Time for Another New Business State: The Case for the Uniform Limited Partnership Act

Carol Goforth

Available at: https://works.bepress.com/carol_goforth/18/
Time for Another New Business Statute:  
The Case for the Uniform Limited Partnership Act

Carol Goforth  
Clayton N. Little Professor of Law  
and Associate Dean

A Little History

Arkansas has always been willing to carefully consider the merits of uniform legislation promulgated by such organizations as the National Conference of Commissioners on Uniform State Law (NCCUSL). Consider our partnership statutes. In 1941, Arkansas adopted the Uniform Partnership Act, which was substantially based upon the Uniform Partnership Act originally drafted by NCCUSL in 1914. Following a detailed report and recommendations from the American Bar Association, NCCUSL promulgated a substantially revised Uniform Partnership Act in 1994. This act, however, was quickly amended in several important ways by NCCUSL, and in 1999 Arkansas adopted the version of the Uniform Partnership Act which NCCUSL proposed in 1996, calling it the Uniform Partnership Act (1996). Arkansas’ current general partnership statute is essentially identical to NCCUSL’s Uniform Partnership Act (1996), although the state’s version does contain specific information about the repeal of the earlier Arkansas statute and other administrative matters not specified in the uniform version.

With regard to limited partnerships, Arkansas adopted the Uniform Limited Partnership Act in 1953, based upon a NCCUSL proposal. Then, in 1979, Arkansas adopted the Revised Uniform Limited Partnership Act as proposed by NCCUSL in 1976. In 1991, Arkansas enacted a number of

1. NCCUSL is an organization comprised of “more than 300 lawyers, judges and law professors, appointed by the states as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands, to draft proposals for uniform and model laws on subjects where uniformity is desirable and practicable.” NCCUSL, Background, at http://www.nccusl.org/. For a more detailed analysis of the impact of NCCUSL on Arkansas, see Phillip Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313 (1999).

2. The Arkansas Uniform Partnership Act has been codified at A.C.A. §§ 4-42-101 et seq., although it is scheduled for repeal effective January 1, 2005. It is also a statute which has been amended numerous times over the years, and so has never tracked the Uniform Act precisely.

3. Codified at A.C.A. §§ 4-46-101 et seq. This created the somewhat amusing situation of the Arkansas Legislature having adopted a statute with the date of 1906 in its title in the year 1999 to go into effect on January 1, 2000.

4. As part of this new Uniform Act, the Uniform Partnership Act which has long been codified at A.C.A. §§ 4-42-101 et seq. is set to be repealed effective January 1, 2005.


6. A.C.A. §§ 4-43-101 to -1109 (Repl. 1996), prior to amendments in 1991. The prior act was not actually repealed until
amendments to this Uniform Act, based on amendments which had been promulgated by NCCUSL in 1985. There are a smattering of non-uniform provisions in the Arkansas limited partnership statute, including provisions relating to the formation of limited liability limited partnerships (LLLPs), but the bulk of our current limited partnership statute is clearly derived from the NCCUSL model.

Even from these two limited examples, the influence of NCCUSL is obvious, and that organization has now promulgated a new uniform act, the Uniform Limited Partnership Act (2001). It is the thesis of this article that it is in the best interests of Arkansas to adopt this new statute as soon as reasonably possible.

A Word About Nomenclature

Keeping track of the correct names of the various partnership statutes is not as easy as it should be. First there was the Uniform Partnership Act, or UPA, a uniform act originally promulgated by NCCUSL in 1914. Then, at least for our purposes, there was the Arkansas version of this statute, also called the Uniform Partnership Act (and generally also referred to as the UPA). Of course, the Arkansas version is not and never has been completely identical to the uniform version, so it makes sense to have an easy way to differentiate between these two statutes. I have always preferred to talk about the UPA (for the uniform version) and the Arkansas UPA (for Arkansas’ version), and will continue to do so in this article.

