

Vicarious Liability of the Law Partner for the Malpractice of a Fellow Partner

In a legal malpractice case the plaintiff routinely sues not only the alleged wrongdoer, but also those who were or appeared to have been his partners.¹ It is elementary that a law partner, however innocent of wrongdoing, may be held vicariously liable for the malpractice² of a fellow partner.³ Moreover, the law partnership is governed by the ordinary rules of partnership and agency law.⁴ With the ever increasing number of legal malpractice actions being pursued, these rules are of great significance to the law partner.⁵ This significance becomes vital when it is considered that the percentage of lawyers in the private sector is increasing, while the percentage of sole practitioners is decreasing.⁶ Furthermore, because a strict fiduciary standard is likely to be applied in judging the wrongful acts of the law partner toward his client,⁷ the potential for vicarious liability within the law partnership is far reaching.

A. *Is There a Partnership?*

Although the lawyer's relationship with his client is said to be personal,⁸ the courts have repeatedly recognized that the employment of one member of a law firm is the employment of the entire firm.⁹

1. R. MALLIN & V. LEVITT, *LEGAL MALPRACTICE* § 35 (2d ed. 1981).

2. The term "malpractice" is used broadly in this article to refer to all types of attorney misconduct.

3. See generally R. MALLIN & V. LEVITT, *supra* note 1, at § 33.

4. See *Succession of Killingsworth v. Schlater*, 270 So. 2d 196, 206 (La. Ct. App. 1972).

5. R. MALLIN & V. LEVITT, *supra* note 1, at § 6. During the 1970's there were almost as many reported legal malpractice decisions as there were reported decisions of legal malpractice in the previous history of American jurisprudence. *Id.*

6. V. COUNTRYMAN, T. FIMAN & T. SCHNEYER, *THE LAWYERS IN MODERN SOCIETY* 5 (2d ed. 1976). The percentage of partners in firms increased 12.5% from 1951 to 1970. The percentage of sole practitioners for the same period decreased 17.6%. Note, however, that during this time the percentage of lawyers in the private sector declined 14.1%. *Id.*

7. See *Cook v. Brundidge*, Fountain Elliott & Churchill, 539 S.W.2d 751, 757 (Tex. 1976), *rev'g* *Cook v. Lyon*, 522 S.W.2d 740 (Civ. App. 1975).

8. *E.g.*, *Succession of Zatarain*, 138 So. 2d 163, 165 (La. Ct. App. 1962).

9. *E.g.*, *S.C.A. Services, Inc. v. Morgan*, 557 F.2d 110, 114 (7th Cir. 1977); *Sellers v. State*, 56 Ala. App. 367, 368, 321 So. 2d 706, 707 (Ala. Crim. App. 1975); *Ganzer v. Schiffbauer*, 40 Neb. 633, 634, 59 N.W. 98, 100 (1894).

Each law partner is the agent of the other for purposes of partnership business.¹⁰ The act of one partner is said to be the act of all.¹¹ The first and most important issue, then, in a malpractice suit alleging vicarious liability of a law partnership, is whether a partnership existed at the time the alleged liability arose.

A related consideration concerns the "de facto" partnership.¹² Regardless of the attorneys' understandings among themselves, a "de facto" or "apparent" partnership may exist for purposes of liability to a client.¹³ The law is unsettled concerning what indicia are sufficient to create the de facto partnership,¹⁴ but the test seems to be whether the attorneys have led the client to reasonably believe he was being represented by a partnership.¹⁵ The potential for liability based on the de facto partnership concept exists in loose associations of attorneys who share office space, secretarial and administrative help, and who assist one another when the need arises.¹⁶ In addition, some risk exists that liability will be imposed because of the mere use of a joint name on letterheads and pleadings, without descriptive language to the contrary.¹⁷

Most often, the question of whether a partnership existed at the time the alleged liability accrued is presented in the context of a partnership that *did* actually exist but has since dissolved.¹⁸ Generally, the dissolution of the partnership does not relieve the partnership of vicarious liability if the liability was assumed during the course of the

10. U.P.A. § 9(1) (1914).

11. *Sellers v. State*, 56 Ala. App. 367, 368, 321 So. 2d 706, 708 (Ala. Crim. App. 1975).

12. See generally R. MALLEN & V. LEVITT, *supra* note 1, at § 33.

13. *Id.*; see also U.P.A. § 16 (entitled "Partnership by Estoppel"). See generally Mallen, *Apparent Partnership and Real Partnership Liability*, 3 PROF. LIAB. RPTR. 163 (1976).

14. R. MALLEN & V. LEVITT, *supra* note 1, at § 33.

15. See *Norfleet v. Stewart*, 180 Ark. 161, 20 S.W.2d 868, 870 (1929); *Coleman v. Moody*, 52 Tenn. App. 138, 372 S.W.2d 306, 316 (1963).

16. R. MALLEN & V. LEVITT, *supra* note 1, at § 33; see *Collins v. Levine*, 156 Ga. App. 502, 274 S.E.2d 841, 842 (1980).

