ALLAN W. VESTAL & DONALD J. WEIDNER, THE REVISED UNIFORM PARTNERSHIP ACT § 1207 Authors' cmt. (2006).

[28] Meaning that the new laws create a situation in which one member's gain will be matched by another member's loss. Zero sum generally refers to a situation in which gain or loss is exactly balanced by the losses or gains of the other party; it derives its name from the fact that when the total gains are added up and the total losses are subtracted, the sum will be zero.

winners and losers. Consider the following example of a conversion of an existing partnership from being governed by UPA to being governed by RUPA:

Brooke and Lilly have for many years been involved in the thoroughbred horse industry, and have been quite successful in this venture.[29] Edward has also been involved in the horse industry for several years, and, while not as successful as Brooke and Lilly, has done better than most. Brooke, Lilly, and Edward meet after a Keeneland sale and decide to go into a partnership to buy and sell stallions and broodmares. There is no written partnership agreement; the extent of the oral partnership agreement is the requirement for a majority vote for all actions, and for all profits, losses, and expenses to be shared pro rata among the three of them.[30] They all live in the state of Transition, and Transition long ago adopted UPA without modification. The partnership of Brooke, Lilly, and Edward, doing business under the assumed name "B/L/E," begins business with $3000 of capital contributed in equal shares by the partners. Privately, Edward has some concerns about going into business with Brooke and Lilly, who have been in business together for a number of years, but he is comforted by the fact that he will have the right to withdraw from the partnership at any time and, in doing so, cause its dissolution.[31] Edward knows that upon the dissolution of the partnership, except as may be necessary to wind up the partnership's affairs and complete transactions already initiated, the au-

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[29] Notwithstanding the adage on how to make a small fortune in the horse industry—"Well, first you start with a large fortune."

[30] As such, their partnership agreement simply repeats the default rules of UPA § 18(h), 6 pt. II U.L.A. 101 (1914) (majority vote on matters in ordinary course of partnership business); *id.* § 18(e), 6 pt. II U.L.A. 101 (1914) (per capita voting); and *id.* § 18(a), 6 pt. II U.L.A. 101 (1914) (sharing of profits and losses on a per capita basis). *See also* KY. REV. STAT. ANN. §§ 362.235(8), (5) and (1) (West 2006).

[31] UNIF. P'SHIP ACT § 31(1)(b), 6 pt. II U.L.A. 370 (1914) (providing that dissolution of a partnership is caused without violation of the agreement among the partners "by the express will of any partner when no definite term or particular undertaking is specified"); *see also* KY. REV. STAT. ANN. § 362.300(1)(b) (West 2006); D.C. CODE § 33-108.01 (2006). We assume that the described partnership is properly classified as one "at will." *See, e.g.*, Harshman v. Pantaleoni, 741 N.Y.S.2d 348, 349 (N.Y. App. Div. 2002) ("As stated in the partnership agreement here, the only purposes of the partnership are 'to purchase, hold, operate, improve, lease and rent the real property . . . and also . . . to engage in the lumbering and farming thereof, and to lease fishing, hunting, and sporting rights thereto.' These objectives are perpetual in nature, and place no time limitation on the duration of the partnership. . . . Under these circumstances, [the] Supreme Court correctly found the partnership to have no definite term and to be, therefore, an at-will partnership terminated by the plaintiffs' unequivocal election to dissolve it."). *But see* Fischer v. Fischer, 197 S.W.3d 98 (Ky. 2006) (holding partnership for "purchasing, leasing, and selling of real estate" at certain address to be a partnership for a particular undertaking).

thority of the partners to bind one another will be terminated.[32] Further, Edward will have the right to participate in the winding up of the partnership.[33] In short, Edward knows that should his relationship with Brooke and Lilly not develop in a way he deems appropriate or beneficial, he can cause the dissolution and force the winding up of B/L/E, thus putting himself in a position to negotiate a buyout.

Shortly after the formation of B/L/E, the Transition legislature considers and adopts a proposal, backed by the Transition State Bar Association, that Transition adopt RUPA. The bill is effective for all new partnerships three months after its passage,[34] and applies to pre-existing partnerships at the first day of the following calendar year.[35] Shortly after that drag-in effective date, Edward receives a description of certain proposals recently made by Lilly with respect to the operation of the partnership, changes that will substantially defer any potential gain he might realize and which will have immediate negative tax consequences due to phantom income. To Edward, these are changes that he cannot economically bear. Still, they are acceptable to Brooke and Lilly, so they are proposed and adopted.[36] But with RUPA, and not UPA, now governing their relationship, Edward comes to learn that a radically different set of termination provisions governs B/L/E, provisions quite different from those upon which he was counting as his protection in the partnership. Edward may still withdraw from the partnership, now referred to as having dissociated, a concept and a term new to partnership law.[37] While Edward's dissociation from the partnership is not in violation of the partnership agreement and for

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[32] UNIF. P'SHIP ACT § 33, 6 pt. II U.P.A. 436 (1914) ("[E]xcept so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership . . . ."); KY. REV. STAT. ANN. § 362.310 (West 2006); D.C. CODE § 33-108.04 (2006).

[33] UNIF. P'SHIP ACT § 37, 6 pt. II U.P.A. 470 (1914); KY. REV. STAT. ANN. § 362.330 (West 2006); D.C. CODE § 33-108.03 (2006).

[34] UNIF. P'SHIP ACT § 1206(a), 6 pt. I U.P.A. 266–67 (1997).

[35] *Id.*

[36] Assume that these are changes made in the ordinary course of business and under both UPA and RUPA require only majority approval of the partners, and are not extraordinary transactions requiring the approval of all partners. *See* UNIF. P'SHIP ACT §18(h), 6 pt. II U.P.A. 101 (1914); KY. REV. STAT. ANN. § 362.235(8); *id.* § 362.1-401(10) (West 2006); UNIF. P'SHIP ACT § 401(j), 6 pt. I U.P.A. 133 (1997); D.C. CODE § 33-104.01(j) (2006).

