

MEMORANDUM

To: The Advisory Committee on Rules
From: Carolyn Koegler
Re: # 2017-007. Supreme Court Rule 41. Limited Liability Entities
Date: September 14, 2017

Attached please find: (1) a copy of Supreme Court Rule 41 as it existed in 2000; and (2) copies of materials from the Advisory Committee on Rules June 2001 meeting file. The Committee might find these materials useful when considering whether to delete or amend Supreme Court Rule 41.

COPY 1

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ANNOTATED**

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Subdivision (10)(c): Substituted "six" for "five" following "least" in the first sentence and "may" for "shall" following "committee" in the third sentence of the first paragraph and added the second paragraph.

Subdivision (10)(d): Substituted "six" for "five" following "least" in the first sentence.

—1990. Subdivision (4)(c): Substituted "without merit" for "based upon frivolous grounds" preceding "or is obviously unfounded".

—1986. Subdivision (1)(b)(2): Added "or with respect to an inquiry concerning the conduct of a judge which the committee has initiated on its own motion" following "judge" at the end of the subdivision.

Subdivision (5-a): Added.

Subdivision (6)(a): Inserted "or of any proceeding initiated by the committee on its own motion" preceding "upon" and "taken" preceding "at a meeting" in the first sentence.

Subdivision (6)(b): Rewrote the first sentence and added the second sentence.

Subdivision (6)(f): Rewrote the first sentence.

Subdivision (7)(a): Inserted "or into charges generated by an inquiry of the committee undertaken on its own motion" following "complaint" in the first sentence.

Subdivision (7)(b): Amended generally.

Subdivision (8)(a): Added the second sentence.

—1985. Subdivision (1)(b)(1): Inserted "or deputy clerks" following "clerks of any court" and "and any persons performing the duties of a clerk or register" following "probate" in the second sentence.

—1983. Subdivision (1)(b)(1): Inserted "court stenographers or reporters and" preceding "clerks" in the second sentence.

—1981. Subdivision (1)(b)(1): Substituted "canons 1, 2, 3A(1)-(3) and (5)-(7), and 3B" for "canons 1, 2, and 3" and inserted "including registers of probate" following "clerks of any court" in the second sentence.

—1980. Subdivision (1)(b)(1): Added sentence including clerks of any court within term "judge."

Library References

Confidentiality of proceedings or reports of judicial inquiry board or commission. 5 ALR4th 730.

Testimony before or communications to private professional society's judicial commission, ethics committee, or the like, as privileged. 9 ALR4th 807.

Annotations

Due process

The procedural and due process protections in a scheme set out in Supreme Court Rules 39 and 40 exceed what is required by either the New Hampshire or Federal Constitution. *Snow's Case* (1996) 140 N.H. 618, 674 A.2d 573.

RULE 41. PROFESSIONAL ASSOCIATIONS

Persons admitted to the practice of law by this court who become members of professional associations or professional limited liability companies organized pursuant to the laws of the State of New Hampshire are not prohibited by these rules from engaging in the practice of law, so long as such professional associations and all of their shareholders, officers and directors or such professional limited liability companies and all of their members and managers have complied with the applicable provisions of the laws of the State of New Hampshire and the rules of practice of this court, including the Rules of Professional Conduct.

All shareholders, officers and directors of a professional association and all members and managers of a professional limited liability company

engaging in the practice of law shall be persons admitted to the practice of law by this court; provided, however, 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.

No member of the bar of this State shall be a stockholder, director or officer of more than one professional association or a member or manager of more than one professional limited liability company organized to practice law within the State of New Hampshire; provided, however, that a lawyer who is acting as the fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer in another professional association or professional limited liability company for a reasonable time during administration of the estate.—Amended September 1, 1987; July 7, 1995.

History

Amendments—1995. Inserted “or professional limited liability companies” preceding “organized” and “or such professional limited liability companies and all of their members and managers” following “and directors” in the first paragraph, “and all members and managers of a professional limited liability company” following “professional association” in the second paragraph, and “or a member or manager of more than one professional limited liability company” preceding “organized” in the third paragraph.

—1987. Substituted “Rules of Professional Conduct” for “Code of Professional Responsibility” at the end of the first paragraph.

Library References

Liability of professional corporation of lawyers, or individual members thereof, for malpractice or other tort of another member. 39 ALR4th 556.

Propriety, under state statutes or bar association or court rules, of formation of multi-state law partnership or professional service corporation. 6 ALR4th 1251.

Annotations

1. Generally

Whether an attorney is practicing in the form of a professional association, as a member of a partnership or as an individual, the traditional responsibilities of loyalty, fidelity, confidentiality and integrity exist. *Petition of N.H. Bar Ass'n.* (1970) 110 N.H. 356, 266 A.2d 853.

2. Adoption of rule

Supreme court would adopt as this rule the New Hampshire Bar Association's proposed rules to permit the practice of law in the corporate form as established by RSA 294-A. *Petition of N.H. Bar Ass'n.* (1970) 110 N.H. 356, 266 A.2d 853.