17. R. MALLEN & V. LEVETT, *supra* note 1, at § 33; see *Collins v. Levine*, 156 Ga. App. 502, 274 S.E.2d 841, 842 (1980); *Myers v. Arazona*, 21 Md. App. 45, 318 A.2d 263 (1974) (the facts, however, indicate more than mere use of joint name). *But see Joseph v. Greater Baptist Church, Inc.*, 194 So. 2d 127 (La. Ct. App. 1966).

18. The ostensible partnership question and dissolved partnership question are often presented in the same case. *2E.g.*, *Redman v. Walters*, 88 Cal. App. 3d 448, 152 Cal. Rptr. 42 (1979); *Andrews v. DeForest*, 22 A.D. 132, 47 N.Y.S. 1011 (1897).

partnership.¹⁹ Two crucial inquiries must be made in determining liability of the dissolved partnership. First, at what point in time was liability assumed? Secondly, if liability was assumed, has it been discharged? The views on these issues are conflicting, but perhaps reconcilable.

A California decision, *Redman v. Walters*,²⁰ confronted both these issues. The plaintiff, Redman, employed the law firm, MacDonald, Brunsell & Walters, to prosecute a lawsuit.²¹ His suit was filed with "MacDonald, Brunsell & Walters" as attorneys of record.²² The suit was later dismissed, however, for failure to come to trial within five years, as required under the California Code of Civil Procedure.²³ Walters, one of the members of the firm employed by the plaintiff, had severed his relationship with the firm ten months from the date of initial retainer.²⁴ Nevertheless, Redman instituted a negligence action against the partnership, MacDonald, Brunsell & Walters, and each attorney individually.²⁵

Walters testified that he had never met the plaintiff, had not performed services on behalf of the plaintiff and had not participated in the receipt of any compensation from the plaintiff.²⁶ Redman's dealings with respect to his lawsuit had been with attorney Brunsell.²⁷ The trial court, on this evidence, dismissed the action and entered summary judgment for Walters.²⁸ The California Appellate Court reversed, reasoning that the performance of the firm's agreement with Redman was a partnership affair to be "wound up" upon dissolution.²⁹ Thus Walter's liability for breach of this agreement was not discharged when he left the firm. The court cited California Corporate Code sections 15030 and 15036 for this proposition.³⁰ These statutes embody sections

19. *E.g.* *Goodman & Mitchell v. Walker*, 30 Ala. 482, 501 (1857); U.P.A. § 36 (1914).

20. 88 Cal. App. 3d 448, 152 Cal. Rptr. 42 (1979).

21. *Id.* at 450, 152 Cal. Rptr. at 43.

22. *Id.*

23. *Id.* at 451, 152 Cal. Rptr. at 44.

24. *Id.* at 453, 152 Cal. Rptr. at 44.

25. *Id.* at 451, 152 Cal. Rptr. at 44.

26. *Id.*, 152 Cal. Rptr. at 43. Redman, however, had advanced the sum of \$1,000 to the firm to cover actual costs. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 453, 152 Cal. Rptr. at 45.

30. *Id.*

30³¹ and 36³² of the Uniform Partnership Act. California Corporate Code section 15036 provides that upon dissolution a partnership is not terminated but continues until the winding up of partnership affairs is complete.³³ Section 15036 further provides that the dissolution of a partnership does not, of itself, discharge the existing liability of any partner.³⁴

The *Redman* court elaborated its "winding up" theory by stating that "an individual partner's liability in such a case will not be determined except by performance of an agreement creating the liability, or by express or implied consent of the other contracting party that he need not so perform."³⁵ The court then refused to find that the plaintiff had impliedly consented to the release of Walters from his obligation although for four years the partnership name had not included Walters.³⁶

In reaching its decision, the court in *Redman* also relied upon the theory of "ostensible partnership" or "partnership by estoppel."³⁷ This theory is frequently asserted in addition to an actual partnership theory in cases considering vicarious liability of the dissolved partnership.³⁸ Again, the court phrased its analysis in terms of California's Corporate Code, embodying the Uniform Partnership Act; the court cited California Corporate Code section 15016 (U.P.A. section 16, entitled "Partner by Estoppel").³⁹ Basically, that statute provides that one who

31. U.P.A. § 30 (1914) provides the following: "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."

32. U.P.A. § 36 (1914) states in pertinent part: "(1) The dissolution of the partnership does not of itself discharge the existing liability of any partner."

33. *Redman*, 88 Cal. App. 3d at 453, 152 Cal. Rptr. at 43.

34. *Id.*

35. *Id.* at 453, 152 Cal. Rptr. at 45 (1979).

36. *Id.* at 455, 152 Cal. Rptr. at 46. The court also recognized, but refused to find, that estoppel might operate to bar the plaintiff's claim. *Id.* at 453, 152 Cal. Rptr. at 45.

Note that the court distinguished notice from consent or estoppel, stating "[e]ven were we to presume, arguendo, such notice to Redman, it does not reasonably follow that he had consented . . . or [had] been estopped to object, to a change in the partnership's obligation to represent him." *Id.* at 454, 152 Cal. Rptr. at 46.