[37] *See* UNIF. P'SHIP ACT § 601(1), 6 pt. I U.P.A. 163 (1997); KY. REV. STAT. ANN. § 362.1-601(1) (West 2006); D.C. CODE § 33-106.02(a) (2006); *see also* UNIF. P'SHIP ACT § 601, 6 pt. I U.P.A. 163 cmt. 1 (1997); HILLMAN ET AL., *supra* note 27, § 601 Authors' cmt. 1.

that reason wrongful,[38] it does not fall within the provisions that require the partnership be dissolved and its affairs wound up.[39] Rather, under Transition's adoption of RUPA, Edward's interest in B/L/E is subject to purchase at a formula determined under the statute.[40] Rather than Edward being able to precipitate a dissolution, winding-up and termination of the partnership, Brooke and Lilly now will be able to determine whether B/L/E will continue, and Edward may look forward only to the buyout of his interest therein, and that buyout may be over a period of time.[41] As contrasted with the law as it existed prior to Transition's adoption of RUPA, Edward has lost significant leverage against Brooke and Lilly as well as the ability to extricate his capital from the venture on a relatively expedited basis.

Further, even if Edward had realized the problem with which he was about to be faced, there is little he could have done about it. Even if he was aware that RUPA was under consideration, and likewise aware of the differing treatment of a voluntary withdrawal under the new law, he would have been hard-pressed to convince Brooke and Lilly to agree to an amendment of their partnership agreement preserving the UPA rule upon voluntary withdrawal. Simply put, Brooke and Lilly would have been without any incentive to agree to that amendment.[42] Edward was not in a position to impose that provision, and from January 1 of the year after Transition adopted RUPA, Edward's bargain-

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[38] UNIF. P'SHIP ACT § 602(b), 6 pt. I U.P.A. 169 (1997); KY. REV. STAT. ANN. § 362.1-602(2) (West 2006); D.C. CODE § 33-106.02(b) (2006).

[39] UNIF. P'SHIP ACT § 801, 6 pt. I U.P.A. 189–90 (1997); KY. REV. STAT. ANN. § 362.1-801 (West 2006); D.C. CODE § 33-108.01 (2006).

[40] UNIF. P'SHIP ACT § 701, 6 pt. I U.P.A. 175–76 (1997); KY. REV. STAT. ANN. § 362.1-701 (West 2006); D.C. CODE § 33-107.01 (2006).

[41] UNIF. P'SHIP ACT § 701(h), 6 pt. I U.P.A. 176 (1997); KY. REV. STAT. ANN. § 362.1-701(8) (West 2006); D.C. CODE § 33-107.01(h) (2006).

[42] With respect to the retroactive application of RUPA to partnerships existing prior to its adoption, the commentary provides in part that the transition period between the initial effective date and the drag-in effective date "affords existing partnerships and partners an opportunity to consider the changes effected by RUPA and to amend their partnership agreements, if appropriate." *See* UNIF. P'SHIP ACT § 1206, 6 pt. I U.L.A. 267 cmt. 6 (1997). The neutrality of this language is misleading. Assuming they are fully informed as to the distinctions between UPA and RUPA, the partners on an individual basis assess whether it is in their individual best interest (*see* UNIF. P'SHIP ACT § 404(e), 6 pt. I U.L.A. 143 (1997)) in determining whether it is advantageous to agree to certain amendments to the partnership agreement prior to the drag-in effective date, or rather to allow the drag-in effective date to impose an advantageous rule.

ing position vis-à-vis long-time partners Brooke and Lilly was markedly diminished.[43]

Similarly, there can be violence done to even a carefully negotiated partnership agreement when the drag-in effective date is reached and a partnership is compelled to be governed by RUPA. Assume that the B/L/E Partnership had, prior to Transition's adoption of RUPA, elected to be a limited liability partnership (LLP).[44] In that partnership agreement there existed carefully negotiated contribution obligations among the partners, contribution provisions that altered the default rule of limited liability, including by reason of contribution.[45] The partnership reaches the drag-in effective date dictated by the Transition legislature and is now governed by RUPA. Section 306(c) of RUPA provides in part, "This subsection applies notwithstanding anything inconsistent in the partnership agreement that existed immediately before the vote required to become [an LLP] under section 1001(b) [of the Transition adoption of RUPA]."[46]

It is clear that, if a partnership is organized under RUPA and seeks to then elect LLP status, all indemnification and contribution obligations among the partners must be adopted contemporaneously with or subsequent to the vote to become an LLP. What is not clear is how section 306(c) will impact indemnification, contribution, and similar provisions in the B/L/E partnership agreement, all of which were elected at the time that the partnership became an LLP under UPA. It is entirely possible to read section 306(c) to the effect that those indemnification and contribution obligations, contractually assumed, will, after the drag-in effective date, not be effective unless readopted contemporaneously with or subsequent to a new election, under section 1001 of RUPA, to be an LLP. This reading is based on the fact that section 306(c) speaks to the filing of a section 1001(b) statement of qualification and does not address or otherwise recognize filings made under a prior law.[47] Furthermore, the official comment to section 306(c) speaks of the "statement of qualification" without addressing filings made under prior law.[48] Assume that we are dealing with a partnership for a particular undertaking, and as such an effort to voluntarily withdraw from the partnership prior to the completion of the undertaking will

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[43] This example is based in substantial part upon that set forth by Allan W. Vestal in *"Wide Open": Nevada's Emerging Intra-State Partnership Law Market*, *supra* note 10 at 278–79.

[44] *See, e.g.*, KY. REV. STAT. ANN. § 362.555 (West 2006).

[45] *See, e.g.*, *id.* § 62.220(3).

[46] UNIF. P'SHIP ACT § 306(c), 6 pt. I U.L.A. 117 (1997); KY. REV. STAT. ANN. § 362.1-306(3) (West 2006).

[47] *See* UNIF. P'SHIP ACT § 306(c), 6 pt. I U.L.A. 117 (1997).

[48] *See id.* § 306 cmt. 3, at 118.

be wrongful.[49] So it is not possible for Brooke, Lilly, or Edward to withdraw from the partnership when they realize that, upon the fast approaching drag-in effective date, those carefully negotiated contribution obligations may well become a nullity.[50]

In the case of limited partnerships, we see arguably even greater changes when RULPA is replaced with ULPA. Initially, there is the change in the application of an integrated statute that does not look to the law of general partnerships where the act is silent.[51] There are material changes in the ability of the limited partners to be involved in management without the potential loss of their limited liability[52] and a clear statement that limited partners, as such, do not owe fiduciary obligations to the partnership or their fellow partners.[53] We see similar modifications to the consequences of a partner's withdrawal from the partnership[54] and the elimination of a limited partner's right to withdraw.[55]

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[49] UNIF. P'SHIP ACT § 31(2), 6 pt. II U.L.A. 370 (1914); KY. REV. STAT. ANN. § 362.300 (West 2006); D.C. CODE § 33-108.01 (2006).