3. Supreme court supervision

The attorneys in a professional association, as well as the association itself, are subject to the disciplinary powers of the Supreme Court; the association places no barrier between its members and the court's authority. *Petition of N.H. Bar Ass'n.* (1970) 110 N.H. 356, 266 A.2d 853.

4. Attorney-client relation

Whether an attorney is practicing in the form of a professional association, a member of a partnership, or an individual, the traditional responsibilities of loyalty, fidelity, confidentiality and integrity exist, and neither rules proposed by the New Hampshire Bar Association to permit the practice of law in the corporate form, nor RSA ch. 294-A, which authorizes such practice, detract from the essentially personal relationship of attorney and client. *Petition of N.H. Bar Ass'n.* (1970) 110 N.H. 356, 266 A.2d 853.

5. Professional responsibility code

This rule is consistent with and in conformity to the Code of Professional Responsibility adopted by the American Bar Association and the New Hampshire Bar Association. *Petition of N.H. Bar Ass'n.* (1970) 110 N.H. 356, 266 A.2d 853.

Cited
Cited in *In re New*
208.

RULE 4:

(1) All admissions examiners of the State will be appointed for a term of three (3) years.

(2) There shall be a bar examination determined by the State and shall cover the following: One examination day following Wednesday of July.

(3) Any person applying for examination provided.

(4)(a) Every applicant beginning the study of work require

(b) Every applicant approved by the State and requiring a study, called a 1 American Bar Association 1 years equivalent in a full-time law working time to the foregoing school in an English course of study the American Bar Association provided that a student that country, or approved by the State of the States of is in good standing schools will be admitted, and the in any law school require attendance constitute completion

(5)(a) All persons required to establish the Standing Committee New Hampshire

MEMORANDUM

TO: Advisory Committee on Rules

FROM: David S. Peck and Eileen Fox

DATE: June 12, 2001

RE: Proposed amendment to Supreme Court Rule 41

On June 12, 2001, we spoke by telephone with Attorney John Cunningham of Ransmeier & Spellman to discuss the proposed amendment to Supreme Court Rule 41, which the Supreme Court had referred back to the Advisory Committee on Rules. Prior to the telephone conference, we sent Attorney Cunningham a copy of the proposed amendment along with other information about the proposed amendment.

The reasons for our telephone conference with Attorney Cunningham were to make certain that we understood the purposes of the proposed amendment and to discuss several issues that had been raised about the proposed amendment, including the question of whether RSA 311:11 should be amended before the amendment to Rule 41 is considered by the Supreme Court.

Attorney Cunningham stated that the main purpose of the rule is to make clear that lawyers are authorized to practice law as owners and employees of limited liability entities, i.e., limited liability companies, limited liability partnerships, and professional corporations (to the extent not prohibited by statute – an issue discussed more fully below). The proposed rule would put lawyers of limited liability companies and partnerships in the same legal position,

in terms of limited liability, as lawyers who are shareholders, directors and employees of professional corporations. Attorney Cunningham said that there was concern that, without an amendment authorizing the practice of law by a limited liability entity, a person who filed a claim against such an entity could argue that the owners of the entity should not be shielded from personal liability because the Supreme Court had not authorized such entities to carry on the practice of law.

Another important purpose of the rule is to impose certain professional conduct and reporting requirements on limited liability entities. For example, under the proposed amendment, all of the major players in such entities, i.e., the owners, managers, shareholder or partners, must be licensed attorneys. In addition, final responsibility for the delivery of professional services in New Hampshire must be vested in lawyers licensed in New Hampshire. The proposed amendment also requires limited liability entities to file reports on a regular basis identifying the owners and managers of the entities not licensed in this state, certifying that the owners and managers are in good standing in the jurisdictions in which they are licensed, and certifying that other requirements, such as compliance with trust accounting provisions, have been met.

We discussed with Attorney Cunningham the question whether the word "manager" had been inadvertently omitted from two places in paragraph 7(a) of the rule. (See David Peck's memo to Howard Zibel dated January 21, 1998.) He agreed that the omission appeared to be inadvertent. Accordingly, we have prepared a revised draft of the amendment to make these corrections.

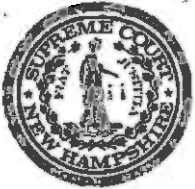
We also discussed with Attorney Cunningham whether the court should attempt to have the legislature amend RSA 311:11 or :11-a before adopting the proposed amendment. This issue was raised by Attorney John Holland in his memo of June 23, 1997. As Attorney Holland pointed out, RSA 311:11 prohibits corporations from practicing law in any court in New Hampshire. RSA 311:11-a then states that the word "corporation" as used in RSA 311:11 shall not include a corporation of attorneys organized as a professional association under the provisions of RSA 294-A. The combination of these statutes arguably prohibits a professional corporation organized under the laws of another state from practicing law in New Hampshire.