NCCUSL then began working on a “Revised Uniform Partnership Act,” which quickly acquired the acronym “RUPA.” Although a version which appeared to be complete was promulgated by NCCUSL in 1994, that organization was forced to make numerous amendments in the next two years, primarily to take into account the spread of limited liability partnerships (LLPs). Once it became obvious that significant amendments were necessary, the problem with relying on the addition of “Revised” to the title of the Act (to differentiate it from the initial version) became apparent. “RUPA” is a nice, easy short-hand for the new statute, but the mere thought of having a “Re-RUPA” (for Revised, Revised Uniform Partnership Act) or “Re-Re-RUPA” (for two subsequent sets of revisions) makes it clear that this is not a road NCCUSL wanted to go down. Hence, the name “Revised Uniform Partnership Act” does not actually appear in any of the versions of the Uniform Partnership Act promulgated by NCCUSL after 1994. Instead, NCCUSL and some commentators refer to the date of the UPA version in parentheticals—for example, UPA (1996) or UPA (1997). Perhaps unfortunately, “RUPA” remains very popular among practitioners and commentators, and continues to be used by most people when discussing the newest versions of the UPA. When necessary, most of these commentators (myself included) will add the date of the version in parentheticals following the acronym “RUPA.” Thus, the version of the Uniform statute which Arkansas used when adopting our newest general partnership act was RUPA (1996). In fact, the official name of the new Arkansas general partnership statute is “Uniform Partnership Act (1996).” I know the date is confusing, since our statute was not actually passed until 1999 and did not go into

the 1991 legislative session, so for a number of years, we had both the Uniform Limited Partnership Act and the Revised Uniform Partnership Act on our books.


8. See, i.e., A.C.A. § 4-43-1110.

9. I will readily admit that in 2001, I authored another LAW NOTES article calling for a non-uniform amendment to the Arkansas Revised Uniform Partnership Act in order to alleviate some of the problems which I will raise in this brief note. See Carol R. Geforth, Limited Liability for General Partners in Arkansas LLLPs (Limited Liability Limited Partnerships), 2001 Ark. LAW NOTES 1. I still believe that such an amendment would have been desirable, but now that we have adopted the modern general partnership statute and there is a parallel uniform limited partnership act for us to consider, it makes a great deal of sense to follow NCCUSL’s lead here, as well.

10. See A.C.A. § 4-46-1202, which specifies that “[t]his chapter may be cited as the Uniform Partnership Act (1996).” Effective January 1, 2005, the prior general partnership act in this state will be repealed.

56
THE CASE FOR THE UNIFORM LIMITED PARTNERSHIP ACT

effect until 2000, and I will simply refer to the statutes as RUPA (1996) if I mean the uniform version, or the Arkansas RUPA if I mean the newer Arkansas general partnership act.

The earliest uniform limited partnership statute was the Uniform Limited Partnership Act (ULPA), and the Arkansas version of that act. Since those provisions have long been repealed in this state, we will not worry overmuch about them. With regard to revisions to that statute, there are actually two versions of the Revised Uniform Limited Partnership Act (RULPA), one of which was promulgated by NCCUSL in 1976, and a substantially amended version which was put forth in 1985. However, Arkansas has had the 1985 version for years, so we will need to distinguish only between RULPA (1985) and the Arkansas RULPA.

The proposed Uniform Act which is the primary subject of this article is NCCUSL’s new revision of the Uniform Limited Partnership Act, and goes by the official name of the Uniform Limited Partnership Act (2001). Since we already have a RULPA, I will use ULPA (2001) to refer to the most recent limited partnership statute promulgated by NCCUSL. If and when a version of this statute is adopted in Arkansas, we can refer to that as the Arkansas ULPA, with the appropriate date in a parenthetical if necessary.

Why Another Limited Partnership Statute, Why This One, and Why Now?