37. *Id.* at 452, 152 Cal. Rptr. at 44.

38. *See supra* n.18.

39. The relevant portions of U.P.A. § 16 provide the following:

(1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made

represents himself, by words or conduct, to be a member of a partnership, or consents to such representation, incurs liability as though he were an actual member of the partnership.⁴⁰ The court concluded that proof presented by the plaintiff in the lower court established that McDonald, Brunsell & Walters held themselves out to the public and Redman as a partnership.⁴¹ Partnership liability was then imposed, irrespective of whether an actual partnership had existed.

Thus, the *Redman* decision alternatively rests on two grounds: (1) The obligation to Redman arose upon his employment of the defendant law firm. Liability for failure to discharge this obligation could not be released upon partnership dissolution except by Redman's consent;⁴² and (2) The partnership, including Walters, continued with relation to Redman's affairs under the ostensible partnership theory. Under the first of these theories (and perhaps the second) vicarious liability of the attorney/partner results at the creation of the attorney-client relationship. In addition, under the first theory, the *Redman* court indicated, that liability is certain to be avoided only through containing a formal, perhaps written, consent to nonrepresentation from the client.

In contrast to *Redman*, the Georgia Appellate Court in *Gibson v. Talley*⁴³ refused to find a member of a dissolved partnership

who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(a) Where a partnership liability results, he is liable as though he were an actual member of the partnership.

40. *See id.*

41. *Redman*, 88 Cal. App. 3d at 451-52, 152 Cal. Rptr. at 44.

42. An Alabama case, *Goodman & Mitchell v. Walker*, 30 Ala. 482 (1857) appears to concur with this strict view. In that case, the court stated:

The dissolution of the partnership . . . did not relieve Mr. Mitchell from the liabilities he assumed, when his firm undertook the collection of the note . . . His partner had bound him . . . and from that responsibility he could not relieve himself, without the consent and act of Mrs. Walker [client] . . . [A]s there was no proof that Mrs. Walker had notice of the dissolution, she having traded with the firm as partners, was not chargeable with the consequences of the dissolution.

Id. at 501 (emphasis added). Note, however, that in *Goodman*, the default was committed while the partnership was in existence.

43. 156 Ga. App. 593, 275 S.E.2d 154 (1980).

liable for malpractice even though the partnership had been retained for representation by the plaintiff/client prior to its dissolution.⁴⁴ The *Gibson* case can be distinguished from, and perhaps reconciled with, the *Redman* case in three instances.

First, in *Gibson*, the plaintiff's automobile collision suit, which the attorney/defendants were alleged to have negligently handled, was not filed until after the partnership dissolution.⁴⁵ In *Redman*, the plaintiff's suit, out of which the alleged negligence of the attorney arose, was filed prior to dissolution.⁴⁶ The two cases, then, might be reconciled on the theory that liability to the client arises upon the filing of the client's lawsuit. Language in *Redman*, however, indicates the contrary.⁴⁷ The *Redman* court repeatedly spoke in terms of a contractual obligation to the plaintiff.⁴⁸ Furthermore, it was emphasized that the partnership had an agreement of representation, i.e., employment, with the client.⁴⁹

Secondly, the two cases can be distinguished because *Gibson* appears to have involved affirmative negligence,⁵⁰ while *Redman* did not.⁵¹ In *Gibson* the court could easily attach liability on the date the act or acts of actual negligence occurred. In *Redman*, however, there was no certain date on which liability could attach, other than perhaps

44. *Id.* at _____, 275 S.E.2d 154 (1980).

45. *Id.*

46. *Redman v. Walters*, 88 Cal. App. 3d 448, 449, 152 Cal. Rptr. 42, 43 (1979); see *supra* p. 243.

47. *Redman*, 88 Cal. 3d at 453-54, 152 Cal. Rptr. at 44-45. For example, the court stated: "The partnership of MacDonald, Brunzell & Walters had *accepted employment from Redman to commence and prosecute his lawsuit*. Upon its dissolution 10 months later the 'partnership' was not terminated in respect of its duty to fulfill its contractual obligation to Redman." *Id.* at 453, 152 Cal. Rptr. at 44 (emphasis added).

Support might, however, be found for the view that liability begins at the filing of the lawsuit. The court did say, "[w]e perceive the [lower] court's meaning to be . . . [that] Redman had in no way waived . . . Walters' continuing liability in *respect of the lawsuit* after the 'dissolution'." *Id.* at 455, 152 Cal. Rptr. at 46 (emphasis added). That position is weak, though. Furthermore, an earlier California case supports the proposition that liability begins at retainer. See *Blackmon v. Hale*, 83 Cal. Rptr. 194 n.3, 463 P.2d 418, 424 n.2 (1970) (en banc) ("It is immaterial in this case that the actual misappropriation occurred after the partnership was dissolved.").

48. *Redman*, 88 Cal. App. 3d at 453, 152 Cal. Rptr. at 44.

49. *Id.* at 453-54, 152 Cal. Rptr. at 44-45.

