

Nebraska Ethics Advisory Opinion for Lawyers
No. 94-1

SINCE THE LIMITED LIABILITY COMPANY IS A NEWLY DESIGNATED ENTITY WHICH, BY STATUTE, PURPORTS TO AFFORD LIMITED LIABILITY TO ITS MEMBERS, AND RECOGNIZING THAT OUR SUPREME COURT, IN RULE I PERTAINING TO PROFESSIONAL SERVICE CORPORATIONS, HAS SET FORTH SPECIFIC REQUIREMENTS FOR THE ORGANIZATION AND OPERATION OF PROFESSIONAL SERVICE CORPORATIONS MANDATING JOINT AND SEVERAL LIABILITY OF PC SHAREHOLDERS, IT IS THE OPINION OF THIS COMMITTEE THAT NEBRASKA LAWYERS SHOULD NOT ENGAGE IN THE PRACTICE OF LAW AS A LIMITED LIABILITY COMPANY IN THIS STATE UNLESS AND UNTIL THE NEBRASKA SUPREME COURT ENACTS RULES SPECIFICALLY AUTHORIZING PRACTICE AS A LIMITED LIABILITY COMPANY. THESE RULES WOULD, IN ALL PROBABILITY, CONTAIN REQUIREMENTS SIMILAR TO THOSE SET FORTH IN THE SUPREME COURT'S RULE I GOVERNING PROFESSIONAL SERVICE CORPORATIONS. IN ADDITION, THE ORGANIZATIONAL DOCUMENTS OF THE LIMITED LIABILITY COMPANY WOULD HAVE TO COMPLY WITH DISCIPLINARY RULE 5-107(C) AND ETHICAL CONSIDERATION 5-24 PROHIBITING OWNERSHIP BY, ASSOCIATION WITH, OR THE SHARING OF MANAGEMENT RESPONSIBILITIES WITH, A NONLAWYER, AND WITH PROVISIONS OF DR 6-102(A) PROHIBITING THE LIMITING OF LIABILITY TO A CLIENT FOR HIS PERSONAL MALPRACTICE.

FACTS

An attorney has requested guidance as to the ethical propriety of organizing a limited liability company under the provisions of L.B. 121 to engage in the practice of law in the State of Nebraska.

APPLICABLE CODE PROVISIONS

EC 5-24. To assist a lawyer in preserving his

professional independence, a number of courses are available to him. For example, a lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any director, officer, or stockholder of it is a non-lawyer. Although a lawyer may be employed as a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman. Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

DR 5-107 Avoiding Influence by Others Than the Client.

(C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) A non-lawyer is a corporate director or officer thereof; or

(3) A non-lawyer has the right to direct or control the professional judgment of a lawyer.

DR 6-102 Limiting Liability to Client.

(A) A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

DISCUSSION

This committee is authorized to provide opinions relating solely to the Code of Professional Responsibility and is not authorized to, and does not, render opinions on questions of law. With this limitation in mind, it is necessary to note certain constitutional, statutory, and rules of the Supreme Court of Nebraska.

Under Article V of the Constitution of Nebraska, the right to define and regulate the practice of law belongs to the Judicial Department of our state government. In re Integration, of the Nebraska State Bar Association, 133 Neb. 283, 275 S.W. 265 (1937). General partnerships have traditionally practiced law in the State of Nebraska without specific authorization from the Supreme Court of the Legislature. It should be noted, however, that general partners are jointly and severally liable for the liabilities of the partnership.

Ownership, association with, and control of professional corporations for the practice of law are governed by the code of Professional Responsibility as adopted by the Nebraska Supreme Court. Ethical Consideration 5-24, Discipline Rule 5-107(C) and Discipline Rule 6-102(A) specifically address these issues.

Professional Service Corporations Rule I of the Nebraska Supreme Court, authorizing professional service corporations for lawyers, contains certain requirements which must be set forth in the Articles of Incorporation of a professional service corporation. Rule I requires, inter alia, that all shareholders thereof shall be jointly and severally liable to the extent that assets of the corporation are insufficient to satisfy any liability

incurred by the corporation for the acts, errors, and omissions of the shareholders, to the same extent as if the shareholders were practicing in the form of a general partnership. The rule also provides that, except in conformity with the Court Rules, corporations shall not practice law.

The committee notes that section 12 of L.B. 121, Nebraska's "Limited Liability Company Act, " affords limited liability to members, managers, employees, and agents of a limited liability company. It contains no restrictions on who may own, operate, or control the limited liability company. The Limited Liability Company Act does not appear to have a section similar to Neb. Rev. Stat. § 21-2220 specifically authorizing the practice of law pursuant to its provisions, nor does it have any provision granting supremacy to the Nebraska Supreme Court for the purpose of recognizing and authorizing the authority of the Nebraska Supreme Court to prescribe the terms and conditions under which a limited liability company could engage in the practice of law.

Section 32 of L.B. 121 states in part:

"Except for those provisions in the Liability Company Act concerning the personal liability of members . . . of a limited liability company organized under the Act, nothing in the Act is intended to restrict or limit in any manner the authority and duty of any regulatory body licensing professionals within the state who license such individuals rendering professional services or to regulate the practice of any profession that is within the jurisdiction of the regulatory body licensing such professionals within the state.." [Emphasis added.]

This exception would conflict with the basic intention expressed by the Supreme Court of Nebraska in Rule 1 pertaining to professional service corporations which clearly requires that all lawyers involved with a professional corporation must be jointly and severally liable with respect to their professional services. The

language of section 32 appears to provide that the limited liability afforded LLC members under section 12 of the Act would prevail over the requirements of "any regulatory body licensing professionals within the state..... "

The committee also notes that section 158 of L.B. 121 amends Neb. Rev. Stat. § 21-2222 to read as follows:

Nothing contained in the Nebraska Professional Corporation Act is intended to alter the right of natural persons licensed to provide professional service to organize as a partnership, a limited liability company, an unincorporated association, a business trust, or any other lawful form of business organization. [Emphasis added.]

Since a limited liability company is not a professional corporation, the disclaimer or on-alteration provisions intended by section 158 of L.B. 121 would have no effect upon the issue of whether or not a limited liability company may engage in the practice of law.

CONCLUSION

Since the limited liability company is a newly designated entity which, by statute, purports to afford limited liability to its members, and recognizing that our Supreme Court, in Rule I pertaining to professional service corporations, has set forth specific requirements for the organization and operation of specific requirements for the organization and operation of professional service corporations mandating joint and several liability of PC shareholders, it is the opinion of this committee that Nebraska lawyers should not engage in the practice of law as a limited liability company in this state unless and until the Nebraska Supreme Court enacts rules specifically authorizing practice as a limited liability company. These rules would, in all probability, contain requirements similar to those set forth in the Supreme Court's Rule I governing professional service corporations. In addition, the organizational documents of the limited liability

company would have to comply with Disciplinary Rule 5-107(C) and Ethical Consideration 5-24 prohibiting ownership by, association with, or the sharing of management responsibilities with, a non-lawyer, and with provisions of DR 6-102(A) prohibiting the limiting of liability to a client for his personal malpractice.

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