[50] The authors would emphasize the "may well" of the preceding statement. It may be validly argued that the adoption of indemnification, contribution, and similar provisions of a partnership agreement under UPA is sufficient to satisfy section 306(c) of RUPA and that they need not be readopted upon the partnership becoming governed by the Transition adoption of RUPA. To date it does not appear that any court has considered this issue.

[51] *See* UNIF. LTD. P'SHIP ACT § 107, 6A U.L.A. 70 (2001); Elizabeth S. Miller, *Linkage and Delinkage: A Funny Thing Happened to Limited Partnerships When the Revised Uniform Partnership Act Came Along*, 37 SUFFOLK U. L. REV. 891 (2004); UNIF. LTD. P'SHIP ACT, 6A U.L.A. 2, Prefatory Note (2001); *see also* UNIF. LTD. P'SHIP ACT § 1105, 6A U.L.A. 109 (1976); KY. REV. STAT. ANN. § 362.523 (West 2006); D.C. CODE § 33-201.08 (2006). We do not intend to imply that the issues identified in this article, as they arise in the context of a limited partnership, exist only upon the adoption of ULPA and its substitution for RULPA. Upon the various adoptions of RUPA, many limited partnership acts referenced that new law. *See, e.g.*, KAN. STAT. ANN. § 56-1a604 (2006). This significant alteration of a statute substantively governing limited partnerships, *see, e.g.*, Thomas E. Rutledge, *Linkage, Cabining, and Junction Box: The Brave New World of Entity Law Comes Together in Kansas*, J. OF PASSTHROUGH ENTITIES, Nov.–Dec. 2006 at 17, 20, should have triggered a similar review of existing limited partnership agreements and, as necessary, their amendment.

[52] UNIF. LTD. P'SHIP ACT § 303, 6A U.L.A. 46 (2001). *Contrast* UNIF. LTD. P'SHIP ACT § 303(a), 6A U.L.A. 324 (1976); D.C. CODE § 33-103.06(c) (2006); KY. REV. STAT. ANN. § 362.437(1) (West 2006).

[53] UNIF. LTD. P'SHIP ACT § 305(a), 6A U.L.A. 51 (2001); KY. REV. STAT. ANN. § 362.2-305(1) (West 2006). *Contrast* UNIF. LTD. P'SHIP ACT § 603, 6A U.L.A. 428 (1976); D.C. CODE § 33-203.03.

[54] *See* UNIF. LTD. P'SHIP ACT § 601(a), 6A U.L.A. 71 (2001); *id.* § 602(c); KY. REV. STAT. ANN. § 362.2-601(1) (West 2006); *id.* § 362.2-602(3). *Contrast* UNIF. LTD. P'SHIP ACT § 603, 6A U.L.A. 428 (1976); D.C. CODE § 33-106.02(a) (2006).

Even in those states not adopting ULPA, the change in the general partnership law may have a subtle (and in some cases not so subtle) effect on limited partnerships as a result of this linkage. It is for this reason that Colorado and Delaware left the UPA (1914) in place as the statute to which the limited partnerships—even newly formed limited partnerships—link.[56]

Changes in the law of corporations have led to similar zero sum issues. By way of example, in 2002 Kentucky repealed section 207 of its state constitution, which mandated cumulative voting for directors. At the same time, Kentucky amended its corporate act to provide that cumulative voting would be required only if that requirement is set forth in the articles of incorporation.[57] Undoubtedly there were many corporations in which cumulative voting was not required by the articles of incorporation,[58] but in which certain minority shareholders relied upon the statutory/constitutional provisions to assure their representation on the board. With the changed law, only by requesting an amendment to the articles of incorporation could the protections afforded minority shareholders by cumulative voting be preserved. However, such an addition to the articles of incorporation would have required the approval of a majority of all shareholders. Depending on various group dynamics, it could be exactly those other shareholders whose vote would be needed for the amendment of the articles who would, by doing nothing, succeed to the ability to elect the entire board of directors.

It is, of course, possible to modify, indeed entirely reverse, a rule and have the change effective only prospectively. Effective January 1, 1988, Kentucky adopted its current Business Corporation Act. That act provides that shareholders do not have preemptive rights with respect to the issuance of shares, and provides in part, "The shareholders of a corporation shall not have a preemptive right to acquire the corporation's unissued shares . . . ."[59] Corporations formed under this act may provide preemptive rights to the shareholders in the articles of incorporation.[60] But as to corporations existing on January 1, 1988, preemptive rights are retained unless the corporation's articles specifically ad-

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[55] *See* UNIF. LTD. P'SHIP ACT § 602(a)(3), 6A U.L.A. 73 (2001); KY. REV. STAT. ANN. § 362.2-602(1) (West 2006). *Contrast* UNIF. LTD. P'SHIP ACT § 604, 6A U.L.A. 433 (1976); D.C. CODE § 33-107.01 (2006).

[56] *See* COLO. REV. STAT. § 7-62-1104 (2006) (also allowing any limited partnership to affirmatively elect to link to RUPA); DEL. CODE ANN. tit. 6, § 17-1105 (2006).

[57] *See* KY. CONST. § 207 (repealed 2002); KY. REV. STAT. ANN. § 271B.7-280 (West 2006).

[58] There existed no statutory requirement that the articles of incorporation recite cumulative voting.

[59] KY. REV. STAT. ANN. § 271B.6-300(1) (West 2006).

[60] *Id.* § 271B.6-300(1)(a).

dressed preemptive rights[61] or unless preemptive rights were specifically limited or denied in a subsequent amendment to the articles of incorporation.[62]

Another example of deference to the existing expectations of the owners is seen in the Maine adoption of a new business corporation act. When Maine adopted its new business corporation act in 2001, which was effective in 2003, it provided that existing provisions set forth in articles of incorporation or bylaws would continue to be effective if they complied with prior law and would remain effective even if in conflict with the new act.[63]

Not imposing new rules on existing structures has the benefit of not altering existing bargains and leaving it to the parties thereto to modify (or not) their agreement in light of the new default rule. Retroactive application of the new rules has the apparent benefit of uniformity, but that benefit is minimized by a corporation's ability to include a contrary rule in its articles of incorporation. Hence, the apparent benefit of uniformity is actually applicable only when the governing instrument, whether prepared before or after the adoption of the new retroactively applied default rule, is silent with respect to the matter. Not that the relative merits of drag-in effective dates is our concern—we are addressing a world in which they predominate.

