

ETHICS ADVISORY OPINION

FROM THE STATE BAR OF NEW MEXICO'S ETHICS ADVISORY COMMITTEE

Formal Opinion 2009-01

Topic: Concerns Regarding the Practice of Law in the Form of a Limited Liability Company

RULES IMPLICATED: Rules 16-108, 16-501, 16-502, 16-503, 16-504 NMRA 2008, eff. Nov. 3, 2008. This opinion cites the rules as amended effective November 3, 2008. Subsequent changes to the rules could impact the opinion provided.

DISCLAIMER: The Ethics Advisory Committee is constituted for the purpose of providing lawyers with opinions interpreting the New Mexico Rules of Professional Conduct. The committee's opinions are not binding and are intended only to assist lawyers in the course of their conduct.

QUESTION PRESENTED: Another committee of the State Bar requested the Ethics Advisory Committee's opinion on whether it is appropriate under the Rules of Professional Conduct for a law firm to organize as a limited liability company in New Mexico.

SUMMARY ANSWER: It may be ethically possible for a New Mexico law firm to organize as a limited liability company **but only if** it is otherwise lawful for a law firm to do so. The issue of whether it is otherwise lawful to do so raises significant issues that cannot be answered by the Committee as those issues involve interpretation of substantive law, including implication of separation of powers concerns. However, because the question involves significant issues for lawyers and law firms in this state, a review of the issues of concern to the Committee is presented in this opinion.

From an analysis solely limited to the provisions of the Rules of Professional Conduct, it would appear that the practice of law within any limited liability entity would be permitted so long as three conditions are met: (1) the lawyers acting within such a framework continue to meet all of their obligations under the Rules, (2) the lawyer's liability to the client as provided by the Rules of Professional Conduct is unchanged by the form of limited liability entity, and (3) the lawyer may lawfully practice in such an entity. The Committee believes that conditions (1) and (2) can be met in the case of a New Mexico limited liability company. The Committee is uncertain that condition (3) can be met as the analysis required to make such a determination is beyond the scope of the Committee's work. Correspondingly, the Committee continues to recommend that lawyers considering practice within a limited liability entity other than a professional corporation or association be mindful of the concerns and risks associated with such an entity. Ideally, the dilemma could be remedied by amendment of the Limited Liability Company Act or adoption of a Professional Limited Liability Company Act, as has been done in other jurisdictions. At the same time, a review of Rule 24-107 suggests that, assuming organization of law firms as limited liability companies is or will someday be permitted under statutory law, revision of that rule may be helpful in addressing concerns and clarifying ambiguities regarding entities through which the practice of law may be engaged in this state.

ANALYSIS:

A. Formal Opinion 1996-1

This Committee previously issued a formal opinion, 1996-1, in which it addressed the question of whether lawyers could practice in the form of a registered limited liability partnership (RLLP), an entity that was created by statute. *See*, NMSA 1978, §§ 54-1-44 et seq. (1995); §§ 54-1-44 through 54-1-46 repealed by L. 1997, Ch. 76, §23, eff. July 1, 1997. Formal Opinion 1996-1 began: "Lawyers are being presented with increasing choices for the form of organization they may choose in providing legal services to their clients." That statement remains true today. Since that opinion was issued, utilization of the Limited Liability Company Act, NMSA 1978, §§ 53-19-1 et seq. (1993), as a form of organization by lawyers in New Mexico has increased. Moreover, as noted above, since the issuance of Formal Opinion 1996-1, the old RLLP statutes (as well as the old Uniform Partnership Act) were generally repealed (except for § 54-1-47, which requires the maintenance of certain levels of liability insurance) and the new Uniform Partnership Act was adopted, which includes provision for limited liability partnerships. *See, e.g.*, NMSA 1978, § 54-1A-306(d) (1996). Nevertheless, the fact that some law firms have elected to form as limited liability companies or limited liability partnerships is not dispositive to the question of whether doing so is either legal or ethical.

Formal Opinion 1996-1 concluded with the following statements:

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* ["the expression of one thing implies the exclusion of another"] 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.

Formal Opinion 1996-1 raised several concerns regarding the choice of entity for practicing law under the Rules of Professional Conduct.

