The Inherent Powers Doctrine and Regulation of the Practice of Law: Will Minnesota Attorneys Practicing in Professional Corporations or Limited Liability Companies be Denied the Benefit of Statutory Liability Shields?

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THE INHERENT POWERS DOCTRINE AND REGULATION OF THE PRACTICE OF LAW: WILL MINNESOTA ATTORNEYS PRACTICING IN PROFESSIONAL CORPORATIONS OR LIMITED LIABILITY COMPANIES BE DENIED THE BENEFIT OF STATUTORY LIABILITY SHIELDS?

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I. Introduction

Recent trends in attorney malpractice insurance coverage have increased the significance of deciding between limited and unlimited liability when selecting a business entity form. Unlike partnerships,

1. Statistics from Attorneys Liability Assurance Society (ALAS), a mutual professional liability insurance company, show that despite a decrease in the frequency of legal malpractice claims, there has been an increase in the size of malpractice awards. In 1987, ALAS reported that there were no malpractice claims valued over $10 million and that 90% of the claims were valued under $2 million. However, by 1992, “48% of its claims were valued in excess of $2 million and 12% were greater than $10 million.” Rita H. Jensen, Malpractice Rates May Level Off, NAT'L L.J., July 19, 1993, at 1, 28. The increase in malpractice awards has been attributed, in part, to the collapse of the savings and loan industry. See generally Emily Couric, Malpractice: The Tangled Web, A.B.A. J., April 1993, at 65 (describing the legal malpractice field as having “gone from a cottage industry to a full-blown revolution”).

Malpractice insurance rates have also been rising. ALAS raised rates by 20% beginning Apr. 1, 1993, for a total increase of 72% since 1991. Minet, Inc., another malpractice insurer, raised professional liability insurance rates by 10% to 20% on October 1, 1993, while St. Paul Fire and Marine Insurance Company raised malpractice insurance rates by 7% on January 1, 1993. Rita H. Jensen, Malpractice Rates Rise Again, NAT'L L.J., Apr. 12, 1993, at 3, 24.

Another trend is for attorneys to go “bare,” that is, without malpractice insurance. Barbara Mahan, Uninsured and Insecure, CAL. L.Aw., June 1987, at 58, 60. Law firms are finding that the cost to insure against legal malpractice is not justified by the degree of exposure. One law firm’s premium per attorney jumped $4,300 in one year; consequently, that firm did not renew its malpractice insurance. Id.

2. Limited liability refers to an individual being held jointly and severally liable for the tortious and contractual misconduct of the entity’s other members, but only up to a predetermined sum, usually the individual’s investment in the business. Larry E. Ribstein, Limited Liability and Theories of the Corporation, 50 Mo. L. Rev. 80, 81 n.1 (1991). This limited liability is typically found in corporate entities. See infra notes 62-78 and accompanying text.

3. Unlimited liability refers to an individual being held jointly and severally liable for the full extent of tortious and contractual misconduct of the entity’s other members. This unlimited liability is typically found in partnership entities. See, e.g., UNIF. PARTNERSHIP ACT §§ 12-15 (1914); See also infra notes 26-29 and accompanying text.


5. Most professionals practice as general partnerships. In 1990 there were 22,386 legal partnerships with 129,996 partners; 7,754 architectural and engineering partnerships with 22,726 partners; and 6,891 certified public accountant partnerships with 36,973 partners. 12 STAT. INCOME BULL. 8, 57 (1992). In a general partnership, members receive partnership tax benefits. Id. at 8. In addition, members are liable for their own tortious and contractual misconduct. HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 194 (1979). Each partner also is jointly and severally liable for the tortious and contractual misconduct of the other partners, provided the partner’s misconduct carries on “in the usual way the business of the partnership of which he is a member . . . .” UNIF. PARTNERSHIP ACT § 9 (1914). Certain state partnership provisions do not distinguish between joint and several liability for tortious misconduct and joint liability for contractual causes of action. See, e.g., S.D. CODIFIED LAWS ANN. § 48-2-11 (1991) (stating rule to be that all partners
professional corporations (PC),\(^6\) limited liability companies (LLC),\(^7\) and, in a number of states, registered limited liability partnerships\(^8\) have statutory provisions purporting to limit a professional’s vicarious liability for the contractual and tortious misconduct of the entity’s other members.\(^9\) However, some state supreme courts have denied limited liability to attorneys practicing within PCs, thus bringing into question the viability of legislatively-created liability shields.\(^10\)

The denial of PC limited liability raises the question of whether similar LLC liability shield provisions will effectively protect an attorney-member or an attorney-manager\(^11\) from vicarious liability for the misconduct of the firm’s other attorney-members or attorney-managers.

The PC and the LLC are business entity forms available to attorneys in Minnesota\(^12\) and the enabling statutes for both entities contain legis-

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\(^6\) See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 46, at 322 (5th ed. 1984) (discussing the distinction between joint and several liability and joint liability) [hereinafter KEETON ET AL.].

\(^7\) See infra part III. B.

\(^8\) See infra part III. B.

\(^9\) An individual may generally be held liable for another’s tortious or contractual misconduct under the theory of vicarious liability. The theory states that:

[B]y reason of some relation existing between A and B, the negligence of A [towards C] is to be charged against B, although B has played no part in it, has done nothing whatever to aid or encourage it, or indeed has done all that he possibly can to prevent it.

KEETON ET AL., supra note 5, § 69, at 499. Thus, B may be held vicariously liable to C because of A’s negligence. Id.

\(^10\) See infra note 71.

\(^11\) A limited liability company member is “a person... [who is] the owner of some governance rights of a membership interest of the limited liability company.” MINN. STAT. § 322B.03, subd. 30 (1992). A limited liability company manager is “a person elected, appointed, or otherwise designated as a manager by the board of governors, and any other person considered elected as a manager pursuant to section 322B.68.” MINN. STAT. § 322B.03, subd. 29 (1992). Consequently, an LLC manager may also be a member. In a Minnesota attorney professional LLC (PLC), only those members and managers who are licensed Minnesota attorneys may render legal services on behalf of the PLC. MINN. STAT. § 319A.09 (1992).

This Comment only addresses issues concerning vicarious liability arising as a result of the misconduct of other attorneys within the entity of choice. However, the author recognizes that vicarious liability, if allowed by the Minnesota Supreme Court, may arise out of acts committed by nonattorney employees of the entity. See, e.g., MINN. STAT. § 319A.10 (1992) (allowing liability shield against contractual liability for any contract executed on behalf of the corporation and within the limits of the executor’s actual authority).

\(^12\) See MINN. STAT. §§ 319A.01-.22 (1992) (enabling legislation for professional corporation); MINN. STAT. §§ 322B.01-.955 (1992) (enabling legislation for limited lia-
latively created vicarious liability shields. However, the Minnesota Supreme Court has held the regulation of the practice of law to be the province of the judicial branch. The court has been willing to invoke the inherent powers doctrine to invalidate legislative efforts to regulate the legal profession.

The extent of a Minnesota attorney’s liability under either a PC or LLC has yet to be tested. Thus, one must hypothesize as to whether the Minnesota Supreme Court will challenge these entities’ respective liability shields. Because the supreme court has shown a willingness to apply the inherent powers doctrine to limit the legislature’s power over the legal profession, the viability of statutory provisions that potentially limit the remedies available to a client harmed by an attorney’s misconduct merits serious consideration.

This Comment first explores the history of limited liability as it pertains to law firms, and then describes the liability shields of PC and LLC entities in other states as well as in Minnesota. Next, this Comment discusses the inherent powers doctrine and various judicial applications of the doctrine to legislative efforts to regulate the legal profession. Finally, this Comment analyzes whether the Minnesota Supreme Court is likely to invoke the inherent powers doctrine to invalidate the Minnesota PC and LLC liability shields available to attorneys.

II. History

A. The Development of Limited Liability and the Law Firm Before 1960

Prior to the early 1960s, professionals, including attorneys, were not permitted to form business entities that offered limited liability prote-


14. See, e.g., In re Integration of Bar of Minnesota, 216 Minn. 195, 199-200, 12 N.W.2d 515, 518 (1943); In re Tracy, 197 Minn. 35, 46, 265 N.W. 88, 93, modified by 197 Minn. 35, 267 N.W. 42 (1936).

15. See, e.g., Cowern v. Nelson, 207 Minn. 642, 647, 290 N.W. 795, 797 (1940) (disallowing a statutory exemption allowing brokers to charge fees for drafting legal documents); In re Tracy, 197 Minn. 35, 44-46, 266 N.W. 88, 92-93 (1936) (invalidating a legislative disbarment proceeding), modified by 197 Minn. 35, 267 N.W. 142 (1936).

16. See infra Part II.

17. See infra Part III.

18. See infra Part IV.

19. See infra Part V.

20. See infra Part VI.
LIABILITY SHIELDS FOR MINNESOTA LAWYERS

Single attorney law firms were limited to the formation of sole proprietorships. Although sole proprietorships were easy to form, they posed a significant disadvantage in that the entity and the proprietor shared a single legal identity. This subjected the proprietor to unlimited personal liability for the ordinary debts and obligations of the proprietor.

Two or more attorneys wishing to form a business entity were confined to choosing between general or limited partnerships. Partnerships, like sole proprietorships, subjected at least one member to unlimited liability. In a general partnership, all partners were held personally liable for business debts and obligations unless the partners contractually limited their liability. If the business assets were inadequate to compensate the firm’s creditors or dissatisfied clients, the personal assets of each partner could be used to satisfy the partnership’s obligations. A limited partnership provided a greater liability shield for limited partners by limiting personal liability to the extent of their contribution to the partnership.