III. PARTNERSHIP VERSUS ET AL.: WHO IS THE CLIENT?

Let us assume that Martha, our diligent attorney, is currently providing legal services to the partnership/limited partnership/limited liability company in question and that we are not faced with the issue of her obligations to a "possibly" former client[64] and are rather addressing the situation of a current client.

Perhaps it is time to begin reviewing the question of who is the client when one is counsel to a business entity. This is, however, not a settled question. Imagine that Brooke, Lilly, and Edward appeared at her office door and asked her to represent them in the formation of a business entity. After an appropriate analysis she determined that a limited liability company is appropriate. They

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[61] *Id.* § 271B.6-300(4).

[62] *Id.* § 271B.6-300(4)(f).

[63] *See* ME. REV. STAT. ANN. tit. 13-C § 1701 (2006); *see also* KY. REV. STAT. ANN. § 272.331 (West 2006) (treatment of cooperative associations formed under previous law); COLO. REV. STAT. § 7-117-101 (2006) (preserving certain preemptive and voting rights except to the extent the articles of incorporation are amended by a vote required under the old provisions).

[64] *See supra* note 9.

agreed with her assessment and she proceeded to prepare an operating agreement and, with the consent of Brooke, Lilly, and Edward, filed articles of organization with the secretary of state. The LLC is now legally recognized.[65] But is the LLC Martha's client? Recall that it was three individuals, Brooke, Lilly, and Edward, who appeared at her office door seeking legal representation with respect to the formation of a business entity. The LLC did not exist at the time the attorney-client relationships came into existence. With the LLC now in existence, is her client:

1. Each of Brooke, Lilly, and Edward;
2. The LLC; or
3. Each of Brooke, Lilly, Edward, and the LLC?

Some jurisdictions follow the "incorporation rule" under which, when the organizers consult an attorney regarding the formation of a business entity, upon its formation the attorney-client relationship shifts to the newly formed business structure.[66] However, there exists law to the contrary, namely to the effect that the attorney-client relationship does not shift to the business structure, but rather that a continuing attorney-client relationship exists between the attorney and the individual actors who sought her counsel with respect to the organization of the business venture.[67] There is also law indicating that, at least

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[65] UNIF. LTD. LIAB. CO. ACT § 202(b), 6A U.L.A. 578 (1996); KY. REV. STAT. ANN. § 275.020 (West 2006); *id.* § 275.060(1); D.C. CODE §§ 29-1002.29-1006(g) (2006).

[66] *See, e.g.*, Jesse v. Danforth, 485 N.W.2d 63, 67 (Wis. 1992) (providing that with an organization as a client, an attorney represents merely the entity and not the entity's constituents and providing that this rule applies retroactively "where (1) a person retains a lawyer for the purpose of organizing an entity and (2) the lawyer's involvement with that person is directly related to that incorporation and (3) such entity is eventually incorporated."); *see also* Manion v. Nagim, Civil No. 00-238 ADM/RLE, Civil No. 02-370 ADM/RLE, 2004 U.S. Dist. LEXIS 1776 (D. Minn. Feb. 5, 2004), *aff'd*, 394 F.3d 1062 (8th Cir. 2005) (confirming the holding in *Jesse v. Danforth* that once the entity is formed the attorney's duties shift to the entity and apply retroactively so that no duties are owed to the incorporator); Hopper v. Frank, 16 F.3d 92, 98 (5th Cir. 1994) ("[T]he formation of Gulf Coast [limited partnership] preempted any prior relationship with Hooper and Sanderson with respect to the delivery of final public offering documents [for the limited partnership]."); Buehler v. Sbardellati, 41 Cal. Rptr. 2d. 104, 108 (Cal. Ct. App. 1995) (stating counsel's engagement letter for formation of partnership specified he represented the partnership and did not represent either individual partner). The problem of application of Rule 1.13 to a business organization in its formation is addressed in 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 17.8 (2007).

[67] *See* Boisdore v. Bridgeman, 502 So. 2d 1149, 1154 (La. Ct. App. 1987); Franklin v. Callum, 804 A.2d 444, 448 (N.H. 2002) (stating attorney for unincorporated solid waste management district represented each member thereof); United States v. Am. Radiator & Standard

in the context of an unincorporated business organization, counsel to the organization (and it does not appear that the reasoning of these decisions was conditioned upon the participation of the members in the organization) constitutes representation of all members of the association,[68] although there is certainly law to the contrary.[69] Let us assume that Martha has anticipated this quagmire in her engagement letter, agreeing to a joint representation of Brooke,

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Sanitary Corp., 278 F. Supp. 608, 614 (W.D. Pa. 1967) (holding counsel to trade group was counsel to each constituent member thereof). For a decision applying this rule in the context of a corporation, see *In re Brownstein*, 602 P.2d 655, 657 (Or. 1979).

[68] *See, e.g.*, Pucci v. Santi, 711 F. Supp. 916, 927 n.4 (N.D. Ill. 1989) (noting that attorney for partnership also represents each general partner therein); Schwartz v. Broadcast Music, Inc., 16 F.R.D. 31, 32 (S.D.N.Y. 1954) (stating that each member of unincorporated association is client of the association's attorney); Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985) (holding that the facts supported finding that lawyer for partnership also represented individual partners). In *Chaiken v. Lewis*, the court instructed the jury that "counsel for a partnership represents the partnership entity, but does not thereby become counsel for each partner individually." 754 So. 2d 118, 118 (Fla. Dist. Ct. App. 2000). On appeal, the District Court of Appeal stated that "the instruction given . . . was correct and was consistent with Rule 4-1.13 of the Florida Rules of Professional Conduct . . . as well as American Bar Association Formal Ethics Opinion 361." *Id.*; *see also* McCain v. Phoenix Resources, Inc., 230 Cal. Rptr. 25, 26 (Cal. Ct. App. 1986) ("We conclude that absent any restriction by statute or by the partnership agreement, a limited partner has the right to inspect all documents and papers affecting the partnership, including those held by the partnership's attorney.").