First, certain portions of Rules 16-501 through 16-504, which have undergone changes since Formal Opinion 1996-1 was issued, were of concern to the Committee because, in 1996 and until the revisions made effective on November 3, 2008, those rules made reference only to professional corporations or associations in addition to partnerships. *See, eg.* former Rule 16-504(D) which expressly prohibited "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. (Emphasis added). The inference from former Rule 16-504 was that partnerships as well as professional corporations or associations are entities through which the practice of law was permitted under the Rules of Professional Conduct. The old Rules made no reference to other business entities, including limited liability companies.

In contrast, the revisions to the Rules, effective November 3, 2008, provide a definition of “firm,” which seems more expansive than the implications within the former Rules. The definition of “firm” under the new Rules includes “a law partnership, professional corporation, sole proprietorship, or **other association authorized to practice law...**” Rule 16-100(C) 2008 (emphasis added). Thus, the new Rules indicate that a “firm” for purposes of the Rules of Professional Conduct would include any lawfully authorized association. This leaves open the question of what exactly is an “association authorized to practice law.”

While the statutes at issue in Formal Opinion 1996-1 provided that a partner in a registered limited liability partnership could not escape liability for the partner’s own negligence or tort, the Committee was concerned with the absence of provisions related to RLLPs for liability associated with a “lawyer’s knowledge of her or his partner’s conduct in violation of the Rules of Professional [Conduct][,] [and] the lawyer’s obligation to remediate the wrongful conduct of a subordinate.” Formal Opinion 1996-1 at 2, Rule 16-501(B). The Committee noted that this problem might be addressed in the partnership agreement, and also took some solace in the fact the RLLP statutes required, and require yet today, that liability insurance be maintained by the RLLP. *See*, NMSA 1978, § 54-1-47 (1995). This minimized the concern associated with the provisions now contained in § 54-1A-306 of the Uniform Partnership Act that limit the liability of a partner within a limited liability partnership to the partner’s own acts or omissions.

Formal Opinion 1996-1 also raised the requirements of old Rule 16-108(H), which provided, in pertinent part:

A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. . . .

The new Rule 16-108(H), effective November 3, 2008, removes the language regarding “prohibited by law,” but the change may be non-substantial, as the requirement for independent counsel remains. In 1996-1, the Committee was satisfied that the provisions of the RLLP statutes regarding partner liability, which were far more extensive than those contained in the Limited Liability Company Act, satisfied the requirements of this Rule. The comment to the new Rule states that 16-108(H) does not “limit the ability of lawyers to practice in the form of a limited liability entity, **where permitted by law...**” Rule 16-108 NMRA 2008, Comm. ¶ 14, eff. Nov. 3, 2008 (emphasis added). Even so, the Committee suggested in Formal Opinion 1996-1, and suggests today, that the lawyer inform the client of limitations of liability created by the RLLP statutes or any other limited liability entity statutes through which lawyers may lawfully practice. Such information may be provided in the engagement letter. A similar view has been taken by the District of Columbia Ethics Committee in DC Ethics Opinion 235 (1993), in which the D.C. Ethics Committee held that its form of Rule 16-108(H) (D.C.R.P.C. Rule 1.8(g)) is not violated by incorporating a law firm under a limited liability statute, “if the individual lawyer who committed the malpractice remains personally liable to the client in all events, **and if the client is made aware of the limitation of personal liability of**

the other lawyers in the law firm who were not involved in the malpractice.” (Emphasis added).

B. ABA Formal Opinion 96-401.

The ABA Standing Committee on Ethics and Professional Responsibility (ABA Committee) issued an opinion in 1996 that concluded the Model Rules permit lawyers to practice in a “limited liability partnership or a limited liability limited partnership if [1] applicable law provides that the lawyer rendering legal services remains personally liable to the client, [2] the requirements of the law of the relevant jurisdictions are met, and [3] the form of business organization is accurately described by the lawyers in their communications.” ABA Form.Op. 96-401 at 1.

The ABA Committee also determined that even if the state statutes “exempt lawyers practicing in a firm from tort liability for the actions of subordinate lawyers and non-lawyer assistants, this does not mean that the lawyer is freed from his supervisory obligations under [Model] Rules 5.1(b) and 5.3(b).” *Cf.*, Rules 16-501 and 16-503 NMRA 2008, eff. Nov. 3, 2008. Essentially, the ABA Committee determined that such a situation did not cause conflict with the Rules because, even if civil liability were limited by statute, the lawyer could not escape responsibility to meet the obligations imposed by the Rules of Professional Conduct. *Id.* at 3.