Unfavorable liability treatment was not the only disadvantage of forming sole proprietorships and partnerships. Another significant disadvantage was that these entities did not provide for the favorable tax treatment of pension and profit-sharing plans that was provided to

22. Id.
24. Id.
25. However, an American Bar Association informal ethics opinion determined that a lawyer may not ethically practice in a law firm as a limited partner under the Uniform Limited Partnership Act. ABA Comm. on Ethics and Professional Responsibility Informal Op. 865 (1965).
26. CALLISON, supra note 23, at §§ 2.02-2.04. A general partnership subjects all partners to joint and several liability. UNIF. PARTNERSHIP ACT § 15 (1914). A limited partner generally has no liability for partnership obligations so long as the limited partner does not become a general partner or does not take part in controlling the limited partnership business beyond exercising a limited partner’s rights and powers. UNIF. LIMITED PARTNERSHIP ACT § 303 (1976).
27. CALLISON, supra note 23, § 2.03, at 2-5.
28. Id.
29. A limited partnership is composed of one or more general partners and one or more limited partners. UNIF. LIMITED PARTNERSHIP ACT § 101(7) (1976).
30. CALLISON, supra note 23, § 2.04, at 2-8. However, general partners in a limited partnership are liable for all partnership obligations as if the partnership were a general partnership. UNIF. LIMITED PARTNERSHIP ACT § 403(b) (1976). Thus, general partners have joint and several liability for partnership obligations. See UNIF. PARTNERSHIP ACT § 15 (1914).
corporated businesses. This unequal tax treatment became a motivating factor for the creation of the professional corporation.

B. The Development of Limited Liability and the Law Firm After 1960

The professional community's insistence on the development of a business entity that would provide favorable corporate tax treatment met resistance because of public policy concerns regarding limited liability provisions in the proposed statutes. Courts and legislatures sought to prohibit the formation of professional corporation law firms arguing that: (1) the lawyer-client relationship is a personal one, and a corporation cannot have personal attributes; (2) in a corporate structure, the lawyer's first duty is to the employer, not the client; (3) an intermediary should not be permitted to intervene between lawyers and their clients; and (4) lawyers may improperly insulate themselves from liability in malpractice claims.

Advocates of limited liability responded with valid reasons for allowing attorneys to benefit from a liability shield. These advocates argued that denying access to limited liability created disincentives for experimentation with new entity forms, created the potential for a competitive disadvantage for attorneys, and created potential obstacles to raising necessary capital. Limited liability advocates also contended that attorney-owners may unnecessarily interfere with the work of attorney-employees to the same extent corporate employers would. The desire for favorable corporate tax treatment overcame the controversy and law firms were permitted to form professional corporations beginning in the early 1960s.

31. Paas, supra note 4, at 372. See infra notes 38, 40 (discussing the tax treatment of a PC).
32. See, e.g., Kalish, supra note 21, at 564.
35. Kalish, supra note 21, at 572.
36. Id.
37. See Kalish, supra note 21, at 563-64; In re Bar Ass'n of Hawaii, 516 P.2d 1267, 1268 (Haw. 1973). Note, however, that courts understood that the professional's primary motivation in forming a PC was to obtain tax benefits. At least one court used that understanding as a factor in denying limited liability protection to shareholders in a dentists' professional corporation. See Vinall v. Hoffman, 651 P.2d 850, 851-52 (Ariz. 1982).
38. R. Craig Hannah, Legislative Note, Professional Corporations: Shareholder Liability and the Saving Clause, 42 Ark. L. Rev. 777, 777 (1989); Kalish, supra note 21, at 563; Paas, supra note 4, at 372-73.
The tax motivations were undermined by tax legislation in the early 1980s. This legislation essentially negated the tax advantages of the professional corporation. Consequently, commentators argue that PCs are now formed not for tax reasons, but because of other corporate nontax factors, such as limited liability. This possible shift in motivation raises the issue of whether attorneys should continue to benefit from the PC's liability shield.

C. Limits on Limiting Liability

Regardless of the entity's liability shield, traditional tort rules do not permit an attorney (or any other individual) to escape personal liability for personal misconduct. However, an attorney can limit personal liability arising from a fellow practitioner's tortious and contractual misconduct by selecting an entity with a liability shield. Therefore, when forming a law firm, an attorney's entity selection may be largely influenced by that entity's ability to limit the vicarious liability of the firm's individual members.

Irrespective of state statutory provisions, the extent to which the personal liability of an attorney can be limited is influenced by the ABA Model Rules of Professional Conduct, the ABA Model Code of Professional Responsibility, and the appropriate state rules of professional conduct. These rules recognize that the "ultimate" power for

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40. Corporate business entities are characterized by continuity of life, limited liability, free transferability of ownership interests, and centralized management. Such attributes arise because the corporation is a separate legal entity. Callison, supra note 23, § 2.05, at 2-9.


42. Reuschlein & Gregory, supra note 5, § 143.

43. See infra parts III. A, B. (discussing the liability shields of PC and LLC business entities).

44. See Model Rules of Professional Conduct Rule 1.8(h) (1983).

45. See Model Code of Professional Responsibility EC 6-6 (1980).

46. See, e.g., Minnesota Rules of Professional Conduct Rule 1.8(h) (1992). States may also have rules concerning the admission and discipline of attorneys that expressly prohibit the limitation of liability. See Ind. St. Admis. and Disc. Rule 27(c) (1993) which states:

Incorporation by two (2) or more lawyers associated in the practice shall not modify any law applicable to the relationship between the person or persons furnishing professional services and the person receiving such service, including, but not limited to, privileged communications which bind all associated,
deciding attorney liability issues lies with the state supreme courts.\textsuperscript{47} Although the PC and LLC statutes provide a liability shield, the legal profession's ethical requirements may mandate a higher standard of responsibility.

Attorneys are permitted to engage in the practice of law within a business entity offering limited liability\textsuperscript{48} provided that two ethical safeguards are followed: "1) the lawyer rendering the legal services to the client must be personally responsible to the client; [and] 2) restrictions on liability as to other lawyers in the organization must be made apparent to the client . . . ."\textsuperscript{49}

Additional ethical criteria concerning the limitation of attorneys' liability are articulated in the Model Code of Professional Responsibility and the Model Rules of Professional Conduct. The Model Code of Professional Responsibility, Ethical Canon 6-6, states that:

A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so. A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his liability for malpractice of his associates in the corporation, but \textit{only to the extent permitted by law}.\textsuperscript{50}

Rule 5.1 of the Model Rules of Professional Conduct suggests further limits on the extent to which attorney liability can be reduced by delineating the circumstances under which a partner or supervising lawyer may be held liable for a fellow member's misconduct.\textsuperscript{51} While the language of the Rule delineates specific instances in which an att-

\textsuperscript{47} See, e.g., \textit{In re Daly}, 284 Minn. 567, 571, 189 N.W.2d 176, 178-79 (1971) (stating that the state supreme court has the ultimate authority over the regulation of the practice of law as well as the authority to formulate those rules and regulations under which attorneys must practice).

\textsuperscript{48} ABA Comm. on Ethics and Professional Responsibilities, Formal Op. 303 (1961) (ability of lawyers to practice professional services as a PC).

\textsuperscript{49} \textit{Id.}

\textsuperscript{50} \textit{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} EC 6-6 (1980) (emphasis added). An earlier draft of the Code of Professional Responsibility read as follows: A lawyer should not seek to limit his liability to his client for malpractice, whether by contract, limitation of corporate liability, or otherwise. Thus the liability of lawyers who are stockholders in a professional legal corporation should be the same as it would be if they were practicing as partners. \textit{See} \textit{AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY} 273 textual and historical notes (1979). This legislative history indicates the ABA's resistance to permitting attorneys to benefit from the corporate limited liability shield.

\textsuperscript{51} \textit{MODEL RULES OF PROFESSIONAL CONDUCT} 5.1 (b)-(c) (1983) which provides:
torney may be held vicariously liable as a disciplinary measure, the
Comment expands those instances within a criminal or civil setting by
stating that "[w]hether a lawyer may be liable civilly or criminally liable
for another lawyer’s conduct is a question of law beyond the scope of
these Rules." 52

Notwithstanding ABA ethical standards and statutory attempts to
limit attorney liability, the ultimate power to determine the scope of an
attorney’s personal liability lies with the courts. 53 The court’s general
decisionmaking power is supported by the decision in First Bank &
Trust Co. v. Zagoria. 54 In that case, the Georgia Supreme Court stated
that:

[Ethical Consideration 6-6] authorizes a limitation of liability for the
malpractice of associates by contract or arrangement with the clients
of the professional corporation. However, it cannot successfully be
argued that Ethical Consideration 6-6 is a self-executing rule which
automatically insulates each shareholder of a professional corpo-
ration from liability for the malpractice of the other. 55

The Georgia Supreme Court then proceeded to prohibit attorneys
from limiting their personal liability for another firm member’s
misconduct. 56

However, other state supreme courts have used this same power to
determine that a liability shield may be used by attorneys. 57 In Rhode
Island Bar Ass’n, 58 the Rhode Island Supreme Court granted limited
liability to attorney shareholders on the basis that the public interest
was not adversely affected by the decision. 59 The court reasoned that
requiring the corporation to maintain mandatory liability insurance

(b) A lawyer having direct supervising authority over another lawyer shall
make reasonable efforts to ensure that the other lawyer conforms to the rules
of professional conduct.
(c) A lawyer shall be responsible for another lawyer’s violation of the rules of
professional conduct if:
(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the
conduct involved; or
(2) the lawyer is a partner in the law firm in which the other lawyer prac-
tices, or has direct supervisory authority over the other lawyer, and knows of
the conduct at a time when its consequences can be avoided or mitigated
but fails to take reasonable remedial action.