[69] *See, e.g.*, *Hopper*, 16 F.3d at 97 (holding that counsel retained to represent limited partnership in sale of assets represented the partnership and not the individual partners); Mursau Corp. v. Fla. Penn Oil & Gas, Inc., 638 F. Supp. 259 (W.D. Pa. 1986) (finding indirect benefit flowing to limited partnership from services performed by attorney for limited partnership and its general partner not sufficient to create attorney-client relationship between attorney and limited partner), *aff'd*, 813 F.2d 398 (3d Cir. 1987); Morin v. Trupin, 778 F. Supp. 711 (S.D.N.Y. 1991) (stating lawyer to general partners of real estate limited partnership was not counsel to limited partners); Quintel Corp., N.V. v. Citibank, N.A., 589 F. Supp. 1235, 1241–42 (S.D.N.Y. 1984) (holding that attorney representing either the general partner of a limited partnership or the limited partnership itself is not, in the absence of an affirmative assumption of a duty, the attorney for the limited partners); Johnson v. Superior Court, 45 Cal. Rptr. 2d 312 (Cal. Ct. App. 1995) (holding on facts presented, lawyer for limited partnership owed no ethical duty to limited partners); Zimmerman v. Dan Kamphausen Co., 971 P.2d 236, 241 (Colo. App. 1998) ("In Colorado, the fact that an attorney represents a partnership does not, standing alone, create an attorney-client relationship with each of the partners."); *Chaiken*, 754 So. 2d at 118 (holding lawyer for partnership is counsel to the partnership and not the individual partners); *In re* Owens, 581 N.E.2d 633 (Ill. 1991) (holding lawyer who represented only the partnership did not violate prohibition on business dealings with clients by transactions with individual partners); Williams v. Roberts, 931 So. 2d 1217 (La. Ct. App. 2006) (holding that attorney hired by one member to organize LLC and prepare operating agreement was not counsel for other members); The Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 1986-2 (1986).

Lilly, and Edward until the organization of the business entity, and thereafter representation of only the entity.[70]

In this context we may as well consider certain of the dictates of Rule 1.13 of the ABA Model Rules of Professional Conduct (1983, amended 1989), Entity as a Client:[71]

> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
>
> . . . .
>
> (d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.[72]

Rule 1.13 includes within its scope a partnership.[73] As such, counsel to a partnership is to take directions from and communicate matters to the duly authorized representatives of the partnership. But who are those persons? In the

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[70] See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. No. 91-361 (1991) for a discussion on treating a partnership as an entity separate from its owners.

[71] This rule has been adopted in Kentucky. *See* KY. SUP. CT. R. 3.130, Rule 1.13. The rationale for Rule 1.13 has been described as follows: "Ultimately, the rationale behind the Rule is that an organization will have goals and objectives that may, or may not, be consistent with the goals and objectives of all or some of its members or other constituents." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-361 (1991). For a broader review of Rule 1.13 (KY. SUP. CT. R. 3.130, Rule 1.13), see Rutheford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 RUTGERS L. REV. 9 (2003). This rule is being carried forward in the "Ethics 2000" adopted by American Bar Association in 2003 and being adopted or considered by most states, although as a result of other changes in the rule, paragraph (d) is paragraph (f) in the Ethics 2000 iteration.

[72] MODEL RULES OF PROF'L CONDUCT R. 1.13 (2003).

[73] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-361 (2006). Addressing Model Rule 1.13, the Committee states:

> [A] lawyer who represents a partnership represents the entity rather than the individual partners unless the specific circumstances show otherwise . . . . The analysis may include such factors as whether the lawyer affirmatively assumed a duty of representation to the individual partner, whether the partner was separately represented by other counsel when the partnership was created or in connection with its affairs, whether the lawyer had represented an individual partner before undertaking to represent the partnership, and whether there was evidence of reliance by the individual partner on the lawyer as his or her separate counsel, or of the partner's expectation of personal representation.

case of a general partnership, each partner has agency authority on behalf of the partnership by reason of their status.[74] From this we must conclude that, in the case of a partnership, legal counsel is bound to communicate developments to and receive instructions from any partner.[75]

In the context of the limited partnership, at least under the predecessor uniform act, it was generally clear that counsel to the partnership would deal with the limited partnership only by dealing with the general partners because under the statute and most partnership agreements limited partners had neither agency nor decisional authority on behalf of the limited partnership.[76] Of course, in some circumstances the attorney may deal with a limited partner as the "constituent" of the partnership. Such circumstances might arise where the general partner is under the domination and control of the limited partner or where, on a more limited basis, the limited partnership agreement has delegated to a limited partner the authority to act with respect to legal matters.[77] The movement from RULPA to ULPA reduces the risk of such participation by limited partners as a result of the elimination of the proscription of the limited partner's

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[74] *See* UNIF. P'SHIP ACT § 9(1), 6 pt. I U.L.A. 532 (1914); UNIF. P'SHIP ACT § 301(1), 6A U.L.A. 101 (1997); KY. REV. STAT. ANN. § 362.190(1) (West 2006); *id.* § 362.1-301(1); D.C. CODE § 33-103.01 (2006).

[75] Of course, this rule will be different in instances where the partnership has instituted a "Managing Partner" or "Management Committee" and charged it to handle legal matters on behalf of the partnership. See, for example, *Rice v. Strunk*, 670 N.E.2d 1280, 1287–88 (Ind. 1996), which states:

> A written partnership agreement, then, supersedes the provisions of the UPA and constitutes a binding contract among the parties, enforceable in accordance with its terms. To the extent that a partnership agreement places responsibility for the management of the partnership in the hands of less than all the partners, those partners to whom management responsibilities have been given become the "duly authorized constituents" for purposes of Prof.Con.R. 1.13(a). Such circumstances create an attorney-client relationship only between the attorneys and the partnership and not between the attorneys and any individual partner.

Id.