50. The plaintiff, *Gibson*, alleged negligence in the handling of her suit for damages arising from an automobile collision. The suit, unlike *Redman's*, was carried to trial. *Gibson*, 156 Ga. App. at _____, 275 S.E.2d at 155 (1980).

51. *Redman*, 88 Cal. App. 3d at 452, 152 Cal. Rptr. at 44; see *supra* p. 243.

the date of dismissal of the plaintiff's suit—five full years from the date suit was filed.⁵²

The third and perhaps most important distinction between the *Redman* and *Gibson* cases is that, the *Redman* court applied the California Corporate Code which embodies the Uniform Partnership Act.⁵³ In *Gibson*, however, Georgia partnership law was determinative.⁵⁴ The *Gibson* court stated that “[g]enerally, all partners are bound by the acts of any one, within the legitimate scope of the business of the partnership, until dissolution of the partnership. Code Ann. § 75302.”⁵⁵ Although Georgia had a statute that provided for the “winding up” of partnership affairs upon dissolution,⁵⁶ the *Gibson* court did not apply that statute as the *Redman* court had applied California Corporate Code sections 15030 and 15036 (U.P.A. sections 30 and 36) on “winding up.”⁵⁷ The Georgia statute on “winding up” states, in pertinent part, that “[a]s to third persons, [the dissolution] shall absolve the partners from all liability for future contracts and transactions, but not for transactions that are past.”⁵⁸ The implication, therefore, arising from the nonapplication of this statute by the *Gibson* court, is that liability of the partnership in that case arose at some time after dissolution.

Instead of relying on the Georgia “winding up” statute, the *Gibson* court relied on a Georgia statute, entitled “what constitutes partnership as to third persons.”⁵⁹ That statute provides that “[a] common interest in profits alone shall not constitute a partnership as to third persons.”⁶⁰ Based on this statute, the court in *Gibson* denied partnership liability, despite proof by the plaintiff that the partner whose liability was at issue was entitled to share in the fee from the plain-

52. The California Superior Court *did* conclude that because Walters was not an attorney of record on the date of the alleged negligent act (the date of dismissal of Redman's suit), he was not liable. The Court of Appeals, however, rejected that conclusion. *Id.* at 452, 152 Cal. Rptr. at 44.

53. *Id.* at 453, 152 Cal. Rptr. at 44-45. See *supra* pp. 243-45.

The Uniform Partnership Act has been passed in all states except Georgia and Louisiana. A. CONARD, R. KRAUSS & S. SIEGAL, 1982 CORPORATION AND PARTNERSHIP STATUTES, RULES, AND FORMS 1 (1982).

54. *Gibson*, 275 S.E.2d at 155-56.

55. *Id.* at 155 (emphasis supplied).

56. GA. CODE ANNOT. § 75-109 (Supp. 1982).

57. *Redman*, 88 Cal. App. 3d at 453, 152 Cal. Rptr. at 45. See *supra* nn.31-32 and accompanying text.

58. GA. CODE ANNOT. § 75-109 (Supp. 1982) (emphasis supplied).

59. GA. CODE ANNOT. § 75-102 (Supp. 1982).

60. *Id.*

tiff's case.⁶¹ Although the California Corporate Code (U.P.A.) applied in *Redman* has no statute similar to Georgia Code section 75-102,⁶² which asserts specific rules dealing with the sharing of profits, etc. for determining the existence of a partnership with respect to third persons, it does contain section 150016 (U.P.A. section 16), entitled "Partner by Estoppel." The *Redman* court cited section 150016 (U.P.A. section 16) to support the alternative theory of ostensible partnership asserted by the plaintiff.⁶³ Therefore, if both *Gibson* and *Redman* could be said to rest only on an ostensible partnership theory, the two cases are potentially reconcilable. The *Redman* court's additional reliance, however, on the "winding up" theory,⁶⁴ presents an obstacle to such reconciliation.

The three distinctions between *Redman* and *Gibson*, therefore, suggest that in *Gibson* liability did not arise upon the mere retention of the firm's representation. Rather, the *Gibson* court assumed that liability surfaced at some later date, for example, the date of the filing of the lawsuit or the date on which the actual acts of affirmative negligence occurred.

B. *What is the Ordinary Course of Business of the Law Partnership?*

Once it has been determined that there is a partnership, the issue in determining the law partnership's liability becomes whether the wrongdoer/partner was acting in the ordinary course of business of the law partnership or whether he acted in some capacity other than a lawyer in his wrongdoing.⁶⁵ The law partnership can avoid liability

61. *Gibson*, 275 S.E.2d at 156. A case that seems to hold contra to *Gibson* is *Burnside v. McCrary*, 384 So. 2d 1292 (Fla. Dist. Ct. App. 1980). In that case the defendant/attorney had been elevated to the bench after alleged negligent acts occurred. The court did not hold the attorney liable, basing its conclusion, in part, on the finding that he retained no financial interest in the client's litigation. *Id.*

62. U.P.A. § 7 does, however, contain specific rules dealing with sharing of profits, etc., for determining the existence of a partnership. That section provides, though, that "(1) Except as provided by section 16 persons who are not partners as to each other are not partners as to third persons." Therefore, § 7 does not govern the existence of a partnership with respect to third parties as Ga. Code Annot. § 75-102 does. Section 7 applies, rather, in determining liability alleged by one partner against another. See *Farrow v. Cahill*, 663 F.2d 201 (D.C. Cir. 1980).

