

2022-014 -- Voluntary Corporations Formed for the Purpose of Providing Professional Legal Services to the Poor (RSA 292:1-a)

Report of Subcommittee (comprised of Justice Robert Lynn, Jeanne Herrick, and Sean Gill conferring with NH Solicitor General Anthony Galdieri)

September 5, 2023

Background:

RSA 292:1-a permits five or more persons to form a corporation for the purpose of providing legal services to the poor, provided that the Supreme Court approves the organization's articles of association and by-laws and finds that the corporation is a "responsible organization." The statute does not include any criteria for assessing whether an organization is "responsible."

Last September, the Children's Law Center of New Hampshire filed a petition for RSA 292:1-a approval. The Attorney General's Office was invited to respond. It noted the absence of any established criteria for assessing whether an organization is "responsible," identified assessment criteria employed in comparable circumstances by other states, and recommended that the court adopt similar criteria. The court approved the Children's Law Center petition last November and referred the recommendation for adopting criteria to the Advisory Committee on Rules.

That referral was docketed for the Advisory Committee on Rules' March 10, 2023 meeting. A subcommittee of Justice Lynn, Jeanne Herrick, and Sean Gill was formed to study the submission. NH Solicitor General Anthony Galdieri—who authored the Attorney General's response to the Children's Law Center petition—was invited to confer with the subcommittee. The subcommittee has met (virtually) several times since.

Discussion:

RSA 311:11 prohibits a corporation from practicing law, appearing as an attorney in any court or judicial body in the state, or holding itself out to the public as entitled to practice law. *Cf.*, RSA 311:11-a ("[t]he 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."). RSA 292:1-a represents a limited exception to that prohibition; it allows five or more persons to incorporate for purposes of providing legal services to the poor. The incorporators do not have to be licensed to practice law in New Hampshire.

Relatively few organizations have incorporated under RSA 292:1-a. An initial query by the Secretary of State's Office identified only a handful (i.e., NH Public Defender, NH Legal Assistance, 603 Legal Aid, etc.). The Director of the Attorney General's Office Charitable Trust Unit recalls only one or two organizations registering with her office during her tenure. Subcommittee member Justice Lynn did not recall any petitions for approval while he was on the court.

The fact that incorporators under RSA 292:1-a are required to obtain supreme court approval before commencing business is an acknowledgement that the endeavor implicates considerations unique to the legal profession. Those qualified and admitted to practice law are subject to strict oversight and potential criminal penalty or loss of license for violation of legal and ethical standards. The court stands as gatekeeper for determining whether an organization formed under RSA 292:1-a appears sufficiently responsible to meet its legal and ethical obligations.

The participation of non-lawyers in the operation of this kind of organization raises concerns unique to the legal profession—including: issues involving the unauthorized practice of law, potential interference with the attorney’s professional judgment, handling fees (whether collected from a client or recovered from an opposing party), or erroneously suggesting that the organization (rather than the lawyers it employs) are engaged in the practice of law. *See generally, Are Organizations that Provide Free Legal Services Engaged in the Unauthorized Practice of Law?, Fordham Law Review, Vol. 67, Issue 5, Article 25 (1999).* At least a half dozen other states allowing legal services organizations have established criteria that must be addressed to the state supreme court or bar association’s satisfaction before being approved to operate. Among those, a petitioner is typically required to specifically state:

- (a) The structure of the organization and whether it accepts funds from clients;
- (b) The major source of funds used by the organization;
- (c) The criteria used to determine whether potential clients’ eligibility for legal services performed by the organization;
- (d) The types of legal and nonlegal service the organization performs;
- (e) The names of all bar members employed by the organization who regularly perform legal work for the organization; and
- (f) The existence and extent of malpractice insurance that will cover the attorneys providing *pro bono* services.

See, e.g., Alabama Rules Professional Conduct, Rule 6.6, Special Membership for Pro Bono Services.

To the extent that RSA 292:1-a requires the court to make a finding whether a voluntary corporation formed for the purpose of providing legal services to the poor constitutes a “responsible organization,” the subcommittee recommends the adoption of a rule establishing similar criteria by which an assessment can be made as objectively as possible. The criteria suggested are geared toward identifying potential pitfalls in the structure, staffing, and operation of the organization that might implicate unauthorized practice of law and/or fee handling issues. The criteria also provide clear, uniform guidance to persons seeking to operate such organizations in New Hampshire that they need to file a petition with the court before commencing

operations and tells them what information a petition under RSA 292:1-a should minimally contain so they are not left to guess about what the contents of such a petition should be.

The court is best situated to know whether a rule with established criteria will help it determine whether petitioning organizations are “responsible.” The Attorney General’s Office, which has been invited to respond to such petitions in the past, believes that a such rule would: (1) help focus a review and identify potential problem areas at the outset; (2) help ensure the court’s review of such petitions is uniform across all petitioners and transparent in its requirements; (3) help the court decide whether it would like any input from the Attorney General’s Office in relation to the petition; and (4) help the Attorney General’s Office fashion a more informed response in the event its input is invited.

The subcommittee offers the following text of a proposed Supreme Court Rule for the full committee’s consideration with a recommendation to adopt a rule and put it out for public comment at the December meeting:

RULE ____ . Petition to Approve Corporation Providing Legal Services to the Poor

Pursuant to RSA 292:1-a, five or more persons of lawful age may associate together by articles of agreement to form a corporation, without a capital stock, for the purpose of providing professional legal services to the poor; provided, however, that no such corporation shall commence business until its articles of agreement and by-laws, and such other information as may be required, have been submitted to the supreme court for approval and such court has authorized it to commence business upon finding that it is a responsible organization. Any organization seeking authorization from the Supreme Court to operate under this statute must file a petition with the clerk of the Supreme Court that includes, at a minimum, the following:

- (a) A description of the organization’s structure;
- (b) The types of legal and non-legal services the organization will perform;
- (c) The names of all New Hampshire bar members employed by or regularly performing legal work for the organization;
- (d) The criteria used to determine potential clients’ eligibility for legal services;
- (e) The major source of the organization’s funds;
- (f) Whether the organization accepts funds from or on behalf of its clients;
- (g) The existence and extent of malpractice insurance that will cover any attorneys providing legal services;

(h) An acknowledgement that the organization has registered, or will register, with the Charitable Trusts Unit of the New Hampshire Attorney General's office as required by RSA 7:28; and

(i) A copy of the organization's articles of agreement and by-laws.

An organization is not precluded from providing any other or additional information it believes will help the Supreme Court determine whether the organization is providing legal services to the poor and is a responsible organization. Consistent with RSA 292:1-a, authorization to commence business may, after hearing, be revoked or suspended for just cause. The actual practice of law by an organization approved by the Supreme Court pursuant to this rule shall be conducted solely by members of the New Hampshire bar in good standing, unless a Supreme Court rule permits otherwise.