[76] *See* UNIF. LTD. P'SHIP ACT § 403, 6A U.L.A. 56 (2001); KY. REV. STAT. ANN. § 362.447 (West 2006); D.C. CODE § 33-203.03 (2006); *see also* Amtrak Ass'n v. Union Station Assoc. of New London, 643 F. Supp. 192 (D.D.C. 1986) (providing that under D.C. CODE § 33-203.03 (2006), since the limited partners were not alleged to have taken part in the control of the business, such partners were not proper parties to the proceedings).

[77] RULPA did not forbid the delegation to a limited partner of the capacity to represent the limited partnership, but rather defined the consequences of a limited partner appearing, as to a particular third party, to be exercising control over the limited partnership. *See* UNIF. LTD. P'SHIP ACT §§ 303(a) and (d), 6A U.L.A. 324 (1976); KY. REV. STAT. ANN. § 362.437(1) (West 2006); *id.* § 362.437(4); D.C. CODE § 33-203.03(a) (2006); *id.* § 33-203.03(c).

participation in management and control.[78] This raises one of the interesting transition issues that should be confronted. Should Martha inform the partnership, through the general partner, that limited partners may take a more active role in the management of the partnership? If so, and if the general partner determines to let sleeping dogs lie by not informing the limited partners of this seemingly important change, is the general partner guilty of failing to provide information, and does Martha have any obligations in connection with that failure?

In the context of most LLCs, particularly those formed under state laws requiring the designation of whether the LLC is "member managed" or "manager managed" and from that designation determining both decisional and agency authority,[79] we can determine whether the partnership model should be used, which would generally be the rule where the LLC is member-managed, or rather restricted to the managers where the LLC is manager-managed. Of course, these analogies will break down in states, such as Delaware or the District of Columbia, which do not require the designation of the LLC as member-managed or manager-managed and which do not tie the apparent agency authority to that designation.[80]

IV. WITHIN THE PARTNERSHIP, WHO IS THE CLIENT?

All of which, in a particular instance, begs at least aspects of the question with which we are here concerned. Assuming that Brooke, Lilly, and Edward have a partnership agreement that expressly delegates to Lilly the authority to handle legal matters with respect to the partnership, such does not foreclose the possibility that Brooke and Edward are clients to our intrepid attorney. Martha may have done estate planning and adoption work for either or both of Brooke and Edward. Would those activities, in and of themselves, be enough to constitute them as clients with respect to the activities of the partnership? Perhaps not, but imagine as well that while rendering those services Martha reviewed

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[78] UNIF. LTD. P'SHIP ACT § 303, 6A U.L.A. 46 (2001); KY. REV. STAT. ANN. § 362.2-303 (West 2006).

[79] *See, e.g.*, UNIF. LTD. LIAB. CO. ACT § 203(a)(6) (1996); *id.* § 301; KY. REV. STAT. ANN. § 275.025(2) (West 2006); *id.* § 275.135. *See generally* Thomas E. Rutledge, *The Lost Distinction Between Agency and Decisional Authority: Unfortunate Consequences of the Member-Managed Versus Manager-Managed Distinction in the Limited Liability Company*, 93 KY. L.J. 737 (2004–05).

[80] *See* DEL. CODE ANN. tit. 6, § 18-402 (2006) ("[U]nless otherwise provided in a limited liability company agreement, each member or manager has the authority to bind the limited liability company."); D.C. CODE § 29-1006 (2006); *id.* § 29-1017.

the partnership agreement and advised each of Brooke and Edward as to its legal implications with respect to their estate planning? Has our intrepid attorney walked her way into a situation where she has now advised various parties whose interests are or may be coming into conflict with one another with respect to the same subject matter?[81] This common fact pattern requires a careful attorney to be even more particular in assessing the situation.

The situation presented by Transition's adoption of RUPA and the drag-in effective date of section 1206(b) of RUPA is different in character than is the situation that typically arises when considering "who is the client" in the case of a partnership. The more typical situation is where a partnership, and let us assume we are talking about a limited partnership, is going to engage in a transaction with either a third party or with a partner. Where the partnership is to acquire a parcel of improved real property from a third party the answer—and counsel's obligations—are clear: the limited partnership is the client, counsel will take direction from the general partners, and except as directed to

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[81] As observed in ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-361 (1991):

> A lawyer who represents a partnership must take care to avoid the creation of an attorney-client relationship with individual partners unless the lawyer is satisfied that it is ethical to do so and intends to create such a relationship.
>
> Representation of the partnership does not necessarily preclude the representation of individual partners in matters not clearly adverse to the interests of the partnership, nor preempt such an individual representation previously undertaken. However, simultaneous representations of partnerships and of individual partners, even on basically unrelated matters, may result in the lawyer possessing confidences of one client that may not be revealed to another, a circumstance which could effectively prevent continued representation of the other client. See Rule 1.7(a). In such a case the lawyer may have to withdraw from one or both of the representations.
>
> Because [One must wonder whether this opinion would be more clear if this paragraph began "Notwithstanding that"] Rule 1.13(e) authorizes a lawyer to represent both an organization and one or more of its representatives or owners, the difficulties inherent in multiple representation are close to the surface for a lawyer who undertakes to advise both a partnership and one or more of its partners.
>
> Whether the attorney to the partnership has entered into a separate attorney-client relationship with one of the partners almost always will depend on an analysis of the specific facts involved. The analysis may include such factors as whether the lawyer affirmatively assumed a duty of representation to the individual partner, whether the partner was separately represented by other counsel when the partnership was created or in connection with its affairs, whether the lawyer had represented an individual partner before undertaking to represent the partnership, and whether there was evidence of reliance by the individual partner on the lawyer as his or her separate counsel, or of the partner's expectation of personal representation.

the contrary by either the general partners or the agreement of limited partnership, the limited partners are not consulted. The situation is slightly more complicated when the seller is a limited partner. Counsel may owe certain obligations to limited partners,[82] and the first order of business will be for our attorney to both explain those obligations to the general partners and to seek a waiver of any obligations that may be owed by counsel from the limited partner. It will be helpful as well that the limited partner/seller is represented by separate counsel as that will make it difficult to assert that they thought that the partnership's counsel was representing her interests.[83] A greater degree of complexity is achieved when the seller is a general partner. Once again, counsel to the partnership needs to explain to the other general partners the issues involved and seek a waiver from the seller of any obligations that would otherwise be owed. And again, it will be favorable to the partnership's attorney that the seller/general partner has retained separate counsel to represent her in connection with the sale. Still, there are obvious Rule 1.7 issues involved that need to be investigated and resolved.[84]