Id. This provision essentially qualifies each state’s statutory limited liability shield lan-
guage in both the professional corporation and limited liability company statutes as
type III. See infra notes 69 and 87 and accompanying text.

53. Id.
55. Id. at 676.
56. See infra part V. C. for analysis of the Zagoria decision.
57. See, e.g., In re Rhode Island Bar Ass’n, 263 A.2d 692 (R.I. 1970).
59. Id. at 697.
would guarantee that the corporation's clients would not suffer as a result of the limited liability.\textsuperscript{60}

III. A Comparative Analysis of the Limited Liability Shields of State Professional Corporations and Professional Limited Liability Companies\textsuperscript{61}

A. The Liability Shield of the Professional Corporation

All fifty states and the District of Columbia have enacted PC

\textsuperscript{60} Id. In effect, it can be argued that mandatory liability insurance provides a source of recovery which substitutes for the assets of partners or shareholders who are shielded from liability by the limited liability shield. See, e.g., Kalish, supra note 21, at 581.


Unlike the liability shields of the PC and LLC, the RLLP shield only attempts to limit a partner's vicarious liability for the tortious misconduct of other members of the partnership. For example, the Texas RLLP statute states: "Except [for debts and obligations of the partnership arising from errors, omissions, negligence, incompetence, or malfeasance], all partners are liable jointly and severally for all debts and obligations of the partnership . . . ." Tex. Rev. Civ. Stat. Ann. art. 6132b § 15(1) (West Supp. 1994). The Texas RLLP liability shield does not limit a business owner's vicarious liability for anything other than tortious acts committed by other business members. The Louisiana, Delaware, and North Carolina RLLP statutes contain similar liability shield language. See also Del. Code Ann. tit. 6, § 1515(3) (1993); La. Rev. Stat. Ann. § 9:3431(C) (West Supp. 1994); N.C. Gen. Stat. § 59-45 (1993).

As additional RLLP statutes are proposed and enacted, the possibility exists that future RLLP statutes will provide a contractual liability shield similar to the PC and LLC shields. For an example of a proposed statute that appears to provide a contractual, as well as tortious, liability shield, see 1993 MA H.B. 3503 § 3(2) (SN) which states "[a] partner in a registered limited liability partnership shall not be personally liable (including, without limitation, liability for contribution) for debts and obligations of such partnership which arise out of its performance of or failure to perform any services while a registered limited liability partnership . . . ." However, based upon the interpretations of the PC statutes, the extent to which the liability shield will be able to limit vicarious liability of professional-shareholders for corporate debts is questionable.

RLLPs provide additional benefits to professionals who utilize this new entity. In addition to limited liability, RLLPs are much easier to form because any business or professional group operating as a general partnership can register as an RLLP simply by filling out a form and paying a nominal per partner fee. Lisa Isom-Rodriguez, Limiting the Perils of Partnership, Am. Law., July-Aug. 1993, at 80.

Moreover, RLLPs also receive pass-through tax treatment similar to partnerships and, therefore, do not impose the double tax penalty suffered by corporate business entities. Id.
statutes\textsuperscript{62} that contain limited liability shield provisions.\textsuperscript{63} The liability shield protects all professions included in the statute from vicarious liability for the tortious and contractual misconduct of the corporation’s other members.\textsuperscript{64} The scope of these liability shields can be classified into four categories according to the statute’s treatment of shareholder liability:

- Type I) the extreme approach: completely limited liability\textsuperscript{65} or completely unlimited liability;\textsuperscript{66}
- Type II) professional corporation shareholder personal liability limited to personal acts and omissions;\textsuperscript{67}

\begin{itemize}
  \item \textsuperscript{62} See Prof. Corp. Handbook (CCH) 1\textsuperscript{1} 5001-111 (1974) (providing full text of state laws).
  \item \textsuperscript{63} See infra notes 65-69 listing each state’s PC statute according to its limited liability shield language.
  \item \textsuperscript{64} In contrast, compare the intended scope of the language of the registered limited liability partnership statutes that generally only attempt to limit a partner’s vicarious liability for the tortious misconduct of another partner. See supra note 61.
  \item \textsuperscript{65} Maycheck, supra note 41, at 819-20. IOWA CODE § 496C.9 (1993), N.M. STAT. ANN. § 53-6-8 (Michie 1983) and R.I. GEN. LAWS § 7-5.1-1 (1992) fit this category. These three statutes contain a limited liability shield provision similar to Rhode Island’s, which reads as follows: “Except as in this chapter otherwise provided, all provisions of the general corporation law, including the Rhode Island Business Corporation Act, applicable to domestic business corporations shall be applicable to corporations organized under this chapter.” R.I. GEN. LAWS § 7-5.1-1 (1992). The language of this provision indicates that the liability protection afforded to professional corporation members is the same as that provided under general business corporation law—limited liability for both the tortious and contractual misconduct of other members. Maycheck, supra note 41, at 819.
  \item \textsuperscript{66} Maycheck, supra note 41, at 820-22. Currently, four states—Colorado, Oregon, Wisconsin, and Wyoming—have a limited liability provision that provides for unlimited liability. COLO. R. CIV. P. 265(A)(4) (1993); OR. REV. STAT. ANN. § 58.185 (1987); WIS. STAT. § 180.1915 (1993); WYO. STAT. ANN. § 17-3-102 (1989). For example, Oregon’s statute provides:
    (2) A shareholder of a professional corporation may be held: . . . (c) Jointly and severally liable with all of the other shareholders of the corporation for the negligent or wrongful acts or misconduct committed by any shareholder, or by a person under the direct supervision and control of any shareholder in the rendering of professional services on behalf of the corporation to a person receiving the service.
    OR. REV. STAT. ANN. § 58.185 (1987). These four states’ statutory provisions are substantially similar. However, Colorado has an exception for PC’s with adequate insurance coverage (COLO. R. CIV. P. 265(A)(4) (1993)) and Wisconsin has an exception for debts and contractual obligations of the PC (WIS. STAT. § 180.1915 (1993)).
  \item \textsuperscript{67} Maycheck, supra note 41, at 822. The states with this category of statutory provision include the following: Alabama, ALA. CODE § 10-4-390 (1987); Alaska, ALASKA STAT. § 10.45.140 (1989); Hawaii, HAWAII REV. STAT. § 416-153 (repealed, effective July 1, 1987); Kentucky, KY. REV. STAT. ANN. § 274.055 (Michie 1989); Louisiana, LA. REV. STAT. ANN. § 12:807 (West 1969); Maine, ME. REV. STAT. ANN. tit. 13, § 708 (West 1981); Minnesota, MINN. STAT. ANN. § 319A.10 (1992); Nevada, NEV. REV. STAT. § 89.060 (1991); North Dakota, N.D. CENT. CODE § 10-31-09 (Supp. 1993); South Carolina, S.C. CODE ANN. § 33-51-70 (Law Co-op 1989); South Dakota, S.D. CODIFIED LAWS ANN. § 47-
Type III) professional corporation shareholder liability limited to personal misconduct or misconduct of any person under the shareholder’s direct supervision; and,

Type IV) the savings clause: professional corporation shareholder’s professional relationship retained between the person rendering the service and the person receiving the service.


Alabama’s statute, for example provides:

(a) Every individual who renders professional services as an employee of a domestic or professional corporation shall be liable for any negligent or wrongful act or omission in which he personally participates to the same extent as if he rendered such services as a sole practitioner.

(b) The personal liability of a shareholder, employee, director or officer of a domestic professional corporation shall be no greater in any respect than that of a shareholder, employee, director or officer of a corporation organized under the Alabama Business Corporation Act.


For example, New York’s statute provides:

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

N.Y. Bus. Corp. Law § 1505(a) (McKinney 1986).


An example of a savings clause is Ga. Code Ann. § 14-7-7 (1989), which provides:

Nothing contained in this chapter shall limit the authority and duty of any regulating board to regulate the several professions including the right to ex-
Case law involving the scope of protection provided by these liability shields with regard to the legal profession may be classified into two categories: (1) those where the court does not interpret the statutory language of the liability shields, and (2) those cases in which the court does interpret the statutory language of the limited liability shield.

A review of these cases suggests that in order to benefit from the liability shield for the tortious misconduct of a fellow attorney-shareholder or employee of the PC, an attorney must not have personally

establish and enforce standards of practice, and nothing contained in this chapter shall change the law or existing standards applicable to the relationship between the person furnishing a professional service and the person receiving such service, including, but not by way of limitation, the rules of privileged communication and the contract, tort, and other legal liabilities and professional relationships between such persons.

Id. at 490 (quoting State Bar Law Corp. Rules, rule IV B(3)).

State courts have also denied other professionals the ability to benefit from the professional corporation limited liability shields. See, e.g., Boyd v. Badenhausen, 556 S.W.2d 896, 898 (Ky. 1977) (finding a physician personally liable for the negligence of the PC’s clerical staff); Nelson v. Patrick, 326 S.E.2d 45 (N.C. Ct. App. 1985) (holding radiologist-shareholder personally liable for negligence of fellow shareholder which occurred during course of professional corporation’s business).