Some readers, remembering that I have previously opposed certain NCCUSL proposals, might well be wondering why I am advocating the adoption of this particular Uniform Act, at this time. After all, if I have not been a consistent champion of NCCUSL work product, it cannot be merely that I believe in uniformity for the sake of uniformity. In fact, if I did, I still would not necessarily be pushing for the adoption of ULPA (2001), since states have just begun to enact it into law. Instead, I advance the following justifications: (1) we are about to face a real problem in dealing with limited partnerships that have properly registered as limited liability limited partnerships (LLLPs) when the Arkansas UPA disappears on January 1, 2005; (2) we need to address the issue of linkage between our limited partnership statute and general partnership statute, because the repeal of the Arkansas UPA will create problems here; (3) there are real advantages to having general and limited partnership statutes with parallel structure and provisions; and (4) there are a number of relatively minor but cumulatively significant substantive improvements embodied in ULPA (2001) as compared to the Arkansas RULPA. I do not mean to suggest that I like or agree with everything in ULPA (2001)—I do not. But it seems to me to be a clear improvement over what we have or what we are likely to have if we do our tinkering piece-meal.

Let’s consider each of my justifications in turn.

1. What the Heck are we to do with LLLPs?

Perhaps it makes sense to start this section with a brief refresher on LLLPs and the applicable Arkansas statutes. On March 28, 1997, Governor Huckabee signed into law legislation which amended the Arkansas UPA to allow general partners in an Arkansas general partnership to limit their personal liability, at least in part, by registering the general partnership as an LLP (limited liability partnership). Under these new, non-uniform provisions, general partnerships could achieve LLP status by filing a simple application with the Arkansas Secretary of State.

At the same time as the 1997 amendments to the Arkansas UPA, the Arkansas RULPA was also amended to authorize limited partnerships to register as LLLPs (or limited liability limited partnerships) by complying with the procedures set forth in the Arkansas UPA for registering general partnerships as LLLPs. The benefit of achieving LLP or LLLP status in Arkansas under this statute was

---

11. In fact, according to the on-line version of ULPA (2001), the only jurisdiction which has adopted this statute to date (July 1, 2004) is Hawaii.
that general partners in an appropriately registered enterprise would not be "liable directly or indirectly" for debts arising out of misconduct ("errors, omissions, negligence, incompetence or misconduct committed in the course of the partnership business") by others.\footnote{14}

Then, on April 15, 1999, Governor Huckabee signed into law the Arkansas RUPA,\footnote{17} which contained provisions authorizing "improved" LLPs that insulated general partners from personal liability for any entity level debt, but which said nothing at all about LLLPs.\footnote{18} Thus, although the Arkansas UPA expressly authorizes LLLPs, the Arkansas RUPA does not.\footnote{19} Not surprisingly, since it predates the 1999 adoption of RUPA in this state by several years, the Arkansas RULPA includes no reference to the Arkansas RUPA, and does not contain any indication that LLLPs can be organized pursuant to the new partnership provisions. To make it worse, when the Arkansas legislature adopted the Arkansas RUPA, they also enacted provisions which will repeal the Arkansas UPA on January 1, 2005.

This has created a couple of problems. First, there is the illogic of a system which permits general partners in a general partnership to limit their liability for any entity-level debt, but which says that general partners in a limited partnership can only protect themselves against personal liability for debts arising out of the misconduct of others. Second, and more troubling, is the looming problem of repeal. Absent legislative intervention, on January 1, 2005, when the Arkansas UPA is repealed, the Arkansas RULPA will contain a cross reference to a statute (the Arkansas UPA) that no longer exists.\footnote{20} Presumably, such a cross reference would be a legal nullity, and in fact there are other instances where the codifiers of the Arkansas Code have simply deleted cross references to non-existent provisions.\footnote{21} The problem is that it is the cross-references between the Arkansas UPA and Arkansas RULPA which allow for the creation of LLLPs, and which specify the liability of general partners in such entities. Once limitation on the cross-referenced provisions in the Arkansas UPA are repealed, there will be no statutory provisions that explain how a limited partnership can become an LLLP, and no provision explaining what effect such an election would have on the personal liability of general partners in the LLLP. We simply do not know what will happen to existing LLLPs or to other limited partnerships that thereafter wish to register as LLLPs. Not surprisingly, this is an issue of some concern to persons involved in such enterprises.