But each of those situations is different from that with which we are concerned. Each involves a person—be they a stranger to the partnership or one of its constituent owners—dealing with the partnership. The adoption of RUPA (or of ULPA, or of an amendment to the business corporation act, or of a new LLC act) may necessitate a renegotiation of the deal and will necessitate a consideration of the impact of the changed legal environment upon the deal. It needs to be recognized as well that the impact of the change in the law will be different upon each of the partners. As suggested by a trio of respected commentators:

> Lawyers who represent pre-existing partnerships will need to exercise great care in assisting such partnerships to make the transition, either voluntarily or involuntarily, from the U.P.A. to R.U.P.A. In a great many cases it will be inappropriate for a single lawyer to "represent the partnership" in the transition; the different positions of the partners will inevitably require the process be adversarial in some sense and it would be either impossible or improper

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[82] *See, e.g.*, Aradi v. First MSP Corp., 628 N.E.2d 1335, 1339 (Ohio 1994).

[83] *See, e.g.*, Maddox v. Burlingame, 517 N.W.2d 816, 818 (Mich. Ct. App. 1994) ("Retention of an alternative attorney effectively terminates the attorney-client relationship between the [attorney] and the client.").

[84] Another possibility is that the seller is the sole general partner. The obligations of counsel to the limited partnership when the only person enabled by law to represent the limited partnership is also on the other side of the transaction and, in that context, adverse to the partnership is a quagmire that we do not seek to resolve here.

> for the lawyer to subordinate the conflict. Unless the partners are truly undifferentiated [by] their age and life expectancy, by the nature and amount of their contributions and distributions, by the nature and extent of their participation in the enterprise, by the level and usefulness of the information on the enterprise they possess, and by their expectations for the venture and their risk adversity, circumstances will require separate counsel for the participants.[85]

And it is with respect to that latter analysis that it is crucial that our intrepid attorney consider "who is the client."

Let us assume that it was at this juncture that Martha made the phone call described in the introduction.

V. DEALING WITH THE ISSUES

So what is our intrepid counsel to B/L/E partnership to do with RUPA on the horizon? Advise Brooke and Lilly to delay disclosing to Edward their intention to alter the economics of the deal until after he has lost his capacity to withdraw and, by doing so, dissolve the partnership? Advise Edward to withdraw now while he can still withdraw and precipitate a dissolution of the partnership? The first option will deprive Edward of the opportunity to utilize the right he had under his agreement with Brooke and Lilly, while the second option will deprive Brooke and Lilly of the very partnership that was the fruit of their agreement with Edward. Among the partners the situation is zero sum.

Consider this possibility: Brooke, Lilly, and Edward are sitting with Martha at a table, and Edward asks Martha, "Will the new law limit my options as compared with the options I have today under the current law?" May she refuse to answer? May she be truthful[86] and answer?

We perceive there to be two models of analysis that may be employed. Neither is entirely satisfactory in that each may still expose counsel to some level of exposure, but either is far preferred to rushing headlong into the situation and incurring exposures that may be avoided.

The first option is to not advise any of Brooke, Lilly, Edward or B/L/E regarding the application of RUPA. Is "fleeing the potential field of battle" per-

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[85] *See* HILLMAN ET AL., *supra* note 27, § 1206 Authors' cmt. 3 (footnote omitted).

[86] We discard the possibility that she will answer untruthfully. Doing so would be a separate and willful violation of ethical standards, and our intrepid attorney is seeking to satisfy her ethical obligations.

missible? Brooke, Lilly, and Edward are entering into a zero sum situation. All may be clients of counsel to B/L/E, or at least there may be questions as to which of them are clients. Those clients are in all likelihood going to be in conflict with one another. Our attorney has intimate knowledge of the current and the pending legal situation of each of Brooke, Lilly, and Edward, and she is precluded from using that knowledge against any of them. What then is the result if she reviews the situation as a dispute between the partners? It is clear that Martha may not use her knowledge of B/L/E for the benefit of a partner against another partner.[87] Under this paradigm Martha may not assist Brooke, Lilly, or Edward in addressing how B/L/E will deal with RUPA. Rather, each needs independent counsel to advise them as to what the application of RUPA will mean to them. Edward, in anticipation of the drag-in effective date, may precipitate the dissolution of B/L/E, or he may not, but counsel to B/L/E will not be charged by either Brooke or Lilly of advising Edward against their interests and the interests of the partnership.[88]

Let us take as a given that this resolution is not entirely acceptable. In this scenario our attorney is giving up a valued client to whom she has rendered years of valued and appreciated service. In addition, each of Brooke, Lilly, and Edward is going to feel abandoned, and each is losing the benefit of Martha's knowledge of their individual and joint needs and objectives. While the facts may, in an individual situation, dictate this outcome, the following proposal is more palpable.

The second option is for our intrepid attorney to undertake the representation under Rule 2.2,[89] acting as the attorney for the situation as well as counsel for the business organization.

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[87] *See* Giva v. Davison, 637 A.2d 830 (D.C. 1994); Prisco v. Westgate Entm't, Inc., 799 F. Supp. 266 (D. Conn. 1992) (finding that when a dispute arises amongst the constituent owners of an association with respect to that association, the attorney for the association may be required to refrain from representing any of those constituent owners).

[88] Although perhaps difficult to quantify in the context of an at-will partnership, the business organization has some interest in its continued existence and in its orderly governance.