71. See, e.g., We’re Assoc. Co. v. Cohen, Stracher & Bloom, 480 N.E.2d 357 (N.Y. Ct. App. 1985) (refusing to hold a professional corporation’s shareholder personally liable for ordinary business debts of the corporation because the professional corporation statute required the rendition of professional services). See generally Grayson v. Jones, 710 P.2d 76, 77 (Nev. 1986) (finding that a shareholder of a professional corporation was not personally liable for the tortious acts of another member because the shareholder did not personally participate in the misconduct).
participated in the acts or, more expansively, not have directly supervised and controlled the individual responsible for the misconduct.

On the face of the statutes, the “direct supervision and control” language, compared with the “personally participated” language, broadens the liability exposure of the PC attorney. However, even when the “direct supervision and control” language is included with the “personal misconduct” language, an attorney-shareholder is unlikely to be held vicariously liable for the tortious acts of a fellow member without some personal fault on the part of the shareholder.

72. For example, in Stewart v. Coffman, 748 P.2d 579, 581, cert. granted, 765 P.2d 1277 (Utah 1988), the court would not hold an attorney-shareholder vicariously liable for the malpractice of the PC's other members unless the attorney-shareholder had personally participated in the act or omission during the performance of the professional service. The factors the court used to determine that there was no personal involvement in the misconduct included: 1) the shareholder never represented the clients in any matter; 2) the shareholder never corresponded with either client regarding a legal matter; 3) the shareholder never saw the clients' files and never discussed the contents of the files with any other firm member; and 4) the shareholder was a member of a PC. Id. at 580.

Examples of PC statutes using the “personal participation” language include both types I and II. See supra notes 65-67 and accompanying text.

73. For example, the New York PC statute maintains personal liability for the person who renders the professional services and also specifically provides that a shareholder is liable for the misconduct of another individual under the shareholder's direct supervision and control. N.Y. Bus. Corp. Law § 1505(a) (McKinney 1986).

In Connell v. Hayden, 443 N.Y.S.2d 383, 402 (App. Div. 1981), involving a physicians' professional service corporation, the court reversed a lower court's denial of summary judgment by reasoning that even though the physicians were shareholder-employees, the plaintiff had to prove that each physician was at fault in order to hold each one liable.

PC statutes using the “direct supervision and control” language are type III statutes. See supra note 68 and accompanying text.

74. See, e.g., Gershuny v. Martin McFall Messenger Anesthesiologists P.A., 539 So. 2d 1131, 1132 (Fla. 1989) (holding that physician shareholders were not liable for a nurse's negligence because the nurse acted "independently and not under the direct supervision of a physician within the meaning of the statute"). In Connell, 443 N.Y.S.2d at 397, the court held that while a professional corporation itself is vicariously liable, as is any corporation, for the acts of the corporation's employees, a supervisor is not liable because he lacks the right to select, control, and discharge the employee which is essential to the imposition of vicarious liability under [respondeat superior]. This does not mean that a supervisor may not be liable for the injuries caused by the conduct of one of his subordinates. It does mean that his liability is not vicarious, that is, without fault on his part. Id. at 397.

The Connell court further stated that fault includes intentionally directing an act, directing or permitting conduct that the supervisor should realize creates an unreasonable risk of harm, and failing to use reasonable care in taking control over the conduct of another who the supervisor should realize is likely to cause injury. Id. at 398. See also Stewart v. Coffman, 748 P.2d 579 (Utah 1988) (holding that a plaintiff must show that the shareholder actually participated in the misconduct or omission to be held liable), cert. granted, 765 P.2d 1277 (Utah 1988).
Courts have also focused on interpreting the "professional services" language of the liability shield to determine whether attorneys may use the shield. Depending on a court's interpretation of this phrase, vicarious liability may be extended to ordinary business debts and obligations of the professional corporation.75

The Wisconsin Supreme Court held in Herkert v. Stauber76 that "[i]n order for the breach of contract entered into with a professional service corporation to result in personal liability, it must be proved both that the breach relates to 'professional services' and that the breach was a negligent or wrongful act committed in the rendition of those professional services."77 Other courts interpreting "professional services" have reasoned that if business debts of the corporation are defined as ancillary to the rendition of professional services, shareholders of the professional corporation will be held vicariously liable for such debts.78

75. See Zimmerman v. Hogg & Allen, P.A., 207 S.E.2d 267 (N.C. Ct. App. 1974) (suggesting that if the misconduct was part of the law firm's professional services, all other shareholders of the firm could be held liable for one shareholder's misconduct), rev'd on other grounds, 209 S.E.2d 795 (N.C. 1974). See also Nelson v. Patrick, 326 S.E.2d 45, 50 (N.C. Ct. App. 1985) (following Zimmerman, the court held an "innocent" shareholder of a PC jointly and severally liable for another shareholder's medical malpractice because the misconduct occurred during the course of ordinary business); Reiner v. Kelley, 457 N.E.2d 946, 951 (Ohio Ct. App. 1983) (finding that attorney-shareholders had a personal duty to guarantee the financial responsibility of the PC for breach of duty). See generally Annotation, What Constitutes Professional Services Within Meaning of Statute Preserving Individual Liability of Professional Employees of Professional Corporation, Association, or Partnership, 31 A.L.R.4th 898 (1984 & Supp. 1993) (analyzing both state and federal decisions that have expressly considered the question).

76. 317 N.W.2d 834 (Wis. 1982).

77. Id. at 836. See also Zagoria, 302 S.E.2d at 675 (stating in dicta that a PC liability shield may limit an attorney-shareholder's liability for "obligations which do not arise as a result of a breach of a lawyer's obligation to his client or an act of professional malpractice").

78. See, e.g., Infosearch, Inc. v. Horowitz, 459 N.Y.S.2d 348 (Civ. Ct. 1982) (holding that the shareholders were individually liable for business debts of the PC). In a subsequent decision, the New York Court of Appeals rejected the Infosearch decision and found that a PC shareholder could not be held personally liable for ordinary business debts because the PC statute required the rendition of professional services. We're Assoc. Co. v. Cohen, Stracher & Bloom, 480 N.E.2d 357, 359 (N.Y. 1985).
B. The Limited Liability Shield of the Limited Liability Company

The enactment of the first LLC statute by Wyoming in 1977 and the 1988 IRS revenue ruling qualifying Wyoming's LLC as a partnership for tax purposes established the LLC as a viable business entity alternative. Currently, forty-six states have enacted an LLC statute and five other states have pending legislation.

Like the PC liability shield, the LLC liability shield attempts to limit a professional's vicarious liability for the contractual and tortious misconduct of the company's members. LLC statutory shield provisions can be classified into four categories according to their treatment of member/manager liability:


The limited liability company business structure closely resembles that of a professional corporation. Similar to a PC, the LLC can be structured as a member-managed LLC with the members possessing the authority to act on behalf of the company or a manager-managed LLC with an elected or appointed official acting on behalf of the company. Keatinge et al., supra note 79, at 390. In contrast to the professional corporation, the limited liability company allows partnership "flow-through" federal income tax treatment while also affording members the protection of a "corporate-like" limited liability shield without the forfeiture of control and management of the company. Geu, supra note 79, at 45.


The IRS has also released "more than 20 private letter rulings" concerning the tax consequences of newly enacted LLC legislation. Carter G. Bishop & Daniel S. Kleinberger, Structuring the Minnesota LLC, BENCH & B. OF MINN., Nov. 1993, 21, 23.

82. Keatinge et al., supra note 79, at 383-84.


States with pending LLC legislation as of August 15, 1994 are California, Hawaii, Massachusetts, Pennsylvania, and Vermont. Because of the recency of their enactment, the LLC statutes of the District of Columbia, Ohio, South Carolina, and Washington are not analyzed in this Comment.
Category I) completely limited liability;\(^{84}\)
Category II) LLC members/managers personal liability limited to their own misconduct;\(^{85}\)
Category III) LLC members/managers personally liable for their own misconduct as well as for the misconduct of others under their direct supervision and control;\(^{86}\) and,

84. For example, Delaware’s LLC liability shield states:
Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company; and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.


85. An example of this type of statute is the Indiana Business Flexibility Act, which states:
A member, a manager, an agent, or an employee of a limited liability company is not personally liable for the debts, obligations, or liabilities of the limited liability company, whether arising in contract, tort, or otherwise, or for the acts or omissions of any other member, manager, agent, or employee of the limited liability company. A member, a manager, an agent, or an employee of a limited liability company may be personally liable for the person’s own acts or omissions.


86. Arizona’s LLC liability shield language is characteristic of this type of statute.
The provision states:
The liability of a manager or employee of a limited liability company is several only, and a member, manager or employee of a limited liability company is not vicariously responsible for the liability of another member, manager or employee unless such other member, manager or employee was acting under his direct supervision and control while performing professional services on behalf of the limited liability company.

Category IV) the savings clause: all rights and obligations within the professional relationship are preserved.87

Two states, Oregon and Rhode Island, have expressly prohibited any professional group from practicing as an LLC.88 However, the majority of LLC statutes expressly permit professionals, including attorneys, to practice as LLCs. This is accomplished by either defining "businesses" as "any occupation or profession,"89 providing for a separate provision within the LLC statute,90 or through a separate professional LLC statute.91

Nevertheless, statutory approval alone does not guarantee attorney LLCs the protection of the liability shield. Regardless of whether professionals are statutorily permitted to form LLCs, attorneys may also require approval from their respective regulatory body, generally the American Bar Association or the state's highest court.92 This requirement is recognized in most statutes by the inclusion of language providing that, notwithstanding the provisions contained in the LLC statute, each professional LLC is subject to the rules and regulations § 57C-2-01(c) (1993). Such LLC shield language is similar to the type III PC liability shield language. See supra note 68.

87. Two states, Georgia and Iowa, have only a savings clause as their statutory limited liability shield provision. GA. CODE ANN. § 14-11-314 (Michie Supp. 1993); IOWA CODE § 490A.1507 (1993).