After some discussion, we all agreed that this issue cannot be resolved by the proposed amendment to Rule 41. The most that the proposed amendment can do is make clear that the rule does not expand upon statutory authority and alert readers to the potential issue. The language of paragraph 2 of the proposed amendment indicates that the rule does not expand the authority of limited liability entities to operate beyond that granted by the legislature. We suggest that paragraph 2 be amended slightly, however, to expressly state that the rule should not be construed as authorizing a limited liability entity to practice law if it is prohibited by statute from doing so. (The attached draft includes the suggested language.) We also suggest that the Advisory Committee consider including a comment which points out that the issue of the authority of foreign professional corporations to practice law in New Hampshire is unresolved.

We all agreed that it was not necessary for RSA 311:11 or 11-a to be amended before the proposed rule is adopted. Even with the uncertainty about whether foreign professional corporations can carry on the practice of law, the proposed amendment will provide a helpful clarification about the authority of other limited liability entities to carry on the practice of law. Additionally, we believe that the proposed amendment would give the Supreme Court the authority it needs to regulate such entities.

Attorney Cunningham expressed no view on how the trust accounting requirements should apply to limited liability entities. Under paragraph 8 of the proposed rule, a limited liability entity would have to comply with Supreme Court Rules 50 and 50-A. These rules allow client funds held by a lawyer licensed to practice in New Hampshire to be deposited in an out-of state financial institution only with the permission of the clerk of the Supreme Court, and in no circumstance in an out of state bank other than one located in Maine, Vermont or Massachusetts. We question whether this requirement currently is being complied with by lawyers licensed in New Hampshire who practice in states other than Maine, Vermont or Massachusetts. We believe that the Advisory Committee may want to consider whether a lawyer licensed in New Hampshire who practices in another jurisdiction should be required to deposit client funds only in financial institutions in New Hampshire, Maine, Vermont or Massachusetts. On the other hand, this issue is not limited to limited liability entities, and we believe that the issue should be considered in the context of Rule 50 and 50-A rather than in the context of the proposed amendment to Rule

41. Accordingly, we do not believe that the adoption of the proposed amendment should be delayed by consideration of this question.



THE STATE OF NEW HAMPSHIRE
SUPREME COURT
ADVISORY COMMITTEE ON RULES

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David S. Peck, Secretary

March 26, 2001

John M. Cunningham, Esquire
Ransmeier & Spellman, P.C.
P.O. Box 600
Concord, NH 03302-0600

Dear Attorney Cunningham:

Like a phoenix, the proposed amendment to Supreme Court Rule 41 is struggling to rise from the ashes. I am writing to request your assistance in enabling it to fly.

In 1997, you kindly provided assistance to the Advisory Rules Committee in drafting revisions to Rule 41 intended to authorize the limited liability entities to engage in the practice of law. In January 1998, the Advisory Committee on Rules recommended the adoption of the proposed amendment to Rule 41 to the supreme court. The court solicited public comment on the proposal. Thereafter, the court remanded the proposal to the Advisory Rules Committee, with the following request:

The court would like the proponents of the proposed amendment to make a presentation to the court on the effect of the rule generally, and specifically on how section (8), which relates to trust accounts, is intended to operate. The court also would like to review copies of any forms that would be used to implement the rule. The court is interested in the committee's view as to whether an amendment to RSA 311:11-a will be necessary if the court adopts proposed Rule 41, and if so, whether the statutory amendment should be sought before the rule is amended.

The question involving section (8) appears to relate to how it is intended that limited liability entities comply with Supreme Court Rule 50, which requires members of the New Hampshire bar to deposit cash property of clients in a trust account in certain states. The issue seems to involve the obligations of a limited liability entity with respect to client funds and clients located in other jurisdictions.

John M. Cunningham, Esq.
March 22, 2001
Page 2

The question involving RSA chapter 311 arises from a comment made on an earlier draft of the rule by Attorney John Holland. His comments are enclosed.

At its meeting on March 21, 2001, the Advisory Rules Committee voted to ask whether you would be willing to assist the committee in responding to the court's request. I have enclosed materials related to the proposed amendment, including a copy of the proposed amendment itself. The committee would be most appreciative of any assistance you might be willing to provide.

The committee next meets on June 20, 2001. If I can provide you with any additional information, please let me know. Thank you very much for your consideration of the committee's request.

Very truly yours,



David S. Peck
Secretary

encls.

Amend Supreme Court Rule 41 by striking out said rule in its entirety and inserting in place thereof the following so that said rule as amended shall read as follows:

RULE 41. LIMITED LIABILITY ENTITIES

(1) *Definitions.* The following terms used in this rule shall have the meanings set forth below:

(a) "Limited liability entity" shall mean a professional corporation, a professional limited liability company, or a limited liability partnership, that engages in the practice of law in the State of New Hampshire and which is organized under the laws of any state or the District of Columbia which permits a limited liability entity to be engaged in the practice of law.