Adoption of ULPA (2001) would provide a clear solution to these problems. The ULPA (2001) includes a free standing LLLP provision which does

\begin{footnotesize}
\begin{enumerate}
\item See provisions codified at A.C.A. §§ 4-43-1104, 1110 & 1201, as part of the Arkansas RULPA.
\item It may be worth noting that limited partners in a limited partnership had long been insulated against personal liability for debts of the partnership (unless the limited partners participated excessively in the control of the partnership). A.C.A. § 4-43-303. However, under traditional principles of partnership law, a limited partnership was required to have at least one general partner. A.C.A. § 4-43-101(7). The advantage of becoming an LLLP is that the general partner(s) of the limited liability limited partnership will be insulated from personal liability to the same extent as general partners in LLPs.
\item A.C.A. § 4-42-307(2). Note that this language appears in the Arkansas UPA.
\item Codified at A.C.A. §§ 4-46-101 et seq.
\item A.C.A. § 4-42-706.
\item RUPA even deleted the cross reference to limited partnership law that had long appeared in the UPA. See Prefatory Note, Uniform Partnership Act (1997), U.L.A. Partnership 1997 Refs & Annos (2000 Electronic P.P. Update).
\item The Arkansas RULPA specifically references A.C.A. § 4-42-307 as the statute that governs the liability of general partners in Arkansas LLLPs. A.C.A. § 4-49-1110(3). A.C.A. § 4-42-307 is one of the sections of the Arkansas UPA that will be repealed on January 1, 2005.
\item See, for example, the A.C.R.C. notes following A.C.A. § 4-43-1110, which state: "The phrase 'and § 4-32-310' following "§ 4-42-307" in subsection (3) was deleted by the Arkansas Code Revision Commission as a manifest error in reference to law pursuant to § 1-2-303, since such section does not exist."
\end{enumerate}
\end{footnotesize}
not depend on the existence of linking language in any general partnership statute.\textsuperscript{22} Moreover, the provision in ULPA (2001) insulates general partners in LLPs from personal liability to the same extent as general partners in LLPs are protected under the Arkansas RUPA (which will govern all general partnerships in this state effective January 1, 2005). Finally, ULPA (2001) operates very simply (requiring only a statement in the certificate of limited partnership rather than a separate statement of qualification).

Thus, ULPA (2001) provides a simple and egalitarian solution to the problem of LLPs in Arkansas.

2. The General Problem of Linkage.

The UPA and RULPA (including both the uniform and Arkansas versions of the statutes) were cross-linked. The UPA included provisions making that statute applicable to limited partnerships “except insofar as the statutes relating to such partnerships are inconsistent.”\textsuperscript{23} Similarly, RULPA provided that “[i]n any case not provided for . . . the provisions of the Uniform Partnership Act . . . shall apply.”\textsuperscript{24} There were in fact a significant number of issues that were not addressed in RULPA, and which therefore could be answered only by a consideration of the UPA. For example, questions relating to the rights and responsibilities of general partners generally depended upon language in the UPA, since RULPA said only that a “general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners.”\textsuperscript{25}

One of the issues which NCCUSL carefully considered during the drafting process for RUPA was whether this cross-linkage was desirable. The result of this consideration was a general partnership act which specifically eliminated any linkage to limited partnership statutes. Thus, when Arkansas adopted the Arkansas RUPA, it became essential for this state to carefully consider what to do in our limited partnership act.

The Arkansas RUPA does not contain the linking language that existed in the Arkansas UPA. In fact, under the Arkansas RUPA provision governing formation of partnerships, “partnership” is specifically defined so as to exclude an “association formed under a statute other than [this one] . . . .”\textsuperscript{26} This language comes directly from the Uniform Act, and represents an intentional decision by NCCUSL to leave the issue of linkage out of the general partnership statute entirely. In the words of the Reporter for ULPA (2001), “[t]he Drafting Committee's answer to the linkage question made inevitable NCCUSL's approval of a wholesale replacement for RULPA.”\textsuperscript{27} Arkansas must now address the same issue that NCCUSL addressed in creating ULPA (2001): do we continue to try and link our limited partnership statute to the general partnership act, and if so how, or do we create a free-standing statute to deal with limited partnerships?

