Advisory Opinion 1996-1

Lawyers are being presented with increasing choices for the form of organization they may choose to use in providing legal services to their clients. The Advisory Opinions Committee of the State Bar of New Mexico has been asked for its opinion concerning whether the Registered Limited Liability Partnership is an appropriate entity for the practice of law. Underlying the ethical considerations is the legal question concerning the permissible nature of a chosen form of entity. As the New Mexico Supreme Court has not addressed the question, and as the Committee is not constituted to render legal advice, the Committee's consideration of the question has focused on the ethical considerations. The ultimate answer, however, must await decision by our Supreme Court which has the power to approve or prohibit the form of entity chosen for the practice of law.

It is the opinion of the Committee that it would be ethical for lawyers to join together as partners in a Registered Limited Liability Partnership for the practice of law, subject to adherence to the statutory requirements and the ethical considerations discussed herein. In arriving at its opinion, the Committee assumes that each of the partners is licensed to practice law in New Mexico.

Effective June 16, 1995, New Mexico provided for business activities to be conducted as a Registered Limited Liability Partnership ("Registered LLP"). See NMSA §§ 54-1-44 to -48 (Supp. 1995) and other amendatory acts. The Registered LLP Act was adopted as an amendment to the Uniform Partnership Act. NMSA § 54-1-1 et seq. (Repl. Pamp 1988); see id. § 54-1--2(G), (Supp. 1995). A Registered LLP is a partnership formed pursuant to agreement, governed by the laws of New Mexico, registered under § 54-1--44, and in compliance with the provisions of § 54-1-45.

ETHICS CONSIDERATIONS
Among the lawyer's principal obligations are that the lawyer provide competent representation to her or his clients, through the exercise of independent professional judgment. See SCRA 1986, 16-101, 16-201. The lawyer's duty to exercise independent professional judgment on behalf of her or his clients is emphasized by the limitation on the scope of the lawyer's prerogative to limit her or his liability to those clients. See SCRA 1986, 16-108(H). The rules also set forth specific responsibilities for lawyers who practice in law firms or associations. SCRA 1986, 16-501 to -504.

Rule 16-501(B) states:

> Responsibilities for other lawyer's Violations. 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 practices, 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 falls to take reasonable remedial action.

The language of rule 16-501 is broad and provides the basis for disciplinary liability for the conduct of a partner or associate. A lawyer who orders, or with knowledge ratifies another's conduct, is responsible for that conduct. Similarly, a lawyer who is a partner, who supervises another's work, and knows of conduct in violation of the Rules of Professional Conduct may also be responsible for that conduct unless he or she "takes" timely remedial action. The rule provides a basis for disciplinary action, as noted in the ABA Comment to rule 16-501, "Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules."
Rules 16-502 and 16-503, respectively, set forth the responsibilities of the subordinate lawyer and of the partners or supervisory lawyer with respect to legal assistants. Rule 16--504 reaffirms and bolsters the lawyer's professional independence. Among other things, the rule prohibits sharing of legal fees with a non-lawyer.
Rule 16-504(D) expressly prohibits "practice with or in the form of a professional corporation or association authorized to practice law for a profit, if" a non-lawyer owns any interest in or has any right to direct or control the lawyer's professional judgment. The inference from Subsection D is that a lawyer may choose "a professional corporation or association authorized to practice law" as an entity for the conduct of the lawyer's practice. (Emphasis added.)
The Committee notes that the Professional Corporation Act contains specific authority for lawyers. That act authorizes the organization of a professional corporation for the purpose of rendering professional services, including personal services rendered by "attorneys-at-law." NMSA § 56-6-3 -5 (Repl. Pamp. 1983). The statutory grant of authority incorporates the provision of the Business Corporation Act, NMSA §§ 53-11-1 to -18-12, (Repl. Pamp. 1983), to the extent not inconsistent with the provisions of the Professional Corporation Act. NMSA § 53-6-4 (Repl. Pamp. 1983). The Professional Corporation Act does not, however "modify the legal relationships, including confidential relationships, between a person performing

professional services and the client . . . who receives such services; but the liability of shareholders shall be otherwise limited as provided in the Business Corporation Act . . . and as otherwise provided by law." Id. § 53-6-8. This legislative pronouncement addresses, at least with respect to professional corporations, the caveat of the ABA Comment to rule 16-501 that the question of civil liability is a matter of law and not per se within the scope of the ethical considerations. The legislative grant is specific to professional corporations and, within the language of rule 16-504(D), they are "authorized to practice law." The preservation of the relationships between the lawyer and the client also appears to meet the requirements of rule 16-108(H).