(b) "Owner" shall mean a shareholder of a professional corporation, a member of a professional limited liability company, or a partner of a limited liability partnership.

(c) "Manager" shall mean an individual who is licensed to practice law in this state or who is duly licensed by the licensing authority of a state or territory of the United States or the District of Columbia and who is named as a manager of a professional limited liability company in or designated as a manager of a professional limited liability company pursuant to a professional limited liability company agreement or similar instrument under which the professional limited liability company is formed.

(2) *Applicable Law.* The provisions of the laws of this state shall be applicable to attorneys practicing law in this state, subject to the terms and conditions of this rule. Nothing in this rule is to be construed to permit a limited liability entity not authorized by New Hampshire statute to carry on the practice of the law in New Hampshire to do so.

(3) *Shareholders, Members, Managers, Officers, Directors, Employees.* In addition to other provisions required by law, each limited liability entity shall assure compliance with the following requirements:

(a) All owners shall be persons who are duly licensed by this court to practice law in this state, or who are duly licensed by the licensing authority of a state or territory of the United States or the District of Columbia.

(b) All owners shall be in good standing before this court or before the licensing authority of the jurisdiction(s) in which they are actively engaged in the practice of law.

(c) All owners shall own their shares or other ownership interests in their own right.

(d) All owners shall be persons who, except for temporary absence due to illness or accident, time spent in the Armed Services of the United States, vacations and leaves of absence not to exceed two years, are actively engaged in the practice of law with the limited liability entity, in this state or in another jurisdiction in which they have been admitted to practice.

(e) Any owner who ceases to be eligible to be an owner and the executor, administrator, or other legal representative of a deceased or incapacitated owner shall be required to dispose of that owner's shares or other ownership interest as soon as reasonably possible, either to the limited liability entity or to an individual duly qualified to be an owner of the limited liability entity.

(f) All owners and managers of and attorneys employed by a limited liability entity shall by being licensed to practice law in this state, be subject to and bound by the provisions of this rule, including, without limitation, paragraph (10) hereof.

(g) All directors and officers of a professional corporation and all members, managers and officers of a professional limited liability company, as the case may be, shall be owners.

(h) No owner or attorney employed by a limited liability entity shall be an owner, director, officer, member or manager of more than one limited liability entity; provided, however, that an attorney who is acting as the fiduciary representative of the estate of an attorney may hold the stock or other interest of the attorney in another limited liability entity for a reasonable time during administration of the estate.

(i) Attorneys who are partners, members, managers, or employees of the limited liability entity and who practice law in New Hampshire shall be duly licensed by this court to practice law.

(j) One or more owners of the limited liability entity shall be admitted to practice law by this court and shall be engaged in the practice of law in New Hampshire.

(4) *Standards of Conduct.*

(a) Nothing in this rule shall be deemed to diminish or change the obligation of each attorney who is an owner of or who is employed by the limited liability entity to conduct the practice of law in accordance with generally recognized standards of professional conduct and in accordance with the specific standards which may be promulgated by this court or the licensing authority of the jurisdiction(s) in which the attorney practices. Any attorney who, by act or omission, causes the entity to act or fail to act in a way which violates any applicable standard of professional conduct, including any provision of this rule, shall be personally responsible for such act or omission and shall be subject to discipline therefor.

(b) The final responsibility for the delivery of professional services in this state shall be vested in New Hampshire licensed attorneys.

(5) *Confidentiality.* Nothing in this rule shall be deemed to modify, abrogate or reduce the attorney-client privilege or any comparable privilege or relationship, whether statutory or derived from the common law.

(6) *Name.* The name of the limited liability entity shall contain words or abbreviations which indicate that it is a limited liability entity.

(7) *Identity of Non-Resident Attorneys.*

(a) Within thirty (30) days after the organization of a limited liability entity under the laws of the State of New Hampshire or the qualification to do business in New Hampshire of a foreign limited liability entity, the limited liability entity shall file with the clerk of this court a written list of the names and addresses of the owners or managers of the limited liability entity who are not licensed to practice law in the State of New Hampshire and a notarized statement certifying that such owners are in good standing before the licensing authority of the jurisdiction(s) in which they are actively engaged in the practice of law. Within thirty (30) days after any change in the status of such owners, a revised list setting forth the information required by the preceding sentence shall be filed with the clerk of this court. There shall also be filed with the clerk of this court such other information as this court may from time to time prescribe.

(b) In the event that any disciplinary proceeding shall be instituted against any attorney not licensed in New Hampshire who is an owner, manager, or employee of a limited liability entity, notice of such proceeding shall be given to the clerk of this court forthwith.

(c) All applications, reports, and other documents required to be filed with this court by this rule shall be signed and verified by an owner of the limited liability entity who is an attorney licensed to practice law by this court.