At this point, Arkansas has limited options. First, the Arkansas legislature could reverse its decision to repeal the Arkansas UPA, at least as to its applicability to limited partnerships.\textsuperscript{28} Alternatively, having decided to repeal the Arkansas UPA, the Arkansas legislature could now

\textsuperscript{22} ULPA (2001), §§ 102(9) & 201(a)(4) (authorizing LLP status by including simple statement in the certificate of limited partnership) & 404(c) (specifying that LLP status provides full liability shield).

\textsuperscript{23} A.C.A. § 4-42-201(2). This language also appeared in the uniform version of the statute.

\textsuperscript{24} A.C.A. § 4-43-1107. In Arkansas, this language was actually supplemented with a specific statutory cross-reference to the Arkansas UPA (“§ 4-43-101 et seq.”).

\textsuperscript{25} A.C.A. § 4-43-403(a).

\textsuperscript{26} A.C.A. § 4-46-202(b).


\textsuperscript{28} This would, of course, take legislative action, and only makes sense if one can fathom a reason why a statute which has been deemed to be less than optimal for general partnerships should nonetheless continue to supply rules for limited partnerships.
link RULPA to RUPA, in spite of the fact this is "a result which the drafters of RUPA expressly declined to recommend."\textsuperscript{39} Finally, the state could enact an independent, stand-alone limited partnership statute, and the sooner, the better. It seems to me relatively obvious that the best of these three options is the last.

As for the first alternative, it seems relatively silly. Why would a statute which has been deemed by the legislature to be unsuitable for general partnerships be the best approach for limited partnerships, which it only governed indirectly to begin with? I have no good answer.

The second option is also problematical. It is one which was thoroughly considered by NCCUSL, and they determined that there were a number of problems which such linkage would create.\textsuperscript{30} I do not disagree with their assessment, and even if I did, there are also a number of advantages to a stand-alone act which this approach would not achieve. First, a stand-alone act is generally more convenient, keeping all of the applicable provisions in one chapter and minimizing the risk that changes to one type of enterprise might inadvertently affect another because of the cross-linkage (which is exactly the problem which we are currently facing with the imminent repeal of the Arkansas UPA). Second, it reduces ambiguity created by the lack of specificity as to which issues are addressed by which statute. Third, interpretive case-law decided in the context of one type of business organization would not automatically and sometimes unfortunately be applied in dissimilar situations to another form of business.\textsuperscript{31}

This leaves the third choice: creation of a free-standing limited partnership statute. I suppose that this does not necessarily mean we would have to turn to ULPA (2001). Arkansas legislators could certainly try their hands at drafting a stand-alone limited partnership act from scratch, but I cannot conceive of them wanting to do so, or having anything approaching the expertise that NCCUSL was able to bring to the table for this project. Moreover, I cannot believe that they would be able to do so very quickly. The problem of linkage looms large, as the Arkansas UPA is set for repeal on January 1, 2005. We have a fairly short time frame in which we really need to act. I therefore suggest that enactment of ULPA (2001) is the best course for this state to take.


My third justification for proposing the adoption of ULPA (2001) relates to the fact that this statute bears considerable similarity to the Arkansas RUPA, and I perceive significant potential advantages from having general and limited partnership statutes which are basically parallel in approach.