The strictures of the rules seek to assure that the chosen entity for practice meets the lawyer's ethical obligations. Lawyers may choose to adopt provisions in their corporate or organizational documents which address the ethical considerations required to preserve and protect the propriety of the lawyer/client relationship and assure that the lawyer who renders services and that those who supervise or have knowledge of the services may not be shielded from their negligent or improper conduct.

ALTERNATIVE FORMS FOR PRACTICE

The American Bar Association Committee on Ethics and Professional Responsibility determined some years ago that a lawyer may not ethically practice in a law firm as a limited partner under the Uniform Limited Partnership Act ("ULPA"), which provided, generally, that a limited partnership may conduct any business that might be conducted by a partnership without limited partners. See ABA Comm. on Ethics & Professional Responsibility Informal Op. 865 (1965. In order to retain immunity as a limited partner, it was necessary that the limited partner refrain from active participation in the business of the limited partnership. This would be antithetical to the lawyer's duties to the client and preclude any meaningful participation with the lawyer's partners in the conduct of the firm's business. The Registered LLP, however, is not part of the ULPA, but is an accretion to the Uniform Partnership Act. By following the statutory rules, any partnership may become a Registered LLP. As such, a partner in a Registered LLP may be distinguished from the limited partner under the ULPA described in Informal Opinion 865.

The Registered LLP Act sets forth the nature of a partner's liability.

54-1-15. Nature of partner's liability.

> B. Except as provided otherwise in Subsection B of this section, all partners are liable:
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> > (1) jointly and severally for everything chargeable to the partnership under Sections 54-1-13 and 54-1-14 NMSA 1978; and
> > (2) jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.
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> A. Subject to Subsection C of this section, a partner in a registered limited liability partnership is not liable directly or indirectly, by way of indemnification, contribution or otherwise, for debts, obligations and liabilities of or chargeable to the partnership or another partner or partners, whether in tort, contract or otherwise, arising from omissions, negligence, wrongful acts, misconduct or malpractice committed while the partnership is a registered limited liability partnership and in the course of the partnership business by another partner or an employee, agent or representative of the partnership.
> B. Subsection B of this section shall not affect the liability of a partner in a registered limited liability partnership for the partner's own omission, negligence, wrongful act, misconduct or malpractice or that of any person under the partner's direct supervision and control.
> C. A partner in a registered limited liability partnership is not a proper party to a proceeding by or against a registered limited liability partnership, the object of which is to recover damages or enforce the obligations arising out of the omissions, negligence, wrongful acts, misconduct or malpractice of the type described in Subsection B of this section, unless such partner is personally liable under Subsection C of this section.

NMSA § 54-1-15 (Supp. 1995); see also id. § 54-1-48, which again addresses the liability of partners in a Registered LLP. Were lawyers to choose to practice in a Registered LLP, they appear to be protected from liability for acts or omissions of their partners or employees, except that each partner would remain liable for her or his "own omission, negligence, wrongful act, misconduct or malpractice or that of any person under the partner's direct supervision and control."

This provision addresses some of the responsibilities set forth in Rule 16-501. It does not directly address the Rule's considerations concerning the lawyer's knowledge of her or his partner's conduct in violation of the Rules of Professional Responsibility. Nor does it address the lawyer's obligation to remediate the wrongful conduct of a subordinate. The imputation of knowledge from one partner to another may be implied as a matter of law when lawyers form a business organization; and it may also be that such issues could be addressed in the partnership agreement to assure compliance with the letter and spirit of the Rule, the strictum jus. The Registered LLP also appears to address the proscription on limiting liability to clients under Rule 16--108(H).

The Registered LLP goes further than other forms of entity the Committee has reviewed. The act mandates that partners choosing to operate in a Registered LLP shall carry at least five hundred thousand dollars ($500,000) per occurrence of liability insurance to cover the partnership for any liability for which individual partners may be shielded by § 54-1-15. NMSA § 54-1-47 (Supp. 1995).