(8) *Trust Accounts.* Each limited liability entity which maintains an office in a state other than the State of New Hampshire shall comply with the provisions of Rules 50 and 50-A, subject, however, to any requirements which may be imposed by the comparable rules adopted by the highest court of that state with respect to trust funds being maintained in that state. To the extent that the rule of such other state may apply to trust funds maintained in that state, the limited liability entity shall comply with such rule and shall so certify to the clerk of this court annually on or before August 1.

(9) *Letterhead.* A limited liability entity which practices law in a jurisdiction other than New Hampshire and which lists its employees on its letterhead and in other permissible listings shall do so in a manner which makes clear the jurisdictional limitations on those employees of the limited liability entity not licensed to practice in all listed jurisdictions.

(10) *Liability.* The liability of individuals and limited liability entities for performance of professional services in this state shall be determined under the common law and statutory law of this state.

January 22, 1998

Howard J. Zibel
Clerk of Court
New Hampshire Supreme Court
1 Noble Drive
Concord, NH 03301

Dear Mr. Zibel:

At its meeting on January 20, 1998, the Advisory Committee on Rules voted to submit a proposed amendment of Supreme Court Rule 41 to the supreme court. The proposed amendment would strike out current Rule 41, entitled "Professional Associations," in its entirety and replace it with a new Rule 41, entitled "Limited Liability Entities." Whereas Rule 41 now addresses lawyers who become members of professional associations or professional limited liability companies, the proposed new Rule 41 would address lawyers involved in professional corporations, professional limited liability companies, and limited liability partnerships.

A prior draft of the proposal was submitted to public hearing on June 24, 1997. Comments were received in writing from Attorneys John M. Cunningham and John S. Holland, both of whom spoke at the hearing about their comments. As a result, the proposed rule was redrafted with the assistance of Attorneys Cunningham and Holland. In addition to changes related to their written comments, the rule was also changed by adding a definition of "manager" and a final paragraph dealing with liability.

Attached are copies of the written comments received regarding the original draft. In addition, I have prepared an annotated version of the proposed rule that shows the changes made to the original draft that went to public hearing.

Pursuant to Supreme Court Rule 51, and after consultation with the chairman of the Advisory Committee, I am authorized to state that the committee believes that the court should take action on this proposal prior to the time for action on the next annual submission. Public hearing was held on this rule in June

Howard J. Zibel, Clerk
Page 2
January 22, 1998

1997, and no reason appears as to why action should not be taken at this time on the rule, following public notice and a period for comment. The committee did not vote to recommend that the court hold an optional public hearing on this proposal. See Sup. Ct. R. 51(8)(a).

Pursuant to Rule 51(4)(c), the following summary of proposed Rule 41 is submitted for distribution:

Proposed Rule 41 regulates professional corporations, professional limited liability partnerships, and limited liability companies that engage in the practice of law in the State of New Hampshire. The full text of proposed Rule 41 may be obtained upon request directed to Howard J. Zibel, Clerk of Court, New Hampshire Supreme Court, 1 Noble Drive, Concord, NH 03301.

Please contact me if I can provide any additional information.

Very truly yours,

David S. Peck
Secretary

ANNOTATED FINAL DRAFT OF RULE 41

[This annotation shows the difference between the draft rule submitted to public hearing by the Rules Committee in June 1997 and the final draft now being recommended to the court for adoption. Additions to the draft rule are in bold; deletions are ~~stricken out~~. (Those portions of the rule below that are underlined are from the original draft, and should be in bold in the final, unannotated draft. I changed them from bold to underlined to avoid confusion.)]

RULE 41. LIMITED LIABILITY ENTITIES

(1) *Definitions.* The following terms used in this rule shall have the meanings set forth below:

(a) "Limited liability entity" shall mean a professional corporation, a professional limited liability company, or a limited liability partnership, that engages in the practice of law in the State of New Hampshire and which is organized under the laws of any state or the District of Columbia which permits a limited liability entity to be engaged in the practice of law. ~~organized to practice law pursuant to the laws of the State of New Hampshire.~~

(b) "Owner" shall mean a shareholder of a professional corporation, a member of a professional limited liability company, or a partner of a limited liability partnership.

(c) "Manager" shall mean an individual who is licensed to practice law in this state or who is duly licensed by the licensing authority of a state or territory of the United

States or the District of Columbia and who is named as a manager of a professional limited liability company in or designated as a manager of a professional limited liability company pursuant to a professional limited liability company agreement or similar instrument under which the professional limited liability company is formed.

(2) *Applicable Law.* The provisions of the laws of this state ~~under which the limited liability entity has been organized~~ shall be applicable to attorneys practicing law in this state, subject to the terms and conditions of this rule. Nothing in this rule is to be construed to permit a limited liability entity not authorized by New Hampshire statute to carry on the practice of the law in New Hampshire to do so.