First, consider the number of provisions in ULPA (2001) which draw on language which also appears in the Arkansas RUPA. For example, the explanation governing the duties of general partners found in ULPA (2001) was imported from RUPA.\textsuperscript{32} The ULPA (2001) provisions governing the right of general partners to have free access to partnership information also follow the approach delineated in RUPA.\textsuperscript{33} Similarly, the ULPA (2001) provisions governing dissociation of limited partners were taken from RUPA, albeit with some modifications.\textsuperscript{34} The rules applicable to dissociation of general partners also parallel RUPA provisions.\textsuperscript{35} Language governing the substance of how partners' interests are transferred follow RUPA's formul-

\textsuperscript{39} Id. at 589.

\textsuperscript{30} For a list of such issues, I suggest again the excellent article by Professor Kleinberger. Kleinberger, supra note 27 at 589, n.35.

\textsuperscript{31} I am not the first to comment on these potential advantages of a stand-alone act. The Drafting Committee for ULPA (2001) specifically noted these potential benefits, as recited in Kleinberger, supra note 27 at 586-87, n.26.

\textsuperscript{32} ULPA (2001), § 408(b)(3).

\textsuperscript{33} ULPA (2001), § 407.

\textsuperscript{34} ULPA (2001), § 601(b).

\textsuperscript{35} ULPA (2001), § 603(5).
The rights of a partner's creditor also follow the approach taken in RUPA. This list is by no means all-inclusive, but it should be obvious even from this incomplete list that there are substantial substantive similarities between ULPA (2001) and RUPA.

The primary benefits of this type of convergence are at least three-fold. First, it will significantly reduce the learning curve for the new statute, both for practitioners who have already practiced under the Arkansas RULPA (because presumably they have already had to become familiar with the Arkansas RUPA), but especially for those who are turning their attention to partnership law for the first time (whether they are students or practitioners who are encountering their first partnership issues in practice). Second, any interpretive case law decided under the Arkansas RUPA may help frame the issues and analysis when similar issues come up under ULPA (2001). Finally, there is at least a pleasing logic in having symmetrical language apply to similar situations. Rules which suit general partners in modern general partnerships seem intuitively more likely to suit general partners in modern limited partnerships than rules drafted decades ago, in a very different business climate.

In addition, it is also worth emphasizing that it is not just parallel language which is at issue here. The entire approach to the statute which has been taken by NCCUSL in the ULPA (2001) mirrors that which is apparent in RUPA and other modern statutes promulgated by that organization. I will give one concrete example. RUPA includes in one section all of the non-waivable provisions of the Act. ULPA (2001) takes the same approach. This is a structural rather than substantive similarity, but there are advantages to this as well.

As any law professor will eagerly tell you, students have to be trained in how to read statutes. And if we are going to have business and commercial statutes which use the model of a single section containing the non-waivable provisions, and apparently mandatory language in other sections which are still intended to operate only as default rules, it makes sense to have all of our modern statutes drafted along the same lines. This makes it easier to train students (and even experienced practitioners) in how to read and interpret such statutes. It minimizes the risk of misunderstandings. Finally, with regard to the particular example which I have chosen to illustrate this point, there is another benefit. Placing all of the mandatory rules in one section makes it easier to determine what provisions cannot be changed by agreement of the parties since the list is found in a single section rather than appearing sporadically throughout the statute.

While the benefits of parallel structure and substance may not be overwhelming, I believe that they do make the case for adopting ULPA (2001) stronger.

4. Substantive Improvements.

My final justification for urging the adoption of ULPA (2001) is that it makes several substantive improvements over the Arkansas RULPA. None of these comparative advantages are so overwhelming on an individual basis that they would make a compelling case for adopting ULPA (2001), but taken together they provide considerable support for its enactment. In the interests of brevity, I will not spend much time on any individual change. This section is more in the nature of a laundry list of innovations which I believe will operate to the benefit of Arkansas limited partnerships, their partners, or those who deal with such business.

