November 13, 2000

TO: NCCUSL Drafting Committee on the Limited Partnership Act and the Committee's Advisors and Observers

FROM: Professor Daniel S. Kleinberger, Reporter

RE: Discussion of Re-RULPA at 11/10/00 Meeting of ABA Committee on Partnerships and Unincorporated Business Organizations

At its November 10, 2000 meeting, the ABA Business Law Section's Committee on Partnerships and Unincorporated Business Organizations discussed Re-RULPA. NCCUSL sent me to that meeting, so that I could hear the discussion directly and also to signify by my presence NCCUSL's interest in working with the ABA. I believe that both Lauris Rall and Bob Keatinge will be attending our December meeting, and I expect that they will describe in detail the Committee's concerns.

In the interim, I will summarize here two of the major topics of discussion which I found particularly interesting:

1. the Haynsworth flip – The ABA committee remains divided on this topic. The discussion included at least two aspects that seemed somewhat new:

    a. For many years following Re-RULPA's promulgation, most of the limited partnerships covered by the new act will be entities formed under prior acts. These preexisting limited partnerships will be dragged into Re-RULPA, and most will never become LLLPs.

        i. How, if at all, does this fact affect the wisdom of the flip?

        ii. It can be argued that a statute's "default setting" should reflect the arrangements that will apply to most of the entities governed by the statute. According to that argument, we should un-flip, at least until Re-RULPA LLLPs begin to predominate over Re-RULPA non-LLLPs.

    b. Is it appropriate to do the flip and nonetheless call the entity a limited partnership and the act a limited partnership act (as distinguished from, respectively, a limited liability limited partnership and the uniform limited liability limited partnership act)?

2. delegation of general partner managerial duties to one or more limited partners – Under ordinary agency law principles a general partner may delegate responsibilities to some other person, but that delegation does not by itself discharge the general partner's duty to

the limited partnership and the limited partners. The current draft, following ULLCA, creates a special rule when the delegation occurs via the partnership agreement. Section 408(f) provides:

> A general partner is relieved of liability imposed by law for violation of the standards prescribed by subsections (b) through (e) to the extent the partnership agreement vests managerial authority in one or more of the limited partners. permits a general partner to delegate managerial duties to one or more limited partners.

In agency law terms, under this provision the general partner's delegation discharges the general partner's obligations. To use the characterization that surfaced at the November 10 meeting, Section 408(f) permits a general partner to "shed" fiduciary duties and managerial responsibility.

The shedding does not, however, result in a commensurate assumption of responsibility by the limited partner. Section 305(b) provides:

> A limited partner that pursuant to the partnership agreement exercises some or all of the rights of a general partner in the management and conduct of the limited partnership's business is held to the standards of conduct for a general partner to the extent that the limited partner exercises the managerial authority vested in a general partner by this [Act].

(Emphasis added.)

3. Both aspects of this approach drew intense criticism at the November 10 meeting.

    a. Discussion began with Section 305(b), with people raising several objections, including:

        i. The provision is dangerously unclear, because Re-RULPA does not clearly delineate "the managerial authority vested in a general partner by this [Act]." As a result, the provision is unfair to limited partners, because it may:

            (1) discourage limited partners from seeking or exercising traditional oversight rights (e.g., removal of the general partner), and

            (2) cause limited partners to be blind sided by fiduciary obligations.

ii. It is unfair and illogical to provide a gap between the responsibilities shed by the general partner (total, to the extent delegated) and the responsibilities assumed by the limited partner (statutory obligations of a general partner applicable only to the extent the limited partner actually exercises the delegated responsibilities).

b. Discussion then turned to Section 408(f), which everyone recognized as Section 305(b)'s *raison d'etre*. That is, there is no need for Section 305(b) unless Re-RULPA contains Section 408(f).

c. To my ears, there seemed a strong and firm consensus that Section 408(f) is fundamentally inconsistent with Re-RULPA's basic premise (strong, entrenched centralized management), may well engender considerable confusion and does not belong in Re-RULPA. It was pointed out that eliminating Section 408(f) would eliminate the problems engendered by Section 305(b).