88. OR. REV. STAT. § 173-19(2) (1993); R.I. GEN. LAWS §§ 7-16-3 (1992). The Georgia legislature, following the state supreme court's denial of limited liability for a legal professional corporation in First Bank & Trust Co. v. Zagoria, 302 S.E.2d 674 (Ga. 1983), included a provision in the Georgia LLC statute that essentially excludes attorneys from obtaining limited liability when practicing within a limited liability company. See GA. CODE ANN. § 14-11-314 (Michie Supp. 1993). The statute states, in part: "This chapter does not alter any law with respect to disregarding legal entities." Id.

89. See, e.g., FLA. STAT. ANN. § 608.402(6) (West Supp. 1994).


92. Unlike attorneys, in a 1991 amendment to Rule 505, the "accountancy regulatory board" clearly authorized accountants to practice as an LLC business entity. AICPA PROFESSIONAL STANDARDS ET § 505.01 (1993). More than 92% of the 126,149 American Institute of Certified Public Accountants voted to affirm the use of LLCs by accountants. AICPA Press Release (Jan. 15, 1992). The legal profession has received approval by the ABA to practice as a professional corporation (see supra note 48), but the LLC has not yet been addressed by the ABA.
mandated by that jurisdiction’s board or boards regulating a specific professional service.93

IV. THE LIMITED LIABILITY SHIELD OF THE MINNESOTA PROFESSIONAL CORPORATION AND LIMITED LIABILITY COMPANY

A. The Limited Liability Shield of the Minnesota Professional Corporation

In 1973, the Minnesota Legislature enacted Minnesota Statutes Chapter 319A which permits individuals engaged in rendering professional services to form PCs.94 Under Chapter 319A, “professional corporation” is defined as “a corporation organized under [the PC statute] for the purpose of rendering professional service.”95 “Professional service” is defined to include the practice of law.96

Minnesota’s PC liability shield provides that:

[The PC statute does] not alter any law applicable to the relationship between a person furnishing professional service and a person receiving the professional service, including liability arising out of the professional service and the confidential relationship and privilege of communications between the person rendering professional service and the person receiving the professional service; provided, however, that no person is personally liable in tort for any act not personally participated in. No director, officer, or employee of a professional corporation or foreign professional corporation is personally liable in contract for any contract executed on behalf of the corporation within the limits of the executor’s actual authority.97

The language of this liability shield can be categorized as a type II98 statute, meaning that the shield limits a PC shareholder’s personal liability to only those acts in which the shareholder personally participates.99

93. See, e.g., ARIZ. REV. STAT. ANN. § 29-847(B) (Supp. 1993); GA. CODE ANN. § 43-1-24 (Supp. 1993); IOWA CODE § 490A.1506 (1993); MICH. COMP. LAWS ANN. § 450.4905(2) (West 1989); UTAH CODE ANN. § 48-2b-115 (1992). This provision may impliedly recognize the inherent power of the state judiciary to regulate the practice of law. Such language can be interpreted to mean that the regulatory board has the final determination as to the rules and regulations placed upon the particular profession. Consequently, because the regulation of the practice of law lies within the power of the judiciary, legislatures may be recognizing the state supreme court’s inherent power to determine rules and regulations concerning the practice of the law.

94. MINN. STAT. § 319A.03 (1992).

95. MINN. STAT. § 319A.02, subd. 4 (1992).

96. MINN. STAT. § 319A.02, subd. 2 (1992).


98. See supra note 67 and accompanying text.

99. See Maycheck, supra note 41, at 822.
Like other states' PC liability shields, Minnesota's shield preserves the professional relationship between the person rendering the service and the person receiving the service by way of a savings clause. Nevertheless, the question remains whether the Minnesota PC liability shield will protect attorney-shareholders from vicarious liability if tested in Minnesota's courts.

B. The Limited Liability Shield of the Minnesota Limited Liability Company

Enacted January 1, 1993, the Minnesota LLC statute provides a new business entity choice for Minnesota professionals. Through an express provision of the Minnesota PC statute, the state legislature has authorized the use of the LLC entity by professionals, including attorneys.

The liability shield language applying to those professionals choosing an LLC provides that "a member, governor, manager, or other agent of a limited liability company is not, merely on account of this status, personally liable for the acts, debts, liabilities, or obligations of the limited liability company." Consequently, as with other state LLC liability shields, Minnesota's LLC shield purports to protect attorneys from vicarious liability for another LLC member's contractual and tortious misconduct.


102. See infra part VI. Analyzing whether Minnesota attorneys will be granted personal liability protection for the misconduct of the members of the firm by using the PC or LLC business form.


104. Minn. Stat. § 319A.03 (1992) (stating that "one or more natural professional persons may organize a limited liability company pursuant to chapter 322B"). Minn. Stat. § 319A.02, subd. 2 defines personal services to include legal services. Id.


106. See supra notes 84-91 and accompanying text for a comparative analysis of LLC limited liability language in other states' statutes.

107. Minn. Stat. § 322B.303, subd. 1 (1992). Although expressly providing that an LLC member will not be liable for the LLC's liabilities, the provision does not expressly state that the member will not be liable for the misconduct of the LLC's other members. However, the liability shield does seek to limit personal liability for the misconduct of the other members. The LLC will be strictly liable for the misconduct of individual members because of the master/servant relationship under the doctrine of respondeat superior. See generally Keeton et al., supra note 5, at § 69. The LLC liability language, therefore, prevents the individual members or managers from being held strictly liable for misconduct in which the individual is not personally involved. Thus, because the LLC liability shield language expressly states that individuals will not be held liable for liabilities of the LLC, the shield provides a member or manager of an LLC with protection from vicarious liability.
The scope and applicability of the LLC liability shield to the legal profession has not been judicially tested. Therefore, if and when the shield is tested, Minnesota courts will be faced with an issue of first impression. The courts will be required to determine the appropriateness of upholding the statutory language and legislative intent to allow attorneys to benefit from the protection of the liability shield.108

V. THE INHERENT POWERS DOCTRINE AND THE REGULATION OF THE PRACTICE OF LAW BY THE MINNESOTA SUPREME COURT

A. The Inherent Powers Doctrine

The inherent powers doctrine has been defined to encompass those judicial powers "not expressly granted by [the] constitution but [which are] said to arise from the very existence of the judiciary as an independent branch of government."109 The doctrine has been divided into two theories: the affirmative inherent powers doctrine and the negative inherent powers doctrine.110

The affirmative inherent powers doctrine supports the power of the courts to perform functions without legislative direction.111 In contrast, the negative inherent powers doctrine seeks to grant the judiciary the "exclusive" power over various issues in order to prevent further action by the legislature.112

The negative inherent powers doctrine is based on the constitutional separation of powers doctrine in which governmental power is separated into three distinct branches,113 with each branch perform-

108. See infra notes 186-188 and accompanying text.
111. See, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §§ 2.2.2 -2.2.3 (1986).
112. Id. at 2.2.3.
113. The United States Constitution and all state constitutions vest the powers of government in three separate and distinct branches. Note, supra note 109, at 786 n.14. Thirty-six states expressly prohibit the separate branches from exercising another branch's powers. R. DISHMAN, STATE CONSTITUTIONS: THE SHAPE OF THE DOCUMENT 6-7 (rev. ed. 1968). The Minnesota Constitution is similar to most other state constitutions: "The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution." MINN. CONST. art. III, § 1.

This separation of powers theory "has been modified in American practice by the complementary theory of checks and balances, in which the powers of government are blended, each branch exerting direct but limited control over the other two." Note, supra note 109, at 786 (citing M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 13 (1967)). The primary goal of the system is to "ensure against the undue concentration of power in any single department." Note, supra note 109, at 786.
ing specific governmental functions without interference from another branch. Those courts that do not possess constitutional authorization to undertake various rulemaking procedures have found such power by combining the inherent powers doctrine with the separation of powers doctrine to essentially conclude that the courts have rulemaking powers exclusive of the legislative branch.114

There are three distinct areas in which the Minnesota Supreme Court has exercised this inherent power: 1) procedural rulemaking,115 2) judicial administration rulemaking,116 and 3) practice rulemaking.117 Cases addressing the issue of attorney-shareholder limited liability indicate that legislative enactment of statutes concerning this issue falls within the court’s inherent practice rulemaking power.118

114. See Note, supra note 109, at 786; 7 C.J.S. Attorney and Client § 6 n.94 (1980 & Supp. 1993) (listing state courts, including Minnesota, that assert the inherent power to regulate the practice of law). See, e.g., Sharood v. Hatfield, 296 Minn. 416, 210 N.W.2d 275 (1973) (recognizing the court’s inherent power over the regulation of the practice of law). Even when the legislature enacts a statute that infringes on one of the court’s inherent powers, the court may use the comity doctrine to uphold the legislation without relinquishing its control over the particular rule-making power at issue. Note, supra note 109, at 791-92.

The ABA House of Delegates has passed a resolution reasserting its support of the exclusive province of the courts to regulate the legal profession. See McMillion, New Legislative Priorities, A.B.A. J., Apr. 1989, at 129.

115. Procedural rulemaking has been defined as “the ability to decide and control the procedural rules or laws under which the courts will operate.” Maynard E. Pirsig & Randall M. Tietjen, Court Procedure and the Separation of Powers in Minnesota, 15 WM. MITCHELL L. REV. 141, 143 (1989) (discussing in detail the development and scope of the procedural rulemaking power of the Minnesota Supreme Court). See, e.g., State v. Willis, 332 N.W.2d 180, 194 (Minn. 1983) (granting the court the inherent power to establish rules of evidence); Clerk of Court’s Compensation v. Lyon County Comm’rs, 308 Minn. 172, 182, 241 N.W.2d 781, 787 (1976) (finding that a court order setting the minimum salary of the clerk of the district court was not an appropriate use of the judiciary’s inherent power). See generally CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.2.1, at 22 (1986).