First, ULPA (2001) provides for filings which constitute constructive notice (after a 90-day period) of the dissociation of general partners, of dissolution of the limited partners, of termination, merger and conversion. This is a benefit primarily to partners,

---

37. ULPA (2001), § 703.
38. Moreover, because the provisions at issue have been included in ULPA (2001) only after careful consideration of whether the same language should apply to limited partnerships, the possibility of inappropriate linkage is not as pronounced.
39. RUPA, § 103.
40. ULPA (2001), § 110.
41. ULPA (2001), §§ 103(c) & (d).
and former partners, but possibly also to those dealing with limited partnerships, as it provides a some additional certainty about when constructive notice begins to operate. It also provides a much greater incentive for accurate filings, which should improve the degree to which the filings can be relied upon.

Second, ULPA (2001) insulates limited partners from personal liability for entity debts, essentially to the same extent as shareholder of corporations. This means that each limited partner has a full, status-based liability shield against personal liability, “even if the limited partner participates in the management and control of the limited partnership.” The elimination of the “control rule” brings limited partners parity with LLC members, LLP partners and corporate shareholders, and simplifies a body of law which had grown increasingly convoluted and outdated over the years. Removal of the “participation in control” test is therefore a logical and positive step.

Third, ULPA (2001) allows for the creation of LLLPs which offer general partners protection against personal liability that parallels the protection available to general partners in LLPs. It makes no sense to have to limited liability for general partners in general partnerships and none for general partners in limited partnerships, so we clearly ought to recognize some sort of LLLPs. In addition, if we offer full shield protection for general partners LLPs, the same protection should logically be available for general partners in LLLPs, and this is the approach taken by ULPA (2001).

ULPA (2001) is also more comprehensive, dealing in detail with a number of issues which are either left out of RULPA or are dealt with only superficially. For example, ULPA (2001) offers specific guidelines for dealing with the issue of partners’ liability for unlawful contributions, includes provisions dealing with the involuntary dissociation of limited partners, has an expanded list of causes for involuntary dissociation of a general partner, includes clearer rules regarding the substance of how partners’ interests are transferred, offers more elaborate provisions dealing with the rights of partners’ creditors, has dissolution provisions that give a specified period in which the remaining partners

42. ULPA (2001), § 303.
43. ULPA (2001), comment to § 303.
44. The original ULPA (1916) provided that “[a] limited partner shall not become liable as a general partner [i.e., for the obligations of the limited partnership] unless ... he takes part in the control of the business.” When NCCUSL promulgated RULPA (1976), the new statute retained the basic test but attempted to limit the impact of the rule by specifying that a limited partner would only be liable to persons who transact business with the limited partnership with actual knowledge of the limited partner’s participation in control, and by including a relatively lengthy list of activities which would be statutorily deemed not to constitute participating in control. RULPA (1976), § 303. These protections were counterbalanced by another rule which made a limited partner generally liable for the limited partnership’s obligations “if the limited partner’s participation in the control of the business is ... substantially the same as the exercise of the powers of a general partner.” RULPA (1976), § 303(a). The 1985 amendments to RULPA removed the “substantially the same” language and expanded the safe harbor listing of things which would not constitute control. With the spread of LLPs and LLCs, the need for the control test as a balance to offset the “corporate” benefit of limited liability appears to have disappeared, and ULPA (2001) purports to do no more than take the “next step” in the evolution of limited partner liability. ULPA (2001), comment to § 303.
45. ULPA (2001), §§ 102(90, 201(a)(a4)), & 404(c).
46. ULPA (2001), §§ 508 & 509 (modeled after the approach utilized in our corporate statutes).
47. ULPA (2001), § 601(b) (a topic which is not even addressed in RULPA).
48. ULPA (2001), § 603(5).
49. ULPA (2001), §§ 701 & 702.
50. ULPA (2001), § 703.
have a right to decide whether to continue the business following dissociation of a general partner, and incorporates procedures for barring claims against dissolved limited partnerships.

This is not intended to be a complete listing of the positive changes which will be effected if the state adopted ULPA (2001) in place of the Arkansas RULPA. However, this listing provides some notice of the types of improvements which would be effectuated if this change is made by the legislature.