The ABA Opinion notes that it “assumes that there is compliance with applicable state statutes...” and considered only compliance with the Model Rules. *Id.* at 4. Thus, the ABA Opinion stands solely for the proposition that, so long as the conditions referenced above are met (liability for rendering legal services, meeting all legal requirements of the jurisdiction, and accurately communicating the form of business), any entity would be permitted under the Model Rules. It is the “meeting all legal obligations of the jurisdiction” for being such an entity that perhaps creates the greatest dilemma for the lawyer and which is of most concern to the Committee. This concern is not assuaged by the revisions to the Rules made effective November 3, 2008, and, for the reasons discussed in the subsequent section of this opinion, the concern may never be remedied without action by the legislature.

C. The New Mexico Supreme Court’s Adoption of Rule 24-107.

Little has occurred within the statutory scheme for limited liability entities in New Mexico to assuage the dilemma noted in Formal Opinion 1996-1. The applicable Rules of Professional Conduct have undergone some modification, referenced above, since Formal Opinion 1996-1 was issued. However, a new rule promulgated by the Supreme Court outside of the Rules of Professional Conduct was adopted since that opinion was issued which impacts the analysis of the problem.

Our Supreme Court adopted NMRA 24-107, within the Rules Governing the New Mexico Bar, effective March 28, 2005. That rule provides:

- A. Authorized entities. A lawyer may practice law as a shareholder, member, owner, partner or employee of any limited liability entity, including but not limited to a domestic or foreign limited liability company, professional corporation or limited liability partnership, provided that the statutory law governing the limited liability entity:
- (1) does not expressly prohibit the practice of law in such entity form; and
 - (2) expressly provides that nothing in the statute shall be construed to immunize a lawyer from liability or prospectively limit a lawyer’s liability for the

consequences of the lawyer's own acts or omissions.

B. Retroactive effect. This rule shall be given retroactive effect.

Despite what at first appears to be a definitive solution to the dilemma, this rule creates quandaries for lawyers that require interpretation of rules, case law, statutes and the New Mexico Constitution that are beyond the scope of review for this Committee. Correspondingly, as referenced in Formal Opinion 1996-1, there remain legal risks that the lawyer should consider before selecting any form of limited liability entity.

Rule 24-107 is not a Rule of Professional Conduct. As noted above, the recently revised Rules of Professional Conduct make reference to traditional law firm entities (i.e., general partnerships and professional corporations or associations), as well as any "other association authorized to practice law." NMRA 16-100(C) (2008). Not surprisingly, the revised Rule does not state what "other association[s]" comprise those "authorized to practice law." Rather than conclude that Rule 24-107 was an effort by the Supreme Court to allow lawyers to organize as limited liability companies in the absence of legislative authorization for lawyers (or other professionals) to do so, the rule can be viewed as the Supreme Court's endorsement of such an organization for lawyers if, or when, the legislature generally allows professionals, or lawyers specifically, to do so.

While Rule 24-107 expresses the position of the New Mexico Supreme Court that limited liability entities would be a viable organization for the practice of law, it clearly acknowledges the authority of the legislature, as the final arbiter in determining what business activities are permitted or authorized by law, to preclude lawyers from practicing within a certain form or entity. See, Rule 24-107(A)(1) NMRA (2008). The New Mexico Supreme Court has recognized that the legislature has plenary legislative authority limited only by the constitutions of the United States and of New Mexico. *Albuquerque Metropolitan Arroyo Flood Control Auth. v. Swinburne*, 74 N.M. 487, 490, 394 P.2d 998, 1000 (1964).

In turn, the legislature recognizes the authority of the New Mexico Supreme Court to regulate the *practice of law* within the State of New Mexico. NMSA 1978, § 36-3-1 (1941). Further, the Supreme Court has found that it has inherent authority to regulate the practice of law under Article VI of the New Mexico Constitution. *State Bar of New Mexico v. Guardian Abstract & Title Co.*, 91 N.M. 434, 439, 575 P.2d 943, 948 (1978). However, our courts have recognized that general statutes, including statutes that may impact lawyers more directly or commonly than others, do not infringe upon the Supreme Court's exclusive authority to regulate the practice of law. See, e.g., *Ortiz v. Taxation and Revenue Dept.*, 124 N.M. 677, 679-80, 954 P.2d 109, 111-12 (Ct. App. 1998) (legislation that effectively prohibits representation of individual in case before state agency by lawyer who previously served with state agency for one year after service did not infringe upon judiciary's inherent power to regulate the practice of law).