The Committee has informally addressed whether lawyers may choose to practice in an entity formed under the Limited Liability Company Act. NMSA §§ 53-19-1 to 74 (Repl. Pamp. 1993). The Committee distinguished the Limited Liability Company ("LLC") from the professional corporation, in part because the LLC Act lacked specific authority for lawyers to practice in an LLC. At the time of the enactment of the LLC Act, separate authorizing legislation was enacted to authorize public accountants to practice through the LLC form. See NMSA §§ 61-28A-15 (Repl. Pamp. 1993). The Committee was informed that the drafters of the LLC Act believed that it devolved upon each profession, to the extent required, to seek authority to practice in the LLC form. Accordingly, the Committee determined that the question of whether a lawyer can practice through the LLC form is not free from doubt and raises questions of law which have not been addressed in New Mexico.

There is an express grant of authority for lawyers to practice in professional corporations. There is also a limitation on the form of practice, "as authorized by law", in rule 504(D). There is no corresponding express grant of authority for lawyers to practice in an LLC or a Registered LLP. Other jurisdictions have provided express authority. Colorado permits practice in a professional corporation or LLC form if the lawyers comply with the detailed structure imposed by Colorado Rule of Civil Procedure 265. See Colorado Rules of Professional Conduct, Rule 5.4(d), 7A Colo. Rev. Stat. (Repl. Vol. 1995).

New York has enacted both LLC and LLP laws which limit the member or partner lawyers' malpractice liability to their own acts or to the acts of those subject to their direct supervision or control. The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Op. 1995-7 (1995) determined that New York lawyers may practice through these forms if they meet the statutory requirements and add the appropriate designation to the firm name. The City of New York Committee added that the lawyers "should be prepared to answer any client questions regarding the nature of the change and its ramifications." Id. Kansas, too, has concluded that it is not improper for lawyers to practice in an LLP or LLC. Kansas Bar Assoc. Ethics Advisory Comm. Op. 94-3 (1994), 91-6 (1991). The Kansas Committee reviewed the requirements of rules 5.1 (16-501) and 1.8(h) (16-108(H)) and concluded that there was no material ethical change between practice in a professional corporation and practice in an LLC or LLP. It suggested that clients be made aware of the change and the concept of liability. This Committee agrees that any firm of lawyers, in choosing their professional form for practice, is well advised to disclose the form and ramifications to its clients.

The Committee is mindful that its role is circumscribed: to provide advice on questions of ethics. It is the opinion of the Committee that it would not be unethical for lawyers to choose to practice in a Registered LLP, if they order the affairs of the Registered LLP to provide accountability under the Rules of Professional Responsibility, particularly those which address their duties inter se and their responsibilities to their clients. However, the Committee is also mindful of the maxim expressio unius est exclusio alterius and that neither the legislature nor the Supreme Court has provided explicit legal authority for lawyers to practice in the Registered LLP form. Accordingly, lawyers who opt to practice through a Registered LLP must assess the legal risks which inhere in that choice.

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1 The District of Columbia appears to be the only U.S. jurisdiction which permits non-lawyers to share a profit interest in a law firm. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360(1991). Compare SCRA 1986, 16-504 which prohibits a non-lawyer from having an ownership interest in or right to control the practice.

2 *See* NMSA §§ 54-1-2, -15, -18, -34, -36, -40 (1995 Supp.).

3 *See* SCRA 1986, 16-501 ABA Cmt. As noted in the comment, rule 16-804(A) also proscribes knowing assistance or inducement to violate the Rules.

4 NMSA § 53-6-1 to -14 (Repl. Pamp. 1983). Indeed, the purpose of the act, as stated in § 53-6-1, "is to provide for the incorporation of an individual, or group of individuals, to render the same professional services to the public for which such individuals are required by law to be licensed or to obtain other legal authorization." Similar expressions do not appear with respect to the Registered LLP. One authority suggests that as an addition to the general partnership law express permission would not be required for an LLP. R.R. Keatings, et al., Limited Liability Partnerships: The Next Step in the Evolution of the Unincorporated Business Organization, 51 Bus. Law. 147, 206 (1995).

5 See J. Suzuki, California's New Limited Liability Partnership Act, Vol. 5, No. 1, Legal Malpractice Report 1 (1996). According to Suzuki, California precludes lawyers and accountants from practicing through an LLC, but authorizes them to practice through a Registered LLP. See also Michigan State Bar Committee on Professional and Judicial Ethics, Formal Op. R-17 (1994); Connecticut Bar Association Committee on Professional Ethics, Informal Op. 94-2 (1994).

6 Similar considerations apply to those who may choose to practice in an LLC. It should be noted, however, that the imposition of required liability insurance coverage by a Registered LLP Act provides substantial client protection and does not appear in the LLC Act.