63. *Redman*, 88 Cal. App. 3d at 453, 152 Cal. Rptr. at 45; see *supra* n.39 and accompanying text.

64. *Id.*; see *supra* pp. 243-44.

65. E.g. *Blackmon v. Hale*, 1 Cal. 3d 548, 83 Cal. Rptr. 194, 463 P.2d 418 (1970);

if the wrongdoer/partner is found to have acted in a purely personal capacity⁶⁶ or in a business capacity other than his role as attorney, for example, a corporate officer or trustee.⁶⁷

Sections 9, 13 and 14 of the Uniform Partnership Act are particularly helpful to an analysis of this area.⁶⁸ The key in applying these sections is a determination of whether the wrongful act was committed in the "ordinary course of the business of the partnership."⁶⁹

Rouse v. Pollard, 130 N.J. Eq. 204, 21 A.2d 801 (1941); *In re Steinmetz' Estate*, 253 A.D. 793, 1 N.Y.S.2d 601 (Sup. Ct. 1937); *Riley v. Laroque*, 163 Misc. 423, 297 N.Y.S. 756 (Sup. Ct. 1937); *Andrews v. DeForest*, 22 A.D. 132, 47 N.Y.S. 1011 (1897).

66. *E.g.*, *Blackmon v. Hale*, 1 Cal. 3d 548, 83 Cal. Rptr. 194, 463 P.2d 418; *Rouse v. Pollard*, 130 N.J. Eq. 204, 21 A. 2d 801 (1940); *In re Steinmetz' Estate*, 253 A.D. 793, 1 N.Y.S. 2d 601 (Sup. Ct. 1897).

67. *Tennant Shoe Co. v. Birdseye*, 105 Mo. App. 696, 78 S.W. 1036 (1904) (attorney acted as trustee); *Douglas Reservoirs Water Ass'n v. Maurer & Garst*, 398 P.2d 74 (Wyo. 1965) (attorney was also officer of Association). *See Muka v. Williamson*, 53 A.D.2d 950, 385 N.Y.S.2d 639 (1976) (attorney sued as private attorney escaped liability upon finding that he acted as "county" attorney).

68. The pertinent portion of U.P.A. § 9 provides the following:

(1) Every partner is the agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

U.P.A. § 13 asserts:

Where by the wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

U.P.A. § 14 provided:

The partnership is bound to make good the loss:

(a) where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and
(2) where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.

For three modern cases interpreting these provisions, *see Blackmon v. Hale*, 1 Cal. 3d 548, 83 Cal. Rptr. 194, 463 P.2d 418 (1970) (§ 9, § 13, and § 14); *Husted v. McCloud*, 436 N.E.2d 341 (Ind. App. 1982) (§§ 13-14); *Cook v. Brundidge*, *Fountain, Elliott & Churchill*, 533 S.W.2d 651 (Tex. 1976) (§ 13-14), *rev'g Cook v. Lyon*, 522 S.W.2d 740 (Civ. App. 1975).

69. *See, e.g., Husted v. McCloud*, 436 N.E.2d at 347 (plaintiff made prima-facie

Whether an act is done in the ordinary course of business is determined by considering both the course of business of law firms generally and the course of business of the specific law firm whose liability is at question.⁷⁰ These two factors determine the actual or apparent authority with which the wrongdoer/law partner acted.⁷¹ It appears, however, that the ordinary course of business of the specific law firm will only serve to broaden the agent's authority absent knowledge by the injured party of specific restrictions on the agent's authority.⁷² In other words, the ordinary course of the business of law firms generally is the standard by which the agent's authority will be judged, if the injured party has no knowledge of restrictions on such authority and the usual course of business of the law firm does not indicate a larger authority. Furthermore, the wrongdoer/partner cannot unilaterally expand the scope of his apparent authority through his own course of dealing.⁷³

The courts have enumerated a varied list of specific types of dealing, committed within the ordinary course of business, for which the law partnership will be held accountable. Slander in the promotion of partnership business, may result in partnership liability.⁷⁴ A law partnership has also been held accountable for conversion.⁷⁵

Negligence in failing to discover an outstanding lien upon a title examination commonly renders the partnership vicariously liable.⁷⁶ There are conflicting views, however, whether the law partnership will incur

showing under U.P.A. by demonstrating conversion to have been committed in ordinary course of business); Brundidge, Fountain, Elliott & Churchill, 533 S.W.2d at 758.