[89] In 2002 the ABA deleted Rule 2.2 from the Model Rules of Professional Conduct. See ABA Report to the House of Delegates, No. 401 (Feb. 2002), Model Rule 2.2, Reporter's Explanation of Changes, which states:

> The Commission is convinced that neither the concept of "intermediation" (as distinct from either "representation" or "mediation") nor the relationship between Rules 2.2 and 1.7 has been well understood. Prior to the adoption of the Model Rules, there was more resistance to the idea of lawyers helping multiple clients to resolve their differences through common representation; thus, the original idea behind

Rule 2.2 contemplates our attorney acting as intermediary-counsel for all of B/L/E, Brooke, Lilly, and Edward, even where each is already a client. In contrast with a joint representation of clients who have the same interests, Rule 2.2 allows counsel to act as an intermediary between clients who have potentially conflicting interests.[90] As conditions to proceeding under Rule 2.2, our counsel must receive the informed consent of each client,[91] must believe that an intermediary representation may be reasonably likely to succeed and not hinder the interests of a client,[92] and must reasonably believe she can provide impartial

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> Rule 2.2 was to permit common representation when the circumstances were such that the potential benefits for the clients outweighed the potential risks. Rule 2.2, however, contains some limitations not present in Rule 1.7; for example, a flat prohibition on a lawyer continuing to represent one client and not the other if intermediation fails, even if neither client objects. As a result, lawyers not wishing to be bound by such limitations may choose to consider the representation as falling under Rule 1.7 rather than Rule 2.2, and there is nothing in the Rules themselves that clearly dictates a contrary result.
>
> Rather than amending Rule 2.2, the Commission believes that the ideas expressed therein are better dealt with in the Comment to Rule 1.7. There is much in Rule 2.2 and its Comment that applies to all examples of common representation and ought to appear in Rule 1.7. Moreover, there is less resistance to common representation today than there was in 1983; thus, there is no longer any particular need to establish the propriety of common representation through a separate Rule.

Id.; *see also* HAZARD & HODES, *supra* note 66, § 24.2. Still, Rule 2.2 has been adopted and is still retained in a number of state adoptions of the Model Rules of Professional Conduct, and it provides a useful framework for analysis. *See, e.g.*, KY. SUP. CT. R. 3.130, Rule 2.2. In those jurisdictions that do not have Rule 2.2, Rule 1.7(b) will offer direction on how to proceed. Counsel may find RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 130 helpful in considering the obligations they undertake in a joint representation.

[90] *See generally* John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741 (1992); Robert R. Keatinge, *The Implications of Fiduciary Relationships in Representing Limited Liability Companies and Other Unincorporated Associations and Their Partners or Members*, 25 STETSON L. REV. 389 (1995).

[91] Previous Rule 2.2(a)(1) required that "the lawyer consult[] with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtain[] each client's consent to the common representation." MODEL RULES OF PROF'L CONDUCT R. 2.2(a)(1) (2003). Counsel who does not procure a written memorialization of the giving of this counsel and the waiver of conflicts and risks does so at his or her own peril. *See* Columbus Bar Ass'n v. Mills, 846 N.E.2d 1253 (Ohio 2006).

[92] Previous Rule 2.2(a)(2) required that:

> [T]he lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful . . . .

advice.[93] Informed consent requires that the client "be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client" and the important consideration that as among the clients there will be no confidentiality.[94] Also, counsel needs to keep in mind that the "reasonable beliefs" they must hold[95] are going to be assessed on an objective basis, and not merely a subjective basis.[96] In that environment our attorney may explain to Brooke, Lilly, and Edward the implications of the application of RUPA to their existing agreement.[97] In doing so, she has an obligation to be balanced, explaining to each the consequences of decisions made. That will include explaining to each of the partners the loss of the right to withdraw and to thereby trigger the dissolution of B/L/E. Edward may decide he wants to stay in partnership with Brooke and Lilly, that the business prospects are sound and that the RUPA buy-out price will be fair should he decide to later withdraw. Into how much detail must our counsel go as to the implications of the new law? Enough that "each client will be able to make adequately informed decisions."[98] In doing so, the objective is to "establish or adjust a relationship between clients on an amicable and mutually advantageous basis."[99]

Absent extraordinary circumstances not here posited, such as existing acrimony between the partners,[100] our attorney will be able to lead Brooke, Lilly, and Edward through the implications of the coming changes to their relationships. She will need to present a balanced analysis of those implications, and in

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MODEL RULES OF PROF'L CONDUCT R. 2.2(a)(2) (2003).

[93] Previous Rule 2.2(a)(3) required that "the lawyer reasonably believe[] that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients." MODEL RULES OF PROF'L CONDUCT R. 2.2(a)(3) (2003).

[94] MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 18 (2003).

[95] *See supra* notes 92 and 93.

[96] *See, e.g.*, Whitman v. Estate of Whitman, 612 A.2d 386, 389 (N.J. Super. Ct. Law Div. 1992).

[97] Previous Rule 2.2(b) directed that, "[w]hile acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions." MODEL RULES OF PROF'L CONDUCT R. 2.2(b) (2003).

[98] KY. SUP. CT. R. 3.130, Rule 2.2(a)(2).

[99] KY. SUP. CT. R. 3.130, Rule 2.2 cmt. 3.

[100] *Id.* cmt. 4 ("[A] lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.").

doing so is not precluded from reminding them of their recent success operating as a partnership. And she is empowered to advise them how a new (and presumably) written partnership agreement might be used to preserve certain UPA rules or to provide desired minority protections.

But still, the effort undertaken rests on a tenuous agreement of the various clients. Upon the termination of any client's acceptance of the relationship, he or she may terminate the joint representation;[101] thereafter counsel may not represent any of the parties to the joint Rule 2.2 representation with respect to the subject matter of that representation.[102]

CONCLUSIONS

Had our intrepid attorney only even dealt with one of the partners in the organization of B/L/E, had she had a written engagement letter defining that (and only that) partner as her client, and had the written partnership agreement specified that she was counsel for only that partner, then upon the pending application of RUPA she would have acted entirely properly in counseling only her client on how to best take advantage of the pending changes. But, those are not the facts we have to consider. Rather, relationships between closely held businesses, their owners, and counsel are seldom so well defined and differentiated. Each fact situation must be carefully assessed in light of the ethical rules of the jurisdiction at issue[103] and counsel needs to be sure that all clients are aware of the basis on which they are proceeding in responding to changes in the applicable organizational law. Doing so will help avoid having a good deed punished.

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[101] *See, e.g.*, KY. SUP. CT. R. 3.130, Rule 2.2(c); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.16 (2003).

[102] See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-361 (1991), which states:

> Thus it is clear, under Rule 1.7(a), that the partnership's attorney may not, without the informed consent of the partnership, represent the interests of one partner against the partnership. It is also clear that, under Rule 1.7(a), the partnership's attorney could not, without the informed consent of both the partnership and all adverse parties, represent the interests of one partner against other partners with respect to a matter involving the partnership's affairs.

Id. (internal cross-reference footnote omitted).

[103] *See, e.g., supra* notes 66–69.