Despite the New Mexico Supreme Court's exclusive authority to regulate law in this State, the New Mexico Constitution would not appear to provide the Supreme Court with the authority to create limited liability entities, nor to select which powers, purposes or authorities are given to such entities other than through interpretation of laws. See, e.g., N.M. Const., Art. III (separation of powers provision), Art. IV, § 1 (vesting legislature with exclusive legislative authority) and Art. XI, § 13 (vesting legislature with authority to set laws associated with corporations). Such authority appears to lie exclusively with the legislature.

The legislature has expressly stated that lawyers may practice in professional corporations. NMSA 1978, § 53-6-3(A) (1963). The legislature has not expressly stated that lawyers may practice in any other form of limited liability entity.

a. Requirement of Rule 24-107 that Practice of Law Not be Expressly Prohibited by Statute.

Rule 24-107 raises a significant legal concern, which the Committee cannot answer, regarding the respective powers of the judiciary and the legislature. Rule 24-107 provides that, in order for a lawyer to properly practice in a form of limited liability entity, the statutory scheme for that limited liability entity cannot "expressly prohibit" the practice of law. This is in contrast to the express statutory **permission** given for lawyers to practice in professional corporations. NMSA 1978, § 53-6-3(A) (1963).

In *Williams v. Central Consol. School Dist.*, the Court of Appeals indicated that, where the legislature demonstrates that it can create a right when it wants to, the absence of such language in a statute indicates by negative inference that the legislature did not intend to create one. 1998-NMCA-006, ¶ 9, cert. denied 124 N.M. 311, 950 P.2d 284 (1997). *Williams* involved comparison of provisions within a single statute, that being the Tort Claims Act. However, *Williams* cites to *Patterson v. Globe American Casualty Co.*, 101 N.M. 541, 685 P.2d 396 (Ct.App. 1984), in support of the proposition. *Patterson* compared not one, but "various New Mexico statutes wherein private rights of action have been expressly created." 101 N.M. at 544, 685 P.2d at 399. The *Patterson* court concluded that

These statutes show the Legislature knows how to create a private remedy if it intends to do so. By negative inference, the Legislature's failure to provide for a private action suggests that it did not intend to create one.

Id.

Application of the maxim referenced in Formal Opinion 1996-1, *expressio unius est exclusio alterius*, along with the similar principles included in *Williams* and *Patterson*, and other principles of construction, creates or at least highlights the potential of a separation of powers issue for the lawyer considering Rule 24-107 as a basis for concluding that a limited liability entity is a lawful business form for the practice of law. On one hand, the legislature, with the exclusive legislative authority within the State, has expressly permitted professional activities, including the practice of law, in the form of a professional corporation, but has not expressly done so with regard to a limited liability company, at least for the practice of law. On the other hand, the Supreme Court, with exclusive authority to regulate the practice of law, has indicated that lawyers may practice in any limited liability entity created by the legislature so long as the legislature does not expressly prohibit the practice of law and the second requirement of Rule 24-107 is met.

Certain other professions, over which the legislature has assumed regulation, have approached the same issue through amendments to statutory provisions governing the specific profession. See, e.g., NMSA 1978, § 61-28B-3(G) (1999) (including limited liability companies and limited liability partnerships as types of "firms" under the Public Accountancy Act); §61-23-3(J) (2003) (including limited liability company as a "person" under Engineering and Surveying Practice Act). However, adding to the uncertainty, the Podiatry Act makes reference to a "professional limited liability company," a term that is not used in the Limited Liability Act. NMSA 1978, § 61-8-14(A) (1998) (emphasis added).

In many of our neighboring states, the dilemma has been eliminated by the legislature's adoption of statutes permitting the creation of "professional limited liability" entities. Texas has adopted a Professional Entities Law within its Business Organizations Code. Oklahoma has adopted a Professional Entity Act, within Title 18, Section 801 of its statutes. Utah statutorily permits professional services to be provided through an LLC in § 48-2c-1503 of its Revised Limited Liability Company Act. Professional LLCs are also permitted under Article 11 of Arizona's Limited Liability Company Act.