70. See, e.g., Brundidge, Fountain, Elliott & Churchill, 533 S.W.2d at 758; Blackmon, 1 Cal. 3d at 557, 83 Cal. Rptr. at 199, 463 P.2d at 423. While § 9, § 13, and § 14 contain differences in wording, the courts seem to employ the phrase "ordinary course of business" to indicate both the apparent scope of business of the particular law firm and the course of business of law firms generally. *Id.*

71. See *Blackmon*, 1 Cal. 3d at 557, 83 Cal. Rptr. at 199, 463 P.2d at 423.

72. See *id.*; Brundidge, Fountain, Elliott & Churchill, 533 S.W.2d at 760 (citing *Randall v. Meredith*, 76 Tex. 669, 13 S.W. 576, 580 (1890); U.P.A. § 9 (1914)).

73. *Riley v. Leroque*, 163 Misc. 423, 431, 297 N.Y.S. 756, 765 (Sup. Ct. 1937); *R. MALLEN & V. LEVITT*, *supra* n.1, at § 33.

74. *Ardoyno v. Ungar*, 352 So. 2d 320, 322 (La. App. 1977). However, the court indicated that consent and knowledge of the nonacting partners may be required. *Id.* This would constitute ratification, which is outside the scope of this article.

75. *Husted v. McCloud*, 436 N.E.2d 341 (Ind. Ct. App. 1982).

76. E.g., *Goodman & Mitchell v. Walker*, 30 Ala. 482 (1857); *Redman v. Walters*, 152 Cal. Rptr. 42, 88 Cal. App. 3d 448 (1979); *Mumford v. Staton, Whaley & Price*, 254 Md. 697, 255 A.2d 359 (1969); *Priddy v. Mackenzie*, 205 Mo. 181, 103 S.W. 968 (1907); *Wlodarek v. Thrift*, 178 Md. 453, 13 A.2d 774 (1940).

liability for the defalcation of funds received for the purpose of mortgages in connection with a title examination. This difference in opinion stems from the question whether the purchase of mortgages falls within the ordinary course of business of the law partnership. The California Supreme Court has taken the position that the purchase of mortgages is within the law partnership's regular course of business.⁷⁷ In *Blackmon v. Hale*,⁷⁸ the California court held that an attorney hired to clear title to certain land was practicing law when he was entrusted with \$24,500 with which to purchase an outstanding note and mortgage on the land.⁷⁹ The New York Court, however, in *Andrews v. DeForest*,⁸⁰ has taken the opposite view. In that case the attorney/partner was hired to conduct a title examination in connection with the purchase of a house by the client.⁸¹ The client paid the attorney money for services rendered and for the purpose of encumbrances on title to the house and real property in question.⁸² The court held that purchase of the encumbrances was not included within the attorney's duty under his retainer.⁸³ Therefore, the law partnership escaped liability when a lien on the client's property, represented by the defalcating attorney to have been removed from title, was foreclosed.⁸⁴ A controlling factor in that case seems to have been that the lawyer was also his client's attorney-in-fact and general manager of business affairs. Thus, the court found that the attorney, in embezzling the client's funds, acted in this other capacity.⁸⁵ No such factor was present in the *Blackmon* case.

The misappropriation of funds is an area that warrants careful attention because it is a frequent source of liability for the attorney. In addition, technical distinctions which determine liability are sometimes made.⁸⁶ The English cases early on made the distinction between funds received from a client for general investment purposes and funds received for investment in specified securities.⁸⁷ The receipt of funds for general

77. *Blackmon v. Hale*, 1 Cal. 3d 548, 83 Cal. Rptr. 194, 163 P.2d 418 (1970).

78. *Id.*

79. *Id.* at 554, 83 Cal. Rptr. at 197, 163 P.2d at 420.

80. 22 A.D. 132, 47 N.Y.S. 1011 (1897).

81. *Id.* at 134, 47 N.Y.S. at 1012.

82. *Id.* at 134, 47 N.Y.S. at 1013.

83. *Id.* at 137, 47 N.Y.S. at 1014.

84. *Id.* at 136, 47 N.Y.S. at 1013.

85. *Id.* at 134, 47 N.Y.S. at 1012.

86. See generally Annot., 136 A.L.R. 1110 (1942).

87. *Liability of Solicitor for Impropriety by Partner*, 125 SOLICIT. J. 547, 548 (1981) (citing Cordery on Solicitors).

investment was not considered to fall within the ordinary course of the business of law, while the receipt of funds for specific investments did fall within the ordinary course of the law business.⁸⁸ This distinction was carried forward into the American cases.⁸⁹

Usually, an attorney who receives the funds of a client for general investment purposes and then misappropriates the funds is found to have acted in only a personal capacity.⁹⁰ In addition, other factors are looked to by the court in determining whether the wrongdoer/partner acted personally or for the partnership. These factors include: (1) whether the funds were deposited in a partnership account⁹¹ and (2) whether the client was put on notice that the attorney did not act for the partnership.⁹² The client, for example, may have been asked to make his check payable to the personal account of the misappropriating attorney;⁹³ or, the client may have received "interest" checks drawn on the personal account of the misappropriator.⁹⁴