Not Everything is Rosy

I do not want to leave the impression that I have no problems with ULPA (2001), because I do. I continue to have significant reservations about the choice to have limited fiduciary duties for general partners. This concern is perhaps even greater in the context of limited partnerships, where limited partners are expected to be relatively passive and therefore more at the mercy of those in charge of the day to day operations of the business. Nonetheless, we have already been down that road with the Arkansas RUPA, and I see no real reason to complain at this stage about something that is already the law for most Arkansas partnerships.

I also have concerns about the vulnerability of transferees of partnership interests to abuse. Consider this scenario—a parent, knowing that her child is essentially a deadbeat, conveys property to a limited partnership and gives the child a limited partner’s interest in the entity. One of the child’s creditors executes a charging order and becomes a transferee of the child’s partnership interest following foreclosure. To whom does the creditor execute? In an economic sense, the transferee is only entitled to distributions that the general partners decide to declare. For tax purposes, the transferee may have immediate taxable gain in spite of the fact that no funds are actually being dispersed. This is not much of a “benefit” to the creditor. Admittedly, this is a problem which existed under the Arkansas RULPA, but ULPA (2001) at least has the potential to make the situation worse. First, ULPA (2001) gives limited partnerships a perpetual duration, which was not the case under RULPA. Under RULPA, a transferee might have been able to seek judicial intervention if the partners extended the partnership beyond the specified term. In addition, ULPA (2001) makes it far easier to continue a limited partnership following the dissociation of a general partner, giving a 90 day grace period for the remaining partners to decide to do so and requiring only a majority vote. This increases the vulnerability of transferees in ways which may not be desirable.

There are other objections which I could raise, but my purpose here is only to reserve my right to make suggestions for improvement at some future date if Arkansas does adopt ULPA (2001). My bottom line remains that adoption of ULPA (2001)

51. ULPA (2001), § 801(3).
52. ULPA (2001), §§ 806 & 807 (another topic not addressed in RULPA).
53. The Arkansas RUPA provision on fiduciary duties of partners is contained in A.C.A. §§ 4-46-103(b) (non-waivable provisions) and 4-46-404 (general standards of a partner’s conduct). Some of my concerns about the limited fiduciary duties embodied in those sections have been included briefly in published form. See, e.g., Carol R. Goforth, The Revised Uniform Partnership Act: Ready or Not, Here It Comes, 1999 Ark. L. Notes 47. I was even more detailed in expressing my concerns in earlier correspondence with the Committee on Uniform Law of the Arkansas Bar Association, when it was first considering whether to propose the adoption of RUPA in this state, but that is a battle which is over and done with. If you really want an assessment of the fiduciary duty issue, in the context of limited partnerships, I suggest J. William Callison & Allan W. Vestal, The Want of a Theory, Again, 37 Suffolk U. L. Rev. 719 (2004).
54. See, e.g., A.C.A. §§ 4-43-701 to 704 (addressing procedures and rights of transferees).
55. ULPA (2001), § 104(c).
56. Technically, RULPA included no such judicial intervention process, but the general partnership provision might have been available through cross linkage. See, i.e., A.C.A. § 4-42-508(1).
57. ULPA (2001), § 801(3).
seems the best course of action for Arkansas at this time. Failure to do so means that we will throw the status of LLLPs into question on January 1, 2005; we will either have a limited partnership statute that purports to be linked to a repealed general partnership statute or to a new general partnership statute which was specifically drafted so as to exclude limited partnerships (if our legislature amends the Arkansas RULPA to provide for reference to the Arkansas RUPA instead of the Arkansas UPA); we will continue a system in which our partnership statutes are dissimilar in structure and language, making it easier to misread or misapply one or the other; and we will forego the potential statutory improvements available with ULPA (2001).

**Conclusion**

I know that most practitioners are probably tired of the recent avalanche of changes to business organization statutes. I know also that there is a learning curve associated with any new statute, and that there are always unanticipated problems when there is a major shift in any statute. Nonetheless, for the reasons which I have set forth here, I think Arkansas would be well served by the prompt enactment of ULPA (2001).