116. Judicial administration rulemaking power is defined as concerning those rules that govern “the court’s internal administrative matters.” Pirsig & Tietjen, supra note 115, at 143 n.5. See State v. Ogg, 310 Minn. 433, 438-39, 246 N.W.2d 560, 563-64 (1976) (setting forth the proper procedure for review of driver’s license revocation proceedings).

117. Practice rules govern the “conduct and practice of attorneys and judges.” Pirsig & Tietjen, supra note 115, at 143 n.5; see also In re Integration of Bar of Minnesota, 216 Minn. 195, 12 N.W.2d 515 (1943) (allowing the court to integrate Minnesota attorneys).

118. See First Bank & Trust Co. v. Zagoria, 302 S.E.2d 674, 675 (Ga. 1983), on remand, 306 S.E.2d 433 (1983) (disregarding the express language of the PC statute in relying on the court’s inherent power over the practice of law and holding an attorney-shareholder personally liable for dishonored checks issued by another attorney-shareholder); see also In re Bar Ass’n of Hawaii, 516 P.2d 1267, 1268 (Haw. 1973) (permitting legal PCs but requiring unlimited liability for attorneys for the malpractice of their associates); South High Dev., Ltd. v. Weiner, Lippe & Cromley Co., 445 N.E.2d 1106, 1109 (Ohio
The Minnesota Supreme Court has held that issues "directly relating to and governing the conduct of the legal profession generally" are within the court's jurisdiction and the court may use its inherent power to create rules and regulations to further the primary function of the courts. Furthermore, even though the legislature has the power to enact legislation regulating the creation of a business entity, the legislature's attempt to similarly regulate the practice of law is a violation of the separation of powers doctrine. The distinction between the two issues is based on a belief that there is a "fundamental difference between any commercial business and a profession . . . and that it is by professional rather than commercial standards that [the professional's] conduct will be judged . . . ."

One commentator argues that the theory behind the judiciary's regulatory power over the practice of law stems from the fact that attorneys are "officers of the court whose activities are crucial to the court's operation, [and] their qualifications and conduct must be subject to the control of the court." Therefore, if the conduct the legislature seeks to regulate is essential for the operation of the courts, the regulation of such conduct is considered within the inherent power of the judiciary and the legislature's action may be an unconstitutional violation of the separation of powers doctrine.

1983) (imposing personal liability on individual shareholders of a legal PC for the debts of the corporation).

119. *In re Integration of Bar of Minnesota*, 216 Minn. 195, 200, 12 N.W.2d 515, 518 (1943) (holding that the supreme court has the authority to hear and rule upon any matter that affects the conduct of the legal profession).

120. *Id.* (justifying the establishment of an integrated bar through the supreme court's inherent power to regulate the practice of law).

121. *Id.*


124. *Id.* at 786. However, even if considered an inherent power of the judiciary, many commentators have struggled with the issue of whether the constitutional separation of powers theory mandates that such regulation be the sole jurisdiction of the judicial branch. *Id.* at 786-87.

Commentators have argued that there may be a danger that exclusive judicial control of the legal profession could undermine public confidence in the court:

The inherent power doctrine is detrimental to the courts, as well as to the bar, because it places a severe strain upon the standing of the courts with the public. Generally, the courts are not subjected to the public criticism which is incidental to controversial governmental matters, because the public understands that the function of the courts is simply to administer the law as it is, and that the courts have no direct responsibility for what the law is. This understanding of the nature of the judicial function is the foundation of the public's respect for the courts.

*Charles A. Beardsley, The Judicial Claim to Inherent Power over the Bar*, 19 A.B.A. J. 509, 511 (1933). Other commentators have suggested a different delineation of power over the regulation of the legal profession. See, Note, *supra* note 109, at 797.
B. Minnesota’s Use of the Inherent Powers Doctrine

Unlike a few state constitutions,125 the Minnesota Constitution does not expressly reserve the right to regulate the practice of law to the judiciary. Yet, the Minnesota Supreme Court invokes the inherent powers doctrine to justify judicial decisions invalidating legislative acts that promulgate rules and regulations regarding the legal profession.

The supreme court first applied the inherent powers doctrine in In re Greathouse.126 The court disbarred a Minneapolis attorney who employed other attorneys to solicit business, a practice that was then not uncommon nor prohibited by statute.127 Nevertheless, the court disbarred the attorney for “unethical conduct”128 without statutory authority to do so.

Without express statutory authorization, the decision was based on the court’s inherent power to regulate the practice of law.129 The court stated that “[t]he judicial power of this court has its origin in the Constitution, but when the court came into existence, it came with inherent powers. Such power is the right to protect itself, to enable it to administer justice whether any previous form of remedy has been granted or not.”130 The Greathouse decision is significant for providing the foundation for the court’s creation of various inherent powers of the judicial branch.131

126. 189 Minn. 51, 248 N.W. 735 (1933).
127. Id. at 64, 248 N.W. at 739-40.
128. Id. at 53, 248 N.W. at 736-37.
129. The power to regulate the practice of law has been deemed to include the power to regulate bona fide practitioners as well as the power to define law practice. See generally Comment, Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Power, 28 U. Chi. L. Rev. 162, 166 (1960) (“defining the ‘practice of law’ leads to the determination of the scope of an exclusive judicial power”); 7 C.J.S. Attorney and Client § 29 (1980 & Supp. 1993) (“The power to regulate and define what constitutes the practice of law is vested in the judicial, not the executive or legislative branch.”).
130. In re Greathouse, 189 Minn. at 55, 284 N.W. at 737.
131. Note, supra note 109, at 790. Subsequent Minnesota court decisions expanded the areas of judicial power when there was no “enabling” legislation. See, e.g., In re Integration of Bar of Minnesota, 216 Minn. 195, 12 N.W.2d 515 (1943) (authorizing the court to make rules and regulations concerning the administrative structure of the bar). The court in Integration of Bar of Minnesota stated:

The fundamental functions of the court are the administration of justice and the protection of the rights guaranteed by the constitution. To effectively perform such functions, as well as its other ordinary duties, it is essential that the court have the assistance and cooperation of an able, vigorous, and honorable bar. It follows that the court has not only the power, but the responsibility as well to make any reasonable orders, rules, or regulations which will aid in bringing this about, and that the making of regulations and rules governing the legal profession falls squarely within the judicial power thus exclusively reserved to the court.

Id. at 199, 12 N.W.2d at 518 (emphasis added). See also Fitchette v. Taylor, 191 Minn. 582, 585-86, 254 N.W. 910, 911-12 (1934) (prohibiting a claims adjuster from practicing law).
The supreme court’s first use of inherent power to regulate the practice of law in order to invalidate an existing legislative act occurred in *In re Tracy.* The court invalidated a statute of limitations governing disbarment proceedings. The court reasoned that the legislative enactment unconstitutionally interfered with the court’s power to regulate the practice of law because the regulation placed limitations on what the court could and could not hear as evidence in a disbarment proceeding.

The court further explained the *Tracy* holding by indicating that not all legislative attempts to regulate the practice of law would be found unconstitutional. The court would “comply with the legislative will whenever [the court] can without ceasing to function as independent judges” and provided that the laws “were found to be reasonable and just in their application . . . and . . . were considered sound expressions of public policy.”

Four years later, in *Cowern v. Nelson,* the court appeared to accept legislative enactments by choosing to “defer to the legislative regulation as a declaration of public policy in harmony with the expression of courts in general, and as a legislative effort to cooperate with and implement the efforts of the courts in the enforcement of that policy.” The court allowed real estate brokers to draft legal documents but refused to accept a statutory exemption that permitted the brokers to charge fees for drafting legal documents. In reaching this decision, the court weighed the likelihood of public harm against the public inconvenience that would arise if the statute was invalidated.

Shortly thereafter, in *In re Integration of Bar of Minnesota,* the court approved the integration of the state bar. The court reasoned that its primary functions were “the administration of justice and the protection of the rights guaranteed by the constitution.” Moreover, “to effectively perform such functions it is essential that the court have . . . the assistance and cooperation of an able, vigorous, and honorable bar.” Therefore, “the court not only has the power, but the respon-

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132. 197 Minn. 35, 266 N.W. 88 (1936), modified by 197 Minn. 35, 267 N.W. 142 (1936).
133. *Id.* at 46-47, 266 N.W. at 93.
134. 197 Minn. at 46-47, 266 N.W. at 93.
135. 197 Minn. at 46, 266 N.W. at 93.
136. *Id.*
137. 197 Minn. at 46, 266 N.W. at 93.
138. 207 Minn. 642, 290 N.W. 795 (1940).
139. *Id.* at 646, 290 N.W. at 797.
140. *Id.* at 647, 290 N.W. at 797.
141. *Id.*
142. 216 Minn. 195, 12 N.W.2d 515 (1943).
143. *Id.* at 199, 12 N.W.2d 518.
144. *Id.*
sibility as well, to make any reasonable orders, rules or regulations which will aid in bringing this about . . . ."\textsuperscript{145}