The misappropriation of funds usually involves a misrepresentation to the client and is thus labeled fraud by the courts.⁹⁵ Confusing dicta is found in some court opinions, which suggest that a partnership is not accountable for the fraud of one of its members.⁹⁶ This dicta seems to be grounded in the argument that fraud itself is not within the partnership's ordinary course of business. The flaw in this argument was recognized in a recent Indiana Appellate Court decision, *Husted v. McCloud*.⁹⁷ The defendant in *Husted* argued that conversion was not within the ordinary course of business of the law

88. Annot., *supra* note 86.

89. *Id.*

90. *E.g.*, *Rouse v. Pollard*, 130 N.J. Eq. 204, 21 A.2d 801 (1940); *Riley v. Laroque*, 163 Misc. 423, 297 N.Y.S. 756 (1937); *In re Steinmetz Estate*, 253 A.D. 793, 1 N.Y.S.2d 601 (Sup. Ct. 1937); *Cook v. Lyon*, 522 S.W.2d 740 (Tex. Ct. App. 1975), *rev'd sub nom.* *Cook v. Brundidge*, *Fountain, Elliott & Churchill*, 533 S.W.2d 751 (Tex. 1976).

91. *Id.*

92. *Id.*

93. *Cook v. Lyon*, 522 S.W.2d 751 (Tex. 1975); *Rouse v. Pollard*, 130 N.J. Eq. 204, 21 A.2d 801 (1940).

94. *Rouse v. Pollard*, 130 N.J. Eq. 204, 21 A.2d 801 (1940).

95. *E.g.*, *In re Steinmetz' Estate*, 253 A.D.2d 793, 1 N.Y.S.2d 601 (Sup. Ct. 1937); *Andrews v. DeForest*, 22 A.D. 132, 47 N.Y.S. 1011 (1897).

96. *E.g.*, *In re Steinmetz' Estate*, 1 N.Y.S.2d at 605 ("Being engaged in the perpetration of fraud, he was not acting as the agent of his partners nor was his knowledge imputable to them.').

97. 436 N.E.2d 341 (Ind. Ct. App. 1982).

profession.⁹⁸ The *Husted* court responded, “[w]ere we to allow such a defense, it would be virtually impossible for a plaintiff to recover against a defendant partnership for any misappropriation of funds resulting from the act of the individual partner.”⁹⁹ The label attaching legal consequences to the wrongful act, therefore, is not determinative of whether an activity falls within the ordinary course of business of the law partnership. Rather, what the wrongful act purported to be is determinative. Furthermore, there are many cases that stand for the proposition that the law partnership may incur vicarious liability for fraud.¹⁰⁰

A North Carolina decision, *Jackson v. Jackson*,¹⁰¹ suffers from the flawed reasoning recognized in *Husted*. The *Jackson* court, in construing U.P.A. Section 13, held that malicious prosecution did not fall within the normal range of activities of a typical law partnership.¹⁰² As support for this contention, the court cited the North Carolina Code of Professional Responsibility Disciplinary Rule 7-102(A).¹⁰³ Basically, this rule forbids malicious prosecution. Of course, it is likewise unethical for the attorney to knowingly participate in any illegal conduct or conduct contrary to a disciplinary rule in his representation of a client.¹⁰⁴ Furthermore, the misappropriation of a client’s funds is specifically prohibited by the ethical rules.¹⁰⁵ Stretched to its logical

98. *Id.* at 347.

99. *Id.*

100. *E.g.*, *Smyrne Developers, Inc. v. Bornstein*, 177 So. 2d 16, 18 (Fla. Dist. Ct. App. 1965). *Compare*, *Model Bldg. Ass’n of Mott Haven v. Reeves*, 201 A.D. 329 (1922), *rev’d on other grounds*, 236 N.Y. 331, 140 N.E. 715, 718 (1923) (“[A]lthough the other partners were not participants in the fraud, as between the Association [plaintiff] and themselves, they are liable under the rule of law, where one of two innocent parties must sustain loss from the fraud of a third, the loss falls on the one whose act has enabled such fraud to be committed.”) *with* *Andrews v. DeForest*, 22 A.D. 132, 138, 47 N.Y.S. 1011, 1015 (1897) (“A fraud committed by a partner while acting on his own separate account is not imputable to the firm, although if he had not been connected with the firm he would not have been in the position to commit the fraud.”).

101. 20 N.C. App. 406, 201 S.E.2d 722 (1974).

102. *Id.* at _____, 201 S.E.2d at 724.

103. N.C. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1982).

104. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(8) (1981); *see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-101 (1981).

105. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1981). *Compare* *Jackson v. Jackson*, 20 N.C. App. 406, 201 S.E.2d 722, 70 A.L.R.3d 1294 (1974) (*see* accompanying text) *with* *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795, 76 A.L.R.3d 1004 (1974) (Professional Association of Attorneys was sued for misappropriation of clients’ funds and the court applied partnership law by analogy and held

end, the holding in *Jackson* might preclude recovery, on the basis of vicarious liability, against the law partnership in all situations. The plain language of the Uniform Partnership Act indicates that the drafters did not intend such a result.¹⁰⁶

Jackson raised the interesting question of the relationship between the ethical rules of legal conduct and the law of partnership. The vicarious liability imposed by the law of partnership requires no knowledge of wrongdoing, implied or actual.¹⁰⁷ In the ethical context, however, the general rule is that an attorney will not incur imputed liability for the misconduct of his partner.¹⁰⁸ The opening comments to the A.B.A. Model Rules caution against the uncritical incorporation of the ethical rules into areas of the law that determine civil liability.¹⁰⁹ The *Jackson* case is perhaps one example of the use of these rules to cloud, rather than clarify, the law of civil liability.