(3) *Shareholders, Members, Managers, Officers, Directors, Employees.* In addition to other provisions required by law, each limited liability entity shall assure compliance with the following requirements:

(a) All owners shall be persons who are duly licensed by this court to practice law in this state, or who are duly licensed by the licensing authority of a state or territory of the United States or the District of Columbia.

(b) All owners shall be in good standing before this court or before the licensing authority of the jurisdiction(s) in which they are actively engaged in the practice of law.

(c) All owners shall own their shares or other

ownership interests in their own right.

(d) All owners shall be persons who, except for temporary absence due to illness or accident, time spent in the Armed Services of the United States, vacations and leaves of absence not to exceed two years, are actively engaged in the practice of law with the limited liability entity, in this state or in another jurisdiction in which they have been admitted to practice.

(e) Any owner who ceases to be eligible to be an owner and the executor, administrator, or other legal representative of a deceased or incapacitated owner shall be required to dispose of that owner's shares or other ownership interest as soon as reasonably possible, either to the limited liability entity or to an individual duly qualified to be an owner of the limited liability entity.

(f) All owners and managers of and attorneys employed by a ~~of the~~ limited liability entity shall by being licensed to practice law in this state, be subject to and bound by the provisions of this rule, including, without limitation, paragraph (10) hereof. ~~by becoming owners, agree to the provisions of this rule.~~

(g) All directors and officers of a professional corporation and all members, managers and officers of a professional limited liability company, as the case may be, shall be owners.

(h) No owner or attorney employed by a limited liability entity shall be an owner, director, officer, or

member or manager of more than one limited liability entity; provided, however, that an attorney who is acting as the fiduciary representative of the estate of an attorney may hold the stock or other interest of the attorney in another limited liability entity for a reasonable time during administration of the estate.

(i) Attorneys who are partners, members, managers, or employees of ~~employed by~~ the limited liability entity and who practice law in New Hampshire shall be duly licensed by this court to practice law.

(j) One or more owners of the limited liability entity shall be admitted to practice law by this court and shall be engaged in the practice of law in New Hampshire.

(4) *Standards of Conduct.*

(a) Nothing in this rule shall be deemed to diminish or change the obligation of each attorney who is an owner of or who is employed by the limited liability entity to conduct the practice of law in accordance with generally recognized standards of professional conduct and in accordance with the specific standards which may be promulgated by this court or the licensing authority of the jurisdiction(s) in which the attorney practices. Any attorney who, by act or omission, causes the entity to act or fail to act in a way which violates any applicable standard of professional conduct, including any provision of this rule, shall be personally responsible for such act or omission and shall be subject to discipline therefor.

(b) The final responsibility for the delivery of professional services in this state shall be vested in New Hampshire licensed attorneys.

(5) *Confidentiality.* Nothing in this rule shall be deemed to modify, abrogate or reduce the attorney-client privilege or any comparable privilege or relationship, whether statutory or derived from the common law.

(6) *Name.* The name of the limited liability entity shall contain words or abbreviations which indicate that it is a limited liability entity.

(7) *Identity of Non-Resident Attorneys.*

(a) Within thirty (30) days after the organization of a limited liability entity under the laws of the State of New Hampshire or the qualification to do business in New Hampshire of a foreign limited liability entity, the limited liability entity shall file with the clerk of this court a written list of the names and addresses of the owners or managers of the limited liability entity who are not licensed to practice law in the State of New Hampshire and a notarized statement certifying that such owners are in good standing before the licensing authority of the jurisdiction(s) in which they are actively engaged in the practice of law. Within thirty (30) days after any change in the status of such owners, a revised list setting forth the information required by the preceding sentence shall be filed with the clerk of this court. There shall also be filed with the clerk of this court such other information as

this court may from time to time prescribe.

(b) In the event that any disciplinary proceeding shall be instituted against any attorney not licensed in New Hampshire who is an owner, manager, or employee of a limited liability entity, notice of such proceeding shall be given to the clerk of this court forthwith.

(c) All applications, reports, and other documents required to be filed with this court by this rule shall be signed and verified by an owner, ~~officer, director, or~~ member of the limited liability entity who is an attorney licensed to practice law by this court.

(8) *Trust Accounts.* Each limited liability entity which maintains an office in a state other than the State of New Hampshire shall comply with the provisions of Rules 50 and 50-A, subject, however, to any requirements which may be imposed by the comparable rules adopted by the highest court of that state with respect to trust funds being maintained in that state. To the extent that the rule of such other state may apply to trust funds maintained in that state, the limited liability entity shall comply with such rule and shall so certify to the clerk of this court annually on or before August 1.

(9) *Letterhead.* A limited liability entity which practices law in a jurisdiction other than New Hampshire and which lists its employees on its letterhead and in other permissible listings shall do so in a manner which makes clear the jurisdictional limitations on those employees of

the limited liability entity not licensed to practice in all listed jurisdictions.