In \textit{Sharood v. Hatfield},\textsuperscript{146} the court held unconstitutional a statute that attempted to revise the manner in which all occupations licensed by the state, including the legal profession, were regulated.\textsuperscript{147} The court stated that the legislature lacked the power to regulate the practice of law.\textsuperscript{148} While recognizing a general willingness to comply with the intent of the legislative branch when attempting to regulate the “administrative procedures for admission and discipline of attorneys,”\textsuperscript{149} such compliance would only occur if the statute “did not usurp the right of the court to make the final decision.”\textsuperscript{150}

However, the court failed to state how the statute at issue impaired the judiciary’s final review power. Consequently, the court seemed to ignore the spirit of cooperation with the legislative branch:\textsuperscript{151}

We have no doubt but what some of the provisions of [the statute] as they apply to the judiciary were well motivated, and upon adequate consideration it is entirely possible that the court may wish to adopt some of the provisions by rule of the court. However, in so doing, we do not concede that their enactment was a permissible legislative prerogative.\textsuperscript{152}

The \textit{Sharood} decision “not only holds that the legislature may not validly regulate the legal profession, but it also appears to negate the possibility of legislative influence in the matter.”\textsuperscript{153}

Finally, in \textit{Mack v. City of Minneapolis},\textsuperscript{154} the supreme court held that an act of the state legislature was not an unconstitutional violation of the separation of powers doctrine.\textsuperscript{155} The legislative enactment at is-

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\item 145. \textit{Id.} The court further argued that the integration of the bar “would raise the standards of the profession; eliminate the unfit, the dishonest, and the unethical; . . . and afford protection and recourse to those who might otherwise by reason of destitute circumstances be unable to protect their legal or constitutional rights” resulting in a furthering of the court’s function of administering justice. \textit{Id.} at 200-01, 12 N.W.2d at 518.

\item 146. 296 Minn. 416, 210 N.W.2d 275 (1973).

\item 147. \textit{Id.} at 429, 210 N.W.2d at 282.

\item 148. \textit{Id.} at 425, 210 N.W.2d at 280. The court stated that “[w]hile this court desires to work in harmony with the legislative and executive branches of government, we cannot and should not abdicate our judicial responsibility by failing to assert our inherent right to perform a function which is clearly judicial. . . .” \textit{Id.}

\item 149. \textit{Id.} at 424, 210 N.W.2d at 279.

\item 150. 296 Minn. at 424, 210 N.W.2d at 279. \textit{See supra} notes 120, 123, 127, 133, and 139 for Minnesota Supreme Court cases in which the court struck down legislative acts by arguing that the legislature went “beyond merely indicating what it deems desirable.” \textit{Sharood v. Hatfield}, 296 Minn. 416, 424, 210 N.W.2d 275, 279 (1973).

\item 151. Note, \textit{supra} note 109, at 795.

\item 152. 296 Minn. at 424-25, 210 N.W.2d at 280.

\item 153. Note, \textit{supra} note 109, at 795.

\item 154. 333 N.W.2d 744 (Minn. 1983).

\item 155. \textit{Id.} at 752.
\end{enumerate}
\end{footnotesize}
sue imposed limits on, and allowed an administrative agency to set, attorney fees in workers compensation cases. The court stated that "[e]very legislative enactment 'comes to the court with a presumption in favor of its constitutionality [and the] burden of proof is on the challenging parties to show beyond a reasonable doubt that the act violates some particular constitutional provision.' 

The court reasoned that a decision upholding the constitutionality of the legislative act would not relinquish to the legislature or administrative agency the court's inherent right to regulate the practice of law. The court stated that the "final authority over attorney fees is not given to a nonjudicial body, since ultimately [the supreme court] can review all attorney fee decisions." 

Commentators have expressed dissatisfaction with the current status of judicial power and have proposed alternative applications of the inherent powers doctrine. One argument maintains that "[l]egislative power over the practice of law should . . . stem from the legislature's general interest in serving the public, while judicial power [should] stem from the need to assure that attorneys effectively aid the courts in deciding cases." Such a theory arguably recognizes that both the judiciary and legislature have a legitimate interest in regulating the practice of law and thus have separate constitutional powers to regulate attorneys.

However, this interpretation would prohibit the judiciary from invalidating legislative acts not explicitly dealing with the practice of law that unnecessarily hamper the role of the judiciary. The supreme court's express denial of legislative power to regulate the practice of law in Sharood v. Hatfield makes it unlikely that the Minnesota Supreme Court intends to adopt this proposed theory.

156. Id. at 747.
157. Id. at 751 (quoting Federal Distillers, Inc. v. State, 304 Minn. 28, 39, 229 N.W.2d 144, 154 (1975)).
158. Mack, 333 N.W.2d at 752. Additionally, the court referred to the "uniform practice throughout the country of assigning responsibility for attorney fees to compensation commissions" as further support for the acceptance of the statutory provision. Id. at 753.
159. See, e.g., Charles W. Wolfram, Note, Lawyer Turf and Lawyer Regulation—The Role of the Inherent Powers Doctrine 12 U. ARK. LITTLE ROCK L.J. 1, 14 (1989-90) (suggesting that the doctrine should only be invoked where legislation "cuts to the very core of essential judicial functions").
160. Note, supra note 109, at 797.
161. Id. at 799.
162. Id. at 802-03.
163. 296 Minn. 416, 210 N.W.2d 275 (1973).
164. Note, supra note 109, at 804.
C. Other State Courts' Use of the Inherent Powers Doctrine

In addition to statutory interpretation and board or court approval, some courts have used the judiciary's inherent power to regulate the practice of law as a means to deny attorneys any limitation of personal liability for the misconduct of a firm's other members.

For example, the Georgia Supreme Court held a PC attorney-shareholder personally liable for another attorney-shareholder's misconduct in issuing dishonored checks to a client even though the liable shareholder was not personally involved in the transaction. The court stated that "when a lawyer holds himself out as a member of a law firm the lawyer will be liable not only for his own professional misdeeds but also for those of the other members of his firm." The Georgia Supreme Court's decision established the use of the inherent powers doctrine to deny attorney-professionals access to limited liability. However, the question remains whether the Minnesota Supreme Court will use the same power to achieve the same result in Minnesota.

VI. Analysis

A. Interpretation of the Statutory Language

If the Minnesota Supreme Court chooses to recognize the legislature's implied regulation of the practice of law and merely interprets the liability shield language, the applicability of the shield does not

166. 302 S.E.2d at 676. The court further stated that "no distinction [could be made] between partnerships and professional corporations." Id.
167. Id. at 675.
168. Id. at 676.
169. Id. at 675.
170. See, e.g., South High Dev., Ltd. v. Weiner, Lippe & Cromley Co., 445 N.E.2d 1106, 1107 (Ohio 1983) (holding that an attorney-shareholder is personally liable for PC debts on grounds that supreme court had inherent power to promulgate rules regulating legal practice and pursuant to that power attorneys conducting business in PC form were required to be personally liable for all PC debts as provided in supreme court rules of practice).
appear to be a debatable issue. First, the PC has been a viable business entity choice for Minnesota attorneys since 1973. Second, the ABA has approved the use of PCs by the legal profession provided an attorney remains personally responsible to the client and restrictions on the liability of fellow attorneys is made apparent to the client. Third, Minnesota courts have not challenged the PC liability shield since its enactment in 1973. Because the LLC liability shield provides the same protection as the PC shield, one would expect the same judicial deference.

Furthermore, an examination of the statutory language reveals expressed legislative intent that attorneys may utilize these business structures. The language of the PC and LLC liability shields presents no ambiguities regarding who and what acts will be afforded liability protection. The obvious legislative intent of these statutes is to allow attorneys to take advantage of all the aspects of each business entity, including limited liability. Based on statutory interpretation, there is a high probability that Minnesota courts would permit attorneys to limit their exposure to vicarious liability.

B. The Effect of the Inherent Powers Doctrine on Limited Liability for Minnesota Attorneys

On the basis of statutory interpretation, Minnesota attorneys should be encouraged to use the PC and LLC to reduce vicarious liability exposure. If unambiguous legislative drafting and an unchallenged legal history were sufficient to uphold a statutory provision, every attorney practicing within any PC or LLC would be provided some form of vicarious liability protection. In practice, however, this is not the case.

State courts reviewing liability shield provisions similar to Minnesota's shields have found grounds for holding attorneys jointly and severally liable for the misconduct of a firm's other members regardless of the statutory language. Courts disallowing attorney liability limita-

171. See supra part III, IV.
172. See supra note 48.
173. See supra text accompanying note 49. This Comment assumes that attorneys practicing within the PC or LLC have not attempted to limit their personal liability for their professional services, a violation of the Model Code of Professional Responsibility EC 6-6 (1980).
174. Minn. Stat. § 319A.04 (1992) provides that a professional may organize a PC "for the purpose of rendering one specific kind of professional service." Id. A professional service is defined to include the "personal service rendered by a professional pursuant to a license or certificate issued by the state of Minnesota to practice . . . law." Minn. Stat. § 319A.02 (1992). A professional may organize an LLC to operate for the same purposes. Minn. Stat. § 319A.03 (1992).
175. See supra part IV.
tions have essentially disregarded the statutory language by basing their decision on the state judiciary's established and inherent power to regulate the practice of the law.177

Similarly, Minnesota has invalidated legislative acts that attempt to regulate the practice of law.178 Consequently, the supreme court has firmly established the inherent power of the Minnesota state judiciary to regulate the practice of law without interference by the state legislature.179 One must then determine whether the supreme court will exercise this power to invalidate the legislative regulation of the practice of law arising out of the enactment of the PC and LLC liability shields.

