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FISCAL IMPACT REPORT

ORIGINAL DATE 2/16/09

SPONSOR Egolf LAST UPDATED _____ HB 472

SHORT TITLE Attorneys Forming Limited Liability Companies SB _____

ANALYST Hoffmann

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	NFI See Narrative		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Attorney General's Office (AGO)

SUMMARY

Synopsis of Bill

House Bill 472 amends NMSA Section 53-19-6 of the Limited Liability Company Act (NMSA Chapter 53 Article 19) to allow a limited liability company to conduct or promote any lawful business or purpose, "including the practice of law or operation of a law firm".

FISCAL IMPLICATIONS

House Bill 472 makes no appropriations.

SIGNIFICANT ISSUES

The AGO¹ states that this bill appears to allow a limited liability company to practice law or operate a law firm. It may be intended to allow attorneys to form those entities in order to render professional services through the company, and to avoid liability to third persons. Members of a limited liability company are generally not liable for the debts, obligations, and liabilities of the company (NMSA Section 53-19-13).

New Mexico court cases have described limited liability companies as “artificial entities” which may not practice law and must be represented by a licensed attorney. *Martinez v. Roscoe*, 131 N.M. 137, 33 P.3d 887, (Ct. App. 2001); *Lee v. Catron, Catron & Pottow*, 2008-NM-0922.210 (Ct. App. 2008).

The New Mexico Supreme Court has exclusive jurisdiction to govern the practice of law in this state. NMSA Section 36-2-1. There are no provisions in the Rules of the Supreme Court allowing an artificial entity to practice law or limiting the liability of attorney members of those entities in the practice of law. The Supreme Court has held that professional corporations cannot shield an attorney shareholder from liability for mistakes or professional misdeeds. *Sanders, Bruin, Coll & Worley, P.A. v. McKay Oil Corp.*, 123 N.M. 457, 943 P.2d 104 (1997). Presumably that ruling would apply to a limited liability company formed by attorneys, even if they could practice law in the name of the company.

New Mexico Supreme Court rules also prohibit ownership of law firms by non-lawyers. See NMRA 16-504. This rule would prevent a limited liability company from operating a law firm as contemplated by this bill.

Given those court rules and holdings, there are strong legal arguments that it is unlikely that attorneys would be allowed to practice law through a limited liability company, or shield themselves from liability by forming such an entity, regardless of the changes to state law proposed in this bill.

The AOC² provided the following description of LLCs taken from Lawyers.com:

An **LLC** ... shares features of corporations and partnerships, including powers and recordkeeping duties. An LLC is treated as a corporation for limited liability purposes but as a general partnership for tax purposes. The owners are called "members." LLC formation requires the members to file a certificate of formation or a similar incorporate llc certificate with Secretary of State where the LLC will operate. An operating agreement governs the LLC's affairs.

The State Bar of New Mexico’s Ethics Advisory Committee issued an advisory opinion no. 2009-01, that concludes it is unclear whether attorneys may rely on the New Mexico LLC statute to limit liability. (It should be noted that Rule 24-107, NMRA, and NMSA 1978, section 53-19-13 both prohibit attorneys from attempting to waive their personal liability for personal acts of negligence.) The reasoning of the advisory opinion is that because the professional corporation statute mentions law firms expressly, and the LLC statute does not, it is arguable that the Legislature may have intended that the LLC statute not apply to law firms. At the very least, the advisory opinion has created uncertainty about risk contingencies for the many firms so formed.

House Bill 472 addresses this ethics advisory opinion by clarifying what the opinion states is vague. A law firm or practice would now be, expressly, a lawful business or purpose. The Bill would resolve the uncertainty and allow attorneys to proceed with the business form they find most advantageous.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The AGO states that the Limited Liability Company Act would not be amended to allow limited liability companies to practice law or operate law firms.

CH/mt

1 The Attorney General’s Office provides the following disclaimer.

“This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Opinion letter.

This is a staff analysis in response to the agency’s, committee’s or legislator’s request.”

2 The Administrative Office of the Courts provides the following disclaimer.

“THIS BILL ANALYSIS IS SUBMITTED BY THE AOC AND SHALL NOT BE CONSTRUED AS A SUBMISSION BY THE SUPREME COURT OR ANY OTHER COURT.”