(10) *Liability.* The liability of individuals and limited liability entities for performance of professional services in this state shall be determined under the common law and statutory law of this state.

JOHN M. CUNNINGHAM
OF COUNSEL
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MEMORANDUM

To: Members of committee drafting possible
revisions of Rule 41
From: John M. Cunningham
Date: June 24, 1997
Subject: Comments on current draft (the "Draft")

Dear committee members:

I am a member of the New Hampshire Bar, and I am of counsel to the Concord, New Hampshire law firm of Ransmeier & Spellman, P.C. I was a member of the committee that drafted New Hampshire's original limited liability company act (the "LLCA"), effective July 1, 1993. I was also a member of the committee which has drafted extensive LLCA revisions, which became law on June 9, 1997. Most of these revisions will become effective on August 8, 1997. In addition, I testified in favor of the limited liability partner ("LLP") amendments to the New Hampshire Uniform Partnership Act, which became effective on August 1, 1995.

I wish to make the following comments about the above Draft.¹

1. Authorization of use of LLPs by New Hampshire lawyers. It appears that among the principal purposes of the Draft is to authorize New Hampshire lawyers, subject to certain restrictions, to practice as partners and employees of LLPs. In essence, this will put New Hampshire lawyers who are LLP partners and employees in the same disciplinary and legal position as New Hampshire lawyers who are shareholders, directors and employees (i.e., associates) of professional corporations ("PCs").

The New Hampshire Supreme Court has already long since approved practice by New Hampshire lawyers as shareholders, directors and employees of PCs. I can conceive of no legal or policy factor that would make it in the public interest for New Hampshire lawyers to be allowed to practice in PCs but not in LLPs. Accordingly, it seems to me to be appropriate to allow New Hampshire lawyers to practice as partners and employees of LLPs.

¹ These comments do not necessarily reflect the views of any Ransmeier & Spellman attorney except the author.

2. Clarifications concerning use of PLLCs by New Hampshire lawyers. It appears that another principal purpose of the Draft is to clarify that New Hampshire lawyers may practice not only as members but also as managers and employees of professional limited liability companies ("PLLCs"). This clarification seems to me to be a useful improvement of the existing, slightly ambiguous terms of Rule 41. It also seems to me to be entirely consistent with long-standing Rule 41 provisions permitting New Hampshire lawyers who are shareholders, directors and employees of PCs to practice law in New Hampshire.

3. Proposed technical changes involving the concept of manager. I propose a small number of technical changes in the Draft to make it more consistent with technical concepts in New Hampshire partnership and LLC business organization law. In an LLP, a person may be either a partner or an employee (a lawyer who works for an LLP but is not a partner). In a PLLC, a person may be an owner (a "member"), a manager or officer (essentially the same as a PC director) or an employee (someone who works as a lawyer for a PLLC but is not an owner or manager).

I have marked and circled in ink the changes in the text of the Draft that, in my view, will accurately reflect these concepts. Briefly, the Draft should be clarified to make it explicit that New Hampshire lawyers may practice in LLPs not only as partners but also as employees; and that they may practice in PLLCs not only as members but also as managers, officers and employees.

4. Proposed express reference to single-owner PCs and PLLCs. Rule 41 has always by clear implication permitted New Hampshire lawyers in solo practice to practice as owners of single-shareholder PCs. On June 9, 1997, Governor Shaheen signed into law 1997 Laws, Chapter 120, which, among other things, authorizes single-member LLCs and, by implication, single-member PLLCs.

Accordingly, I propose that the Draft be revised to make it explicit that New Hampshire lawyers in solo practice may practice as owners of single-member PLLCs or single-shareholder PCs. The express authorization of single-member PLLCs will simply apply to PLLCs the same Rule 41 authorization which, as indicated, has long applied by clear implication to PCs.

Sincerely,


John Cunningham

Attachment

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with one or more members

Amend Supreme Court Rule 41 by striking out said rule in its entirety and inserting in place thereof the following so that said rule as amended shall read as follows:

with one or more shareholders,

RULE 41. LIMITED LIABILITY ENTITIES

(1) **Definitions.** The following terms used in this rule shall have the meanings set forth below:

(a) "Limited liability entity" shall mean a professional corporation, ^{or} a professional limited liability company, ~~or a limited liability partnership~~ organized to practice law pursuant to the laws of the State of New Hampshire.

Limited liability partnership

(b) "Owner" shall mean a shareholder of a professional corporation, a member of a professional limited liability company, or a partner of a limited liability partnership.

(2) **Applicable Law.** The provisions of the laws of this state under which the limited liability entity has been organized shall be applicable to attorneys practicing law in this state, subject to the terms and conditions of this rule. Nothing in this rule is to be construed to permit a limited liability entity not authorized by New Hampshire statute to carry on the practice of the law in New Hampshire to do so.

(3) **Shareholders, Members, Officers, Directors.** In addition to other provisions required by law, each

possible, either to the limited liability entity or to an individual duly qualified to be an owner of the limited liability entity.