C. Damages and Insurance

Under section 15 of the Uniform Partnership Act, partners are liable "jointly and severally" for everything chargeable to the partnership under sections 13 and 14.¹¹⁰ For all other obligations they incur joint liability.¹¹¹ The Indiana Appellate Court recently considered the question whether the law partnership is liable "jointly and severally," under U.P.A. Sections 13 and 14, for punitive damages.¹¹² The court's

the Association liable. The *Zimmerman* case did not discuss *Jackson*, nor did it cite ethical considerations in its determination).

106. See U.P.A. §§ 13-14 (1914), *supra* n. 68.

107. *E.g.*, *Priddy v. Mackenzie*, 205 Mo. 181, 194, 103 S.W. 968, 972 (1907); *Husted v. McCloud*, 436 N.E.2d 341 (Ind. App. 1982).

108. *E.g.*, *In re Luce*, 83 Cal. 303, 23 P. 350 (1890); *Yale v. State Bar*, 16 Cal.2d 175, 105 P.2d 112 (1940); *In re Brown*, 59 N.E.2d 855 (Ill. 1945); *In re Corace*, 213 N.W.2d 124 (Mich. 1973); see A.B.A. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 (Proposed Final Draft 1981).

Note, though, that there are areas of vicarious responsibility in the ethical context, *e.g.*, the area dealing with disqualification for conflicts of interest. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101 (1981); *cf.* *S.C.A. Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977) (principles of agency law used to determine whether judge would be disqualified, under federal statute, for conflict of interest).

Also, ethical rules may be relevant to the apparent partnership concept of agency law. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102 (1981).

109. MODEL RULES OF PROFESSIONAL CONDUCT Scope (Proposed Final Draft 1981).

110. U.P.A. § 15 (1914).

111. *Id.*

112. *Husted v. McCloud*, 436 N.E.2d 341 (Ind. App. 1982).

affirmative answer to this question turned on a construction of the language of U.P.A. Section 13, which states that the partner is liable for any "penalty."¹¹³

Another "blow" to the law partner came when the Maryland Court of Appeals did not permit a lawyer, whose partner had misappropriated a client's funds, to recover from his malpractice insurance carrier because of an exclusionary provision in his insurance policy.¹¹⁴ The pertinent portion of the policy stated the following:

This Policy Does Not Apply:

(a) to any malicious act or omission of the insured, any partner or employee.¹¹⁵

The court denied recovery despite the lower court's finding that the attorney's liability was alternatively based on vicarious responsibility for the wrongful act of his partner *and negligence* in failing to discover his partner's perfidy.¹¹⁶

Conclusion

The analysis of vicarious liability of the law partnership is essentially made in two steps: First, is there a partnership, apparent or real; and secondly, were the acts of the wrongdoer/partner committed within the ordinary course of business, apparent or real, of the law partnership.

Probably the most useful tool in this analysis is also the most obvious: the Uniform Partnership Act. For example, U.P.A. sections 16, 30, and 36 normally relate to the first step of the analysis, while U.P.A. sections 9, 13 and 14 related to the second step. Once the determination of liability has been made, U.P.A. sections 13 and 15 have also been important in determining damages.

Particular confusion has resulted from the Court's consideration of the second step of the analysis, concerning the ordinary course of business of the law partnership. The liability of the law partnership is not determined by considering whether the wrongful act, defined

113. *Id.* at 347.

114. *Aragona v. St. Paul Fire & Marine Ins. Co.*, 378 A.2d 1346 (Md. 1977).

115. *St. Paul Fire & Marine Ins. Co. v. Aragona*, 33 Md. App. 499, _____, 365 A.2d 309, 310 (1976), *aff'd*, 378 A.2d 1346 (Md. 1977).

116. *Id.* at _____, 365 A.2d at 313.

Note that negligence in supervision is a cause of action based on a primary obligation of the partner and is outside the scope of this article. For such a case, see *Camp v. Reeves*, 209 A.D. 488, 205 N.Y.S. 259 (1928) (partners held to have duty to disclose misappropriations of fellow partner).

by its after-the-fact legal label, is within the law partnership's ordinary course of business. Nor do aspirational ethical precepts define the attorney's regular business. Rather, the standard to be used is whether the wrongful act, designated by what it purported to be, was committed in connection with the attorney's ordinary course of business, determined by the business of law firms generally and the business of the particular law firm. In recalling this definition perhaps some future murkiness in the law of vicarious liability of the law partnership can be avoided.

Knight Webb