With respect to the PC shield, disallowing attorney limited liability may not contravene the legislature's original intent in enacting the PC statute.180 The statute was primarily enacted to provide professionals with the same tax benefits as business persons who chose to incorporate,181 not to provide professionals with limited liability protection.182 In addition, a profession is distinguishable from any other commercial business and is held to a higher standard of conduct;183 thus limiting liability exposure does not serve to maintain this higher standard, but rather results in professionals being held to the same standard of conduct as nonprofessionals.

By invalidating the liability shield with respect to the legal profession only, the court can avoid infringing on the legislative function of regu

177. See First Bank & Trust Co. v. Zagoria, 302 S.E.2d 674, 675 (Ga. 1983), on remand, 306 S.E.2d 433 (1983) (stating that the legislature "has the clear right to enact technical rules for the creation and operation of professional corporations, but it cannot constitutionally cross the gulf separating the branches of government by imposing regulations upon the practice of law"); In re Bar Ass'n of Hawaii, 516 P.2d 1267, 1268 (Haw. 1973) (asserting the court's inherent power to regulate the practice of law by allowing attorneys to practice as a professional corporation but disallowing attorney limited liability).

178. See, e.g., Sharood v. Hatfield, 296 Minn. 416, 429, 210 N.W.2d 275, 282 (1973) (holding that provision of statute authorizing transfer of attorney registration fees to general fund was unconstitutional); In re Integration of Bar of Minnesota, 216 Minn. 195, 199, 12 N.W.2d 515, 518 (1943) (finding court has power to make regulations and rules governing the legal profession); Cowern v. Nelson, 207 Minn. 642, 647, 290 N.W. 795, 797 (1940) (modifying legislative act that expressly allowed brokers to charge fees for drafting legal documents); In re Tracy, 197 Minn. 35, 44, 266 N.W. 88, 92 (1936) (finding a statute which limited time within which proceedings for removal of attorney can be commenced to be unconstitutional as a projection of legislative power into judicial department), modified by 197 Minn. 35, 267 N.W. 142 (1936).

179. See supra part V. B.

180. See generally Stephen B. Scallen, Federal Income Taxation of Professional Associations and Corporations, 49 MINN. L. REV. 603, 603-05 (1965) (discussing the history of the tax concerns stemming from the professional corporation and association).

181. Id. at 603-05.

182. Id. at 687.

183. See, e.g., In re Tracy, 197 Minn. 35, 43, 266 N.W. 88, 91-92 (1936), modified by 197 Minn. 35, 267 N.W. 142 (1936).
lating state business entities' activities. The legal PC will continue to have the advantage of business and tax benefits, while the court remains in exclusive control of the practice of law. Thus, an invalidation of the PC shield for the legal profession would not contravene traditional judicial and legislative functions.

If the supreme court chooses to invalidate the PC liability shield for attorneys, it follows that Minnesota attorneys would not be afforded the protection of the LLC liability shield. Having established inherent power over liability issues concerning Minnesota attorneys, the court could exert the same power within the confines of the LLC statute and still permit the legislature to define the other business characteristics available to the entity.

However, if the court chooses to invalidate the LLC liability shield for attorneys, the legislative intent of the statute would also be invalidated. A primary motivating factor for creating the LLC entity is to provide individuals with limited liability. Judicial abrogation of that intent merits serious consideration in light of the growing national acceptance accorded this entity.

Nevertheless, the supreme court has shown a willingness to contravene legislative intent to maintain regulatory power over the legal profession. Such actions promote the judicial function of guaranteeing the administration of justice through the creation of an "able, vigorous, and honorable bar." The court achieves this goal by promulgating rules and regulations that (1) heighten the standards of the legal profession, (2) eliminate the unfit, dishonest, and unethical, and (3) ensure remedies for injured parties. To that end, allowing attorneys to benefit from liability shields does not ensure that remedies remain available to parties injured by an attorney's actions.


186. The Georgia Legislature has included language respecting the judiciary's power to regulate the practice of law in the Georgia LLC statute. See supra note 88 and accompanying text.


188. See Bishop & Kleinberger, supra note 81, at 23.

189. See, e.g., Cowern v. Nelson, 207 Minn. 642, 647, 290 N.W. 795, 797 (1940) (modifying legislative act that expressly allowed brokers to charge fees for drafting legal documents).

190. In re Integration of Bar of Minnesota, 216 Minn. 195, 199, 12 N.W.2d 515, 518 (Minn. 1943).

191. Id. at 200-01, 12 N.W.2d at 518.
The supreme court may also find that limited liability legislation is an infringement on the judicial branch's powers because the statutes force the court to relinquish the right of final review of attorney liability.192 This right has been reserved by means of the Model Code, Model Rules, and the inherent powers doctrine.193 Judicial validation of the PC and LLC statutes would essentially terminate the court's final review power because the statutory provisions expressly disallow judicial consideration of certain liability.194 The court is likely to hold that this denial of review power is an invalid attempt to regulate the practice of law.

Finally, there is another viewpoint the supreme court may adopt by choosing to uphold the liability shields despite their effect on the practice of law. This viewpoint is illustrated in the Mack195 case, in which the court supported a decision to uphold a legislative act regulating attorneys' fees in workers compensation cases. The court based that decision on the uniform practice of other jurisdictions that allows legislatures to assign responsibility for establishing attorneys' fees to compensation commissions.196

The supreme court could possibly follow the uniform practice of many other states that include vicarious liability shields within their PC and LLC statutes.197 However, the court is more likely to look to the uniform practice of those state courts that have tested the issue and have declined to allow attorneys the use of such shields.198 These decisions may prove sufficiently persuasive in their analysis to provide Minnesota courts with grounds to invalidate the shields with respect to the legal profession.

Regardless of the reasoning, the ultimate decision is likely to be one that maintains the Minnesota Supreme Court's control over the regulation of the legal profession. The trend of other state court decisions using the inherent powers doctrine to regulate the practice of law indicates a desire and willingness of the courts to preserve the judicial

192. See, e.g., Mack v. City of Minneapolis, 333 N.W.2d 744, 752 (Minn. 1983); Sharood v. Hatfield, 296 Minn. 416, 422-28, 210 N.W.2d 275, 279-81 (1973).

193. See supra notes 44-47 and accompanying text.

194. The language of the LLC liability shield precludes from personal liability for another's acts any individual shareholder who does not personally participate in the misconduct. MINN. STAT. § 319A.10 (1992); MINN. STAT. § 322B.303, subd. 1 (1992). Thus, the enactment of these statutory provisions essentially removed the final review power of the courts concerning individual member vicarious liability. However, the court could always review the constitutionality of the statutory provisions.

195. Mack v. City of Minneapolis, 333 N.W.2d 744 (Minn. 1983).

196. Id. at 753 (reasoning that even if the legislative act was upheld, the Minnesota Supreme Court reserved the power of final review over attorneys’ fees decisions).

197. See supra notes 65-69 and 85-89 and accompanying text.

198. See supra note 70 and accompanying text.
branch’s essentially exclusive and final control over the practice of law.\textsuperscript{199}

The final review power of the court implies that attorney limited liability is a permanently debatable issue. Regardless of whether the Minnesota Supreme Court validates or invalidates attorney liability shields, the court can use changing public policy concerns or fact-specific cases to alter prior determinations on this issue.\textsuperscript{200} Thus, attorney-shareholders or attorney-members/managers are in the precarious position of attempting to predict whether they will be protected from personal liability for the misconduct of the firm’s other members, or whether, because of their occupation, they will forever remain potentially vicariously liable for another’s misconduct.

\section*{VII. Conclusion}

This Comment addresses the problems Minnesota attorneys may encounter in attempting to absolve themselves from vicarious liability for the misconduct of their firm’s other members by utilizing the limited liability shield contained in the Minnesota Professional Corporations Act\textsuperscript{201} and the recently enacted Minnesota Limited Liability Company Act.\textsuperscript{202} The express statutory language of these Acts purports to provide attorneys the protection of the limited liability shield contained in the statutes.

However, because of the Minnesota Supreme Court’s established view concerning the judiciary’s inherent power to regulate the practice of law without legislative interference,\textsuperscript{203} the court may invalidate the statutes’ attempts to govern the scope of liability afforded to the legal profession if the issue is presented to the court. Other state courts have been willing to deny attorneys access to similar shields on these grounds.

On the other hand, the court may allow attorneys to benefit from the limited liability shields, yet reserve the power to hold an attorney vicariously liable pursuant to the court’s final review power. Under such an approach, attorneys would remain in essentially the same position they were in before the limited liability shield provisions were tested: an attorney-shareholder may or may not be held personally lia-

\textsuperscript{199} See supra part V. C.
\textsuperscript{200} See, e.g., State \textit{ex rel.} Chase v. Babcock, 175 Minn. 103, 107, 220 N.W. 408, 410 (1928). The Minnesota Supreme Court argued that in interpreting an article of the constitution, the court should construe the article “in the light of the social, economic, and political situation of the people at the time of its adoption, \textit{as well as subsequent changes in such conditions}.” \textit{Id.} (emphasis added). See also Rice v. Connolly, 488 N.W.2d 241, 247 (Minn. 1992) (reiterating the viability of the Chase rule of construction).
\textsuperscript{201} \textbf{MINN. STAT.} §§ 319A.01-.22 (1992).
\textsuperscript{202} \textbf{MINN. STAT.} §§ 322B.01-.955 (Supp. 1993).
\textsuperscript{203} See supra part V. B.
ble for a fellow member's misconduct regardless of whether the attorney-shareholder uses the PC or LLC business entity that provides a limited liability shield.

Because of this perpetual state of flux, Minnesota attorneys should hesitate to assume that as a shareholder of a PC or member or manager of an LLC they will be shielded from vicarious liability for the misconduct of other members of their firm.

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