(f) All owners of the limited liability entity shall, by becoming owners, agree to the provisions of this rule.

managers,

(g) All directors [and officers] of a professional corporation and all members [and officers] of a professional limited liability company, as the case may be, shall be owners.

add

(h) No owner or attorney employed by a limited liability entity shall be an owner, director, officer, or member of more than one limited liability entity; provided, however, that an attorney who is acting as the fiduciary representative of the estate of an attorney may hold the stock or other interest of the attorney in another limited liability entity for a reasonable time during administration of the estate.

MANAGER

(i) Attorneys ^{and} employed by the limited liability entity who practice law in New Hampshire shall be duly licensed by this court to practice law.

(j) One or more owners of the limited liability entity shall be admitted to practice law by this court and shall be engaged in the practice of law in New Hampshire.

who are partners; members or employees

MEMORANDUM

TO: Supreme Court Advisory Committee on Rules
FROM: John S. Holland - Devins Millimet & Branch, Professional Association
RE: Proposed Rule 41
DATE: June 23, 1997

The following are comments I offer for consideration by the Advisory Committee in connection with the adoption of revisions to Rule 41:

1. The proposed rule requires that a limited liability entity carrying on business in the state of New Hampshire be organized under the laws of the state of New Hampshire, but permits persons who have an ownership interest to be either lawyers licensed in New Hampshire or licensed in other jurisdictions. The requirement that the limited liability entity be organized under New Hampshire law is a more restrictive limitation than that imposed by RSA 294-A relating to professional corporations and RSA 304-D providing for professional limited liability companies. Each of those statutes permits a foreign limited liability entity to carry on business in the state of New Hampshire, provided that it registers to do business.
2. There are no restrictions imposed by statute or by rule which prohibit a foreign partnership from conducting legal business in New Hampshire through duly licensed New Hampshire lawyers. RSA 311:11 prohibits corporations from practicing law in New Hampshire. This prohibition is modified by RSA 311:11-a which permits professional corporations organized under New Hampshire law to carry on business in New Hampshire. RSA 311:11 contains no restriction with respect to professional limited liabilities companies.
3. It would require an amendment to RSA 311:11-a to permit foreign professional corporations to carry on business in New Hampshire after the professional corporations had qualified to do business. Only Rule 41 and not the statute would impose such a restriction upon a professional limited liability company. The restriction appears to be of little value once the ownership issue with respect to professional corporations and limited liability companies has been opened up.

For example, Massachusetts permits foreign professional corporation to register to do business and to do business in Massachusetts through Massachusetts licensed attorneys. If a Massachusetts professional association or professional limited liability company desired to carry on business in New Hampshire, it could form a New Hampshire professional corporation or New Hampshire professional limited liability company and merge the existing limited liability entity into the New Hampshire entity. If the practice thereafter in New Hampshire were carried on by duly licensed New Hampshire lawyers and the practice in Massachusetts were then carried on by duly licensed Massachusetts lawyers, there would be complete compliance with proposed Rule 41 as for as those aspects go.

5. It seems to me that, if the provision of legal services in a jurisdiction can be done only through attorneys who are duly licensed in that jurisdiction, the Supreme Court has adequate authority to control the practice of law and subject to discipline lawyers who violate the standards of conduct as set forth in paragraph (4)(a) of the proposed rule.

Accordingly, I would suggest that the following changes to Proposed Rule 41 be made:

1. Change the definition contained in paragraph (1)(a) to read as follows:

“(a) “Limited liability entity” shall mean a professional corporation, a professional limited liability company or limited liability partnership organized under the laws of any state or the District of Columbia which permits a limited liability entity to be engaged in the practice of law.”
2. Amend paragraph (2) by deleting the words “under which the limited liability has been organized” so that the first sentence of said section reads as follows:

“The provisions of the laws of this state shall be applicable to attorneys practicing law in this state, subject to the terms and conditions of this rule.” [No change is needed to the second sentence since RSA 304-C, for example, contains such authorization].

MEMORANDUM

Supreme Court Advisory Committee on Rules

June 23, 1997

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3. Amend paragraph (7)(a) by adding the following words in the second line after the word "entity": "under the laws of the state of New Hampshire or the qualification to do business in New Hampshire by a limited liability entity" so that the first sentence of paragraph (7)(a) reads as follows:

"Within thirty (30) days after the organization of a limited liability entity under the laws of the state of New Hampshire or the qualification to do business in New Hampshire of a limited liability entity, the limited liability entity shall file with the clerk of this court a written list of the names and addresses of the owners of the limited liability entity who are not licensed to practice law in the state of New Hampshire and a notarized statement certifying that such owners are in good standing before the licensing authority of the jurisdiction(s) in which they are actively engaged in the practice of law."

In order to make the suggested changes fully operative it will be necessary for a change to be made in RSA 311:11-a.

JSH:ris