In Colorado, the concern was met with modification of their form of Rule 16-504(D), *i.e.*, Colorado RPC 5.4(d):

A lawyer shall not practice with or in the form of a professional corporation, association, or **limited liability company**, authorized to practice law for a profit, except in accordance with C.R.C.P. 265 and any successor rule or action adopted by the Colorado Supreme Court. (Emphasis added).

Colorado Rule of Civil Procedure 265 provides an expansive rule regarding the requirements of lawyers practicing in the form of limited liability entities, including many provisions that relate to the ethical concerns associated with practice of law within a limited liability company. Such a solution, limited to court rules, would not eliminate the concern regarding separation of powers.

b. Requirement of Rule 24-107 of Non-Immunization by Statute.

New Mexico's Rule 24-107 also requires that the statutory scheme must "**expressly** provide that nothing in the statute shall be construed to [a] immunize a lawyer from liability or [b] prospectively limit a lawyer's liability for the consequences of the lawyer's own acts or omissions." (Emphasis added). The Limited Liability Company Act provides, in pertinent part: "Nothing in this section shall be construed to immunize any person from liability for the consequences of his own acts or omissions for which he otherwise may be liable." NMSA 1978, § 53-19-13 (1993). While this provision expressly provides that a lawyer would not be immunized from the consequences of the lawyer's own acts or omissions, it is silent as to the issue of prospective limitation of liability. Although the Committee does not advise as to issues of substantive law or court rules other than the Rules of Professional Conduct, the Committee is concerned that the Limited Liability Company Act does not expressly provide what Rule 24-107 requires in a statutory scheme.

Interestingly, the New Mexico Professional Corporation Act, under which law firms have formed for several decades, contains a more generic provision: "**The Professional Corporation Act does not modify the legal relationships, including confidential relationships, between a person performing professional services and the client or patient who receives such services**; but the liability of shareholders shall be otherwise limited as provided

by the Business Corporation Act and as otherwise provided by law." NMSA 1978, § 53-6-8 (1969) (emphasis added). It is unclear and is beyond the Committee's scope whether this language would be deemed to "**expressly** provide that nothing in the statute shall be construed to immunize a lawyer from liability or prospectively limit a lawyer's liability for the consequences of the lawyer's own acts or omissions" as required by Rule 24-107(B). However, a strong argument exists that, based on the traditional relationships secured by the Professional Corporations Act, there is at least an inference that nothing in the Professional Corporation Act would immunize the lawyer from liability for the lawyer's own acts or omissions, prospectively or otherwise.

D. In New Mexico, Only One Limited Liability Entity Statute References the Practice of Law.

The purpose of the Professional Corporation Act "is to provide for the incorporation of an individual, or group of individuals, to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization." NMSA 1978, § 53-6-1 (1963). The Professional Corporation Act, among other things, limits the purpose of the corporation to "one specific type of professional service and services ancillary thereto," as well as own realty, personality and make investments. NMSA 1978, § 53-6-5 (1963). Except to the extent provisions of the Business Corporation Act conflict with provisions of the Professional Corporation Act, the Business Corporation Act applies to professional corporations. NMSA 1978, § 53-6-4 (1963). The Limited Liability Company Act does not contain similar language. The absence of any express legislative authority for lawyers to organize in a limited liability company, when such express authority exists for professional corporations, continues to give the Committee pause in concluding that New Mexico lawyers may permissibly organize their New Mexico law firm as a limited liability company.

CONCLUSION

For the reasons set forth above, despite the adoption of Rule 24-107 and the revisions to the Rules of Professional Conduct made effective November 3, 2008, the Committee remains concerned that there may be legal impediments to the formation of a New Mexico law firm other than as a general partnership, sole proprietorship or professional corporation or association. To the extent that the practice of law in the form of a limited liability company or other limited liability entity is not authorized by law, the lawyer practicing in such an entity would face ethical concerns but may also lose the very liability shield that would presumably have been a significant basis for organizing as such a limited liability entity.

The concerns raised in this opinion could, in the Committee's view, be remedied by amendments to New Mexico's Limited Liability Company Act as well as revision of Rule 24-107 NMRA to clarify the requirements of statutory provisions associated with limited liability entities.