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## Are Organizations that Provide Free Legal Services Engaged in the Unauthorized Practice of Law?

### Cover Page Footnote

Director of Legal Advocacy Group of the American Association of Retired Persons (AARP) Foundation which operates a public interest litigation unit, a program that provides technical assistance in designing and operating Legal Hotlines, a discount legal services program for AARP members involving nearly 3000 lawyers in private practice, and Legal Counsel for the Elderly, a full service legal aid office and long-term care ombudsman program for older residents of the District of Columbia.

## ARE ORGANIZATIONS THAT PROVIDE FREE LEGAL SERVICES ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW?

Wayne Moore\*

If you are a director of a social service agency, a law school clinic, a corporate pro bono program, the ACLU, a national support center formerly funded by the Legal Services Corporation, or a similar corporation that employs one or more attorneys as staff and has lay persons on its board of directors, this could happen to you: A staff attorney walks into your office and announces that he or she can no longer represent clients (other than the corporation or its staff) for fear that the organization would be engaged in the unauthorized practice of law (“UPL”) and that he or she would be aiding in the unauthorized practice of law. This happened to me.

Part of my management duties included overseeing a thirteen-attorney litigation unit within the American Association of Retired Persons (AARP), a section 501(c)(4) corporation,<sup>1</sup> governed by its Board of Directors comprised entirely of non-lawyers. As an attorney, I reported to a non-lawyer who, in turn, reported to the CEO of the AARP who was also a non-lawyer. Prior to my assuming management of this unit, the attorneys primarily drafted amicus curiae briefs and, on occasion, represented the AARP as a plaintiff in public interest litigation; neither of these activities constitutes the unauthorized practice of law.<sup>2</sup> We began planning, however, to represent third parties such as AARP members or other elderly people in public interest litigation. This new activity is not exempted from the UPL rules.<sup>3</sup>

My first reaction to the staff attorney’s statement was to protest that all the unit’s attorneys who represented third parties were licensed to practice in the jurisdiction. Therefore, how could the unit be engaged in the unauthorized practice of law?

The staff attorney cited a court rule that prohibits a corporation from practicing law<sup>4</sup> and *In re Co-operative Law Co.*,<sup>5</sup> a leading case on the issue.

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\* Director of Legal Advocacy Group of the American Association of Retired Persons (AARP) Foundation which operates a public interest litigation unit, a program that provides technical assistance in designing and operating Legal Hotlines, a discount legal services program for AARP members involving nearly 3000 lawyers in private practice, and Legal Counsel for the Elderly, a full service legal aid office and long-term care ombudsman program for older residents of the District of Columbia.

1. See 26 U.S.C. § 501(c)(4) (1994 & Supp. II 1996) (granting tax-exempt status to non-profit organizations that operate exclusively to promote social welfare).

2. See Rules of the D.C. Ct. App. Rule 49(c)(6) (1998) (exempting internal counsel, who only advise his or her employer, from having to be members of the bar).

3. See *id.* Rule 49(c).

4. See *id.* Rule 49(a), (b)(1), (b)(2)(f).

Rule 49(a) of the Rules of the District of Columbia Court of Appeals provides that “[n]o person shall engage in the practice of law in the District of Columbia or in any manner hold out as authorized or competent to practice law in the District of Columbia unless enrolled as an active member of the District of Columbia Bar, except as otherwise permitted by these Rules.”<sup>6</sup> Rule 49(b)(1) defines “person” to include a corporation.<sup>7</sup> Rule 49(b)(2)(F) specifies that the practice of law includes furnishing an attorney who practices law.<sup>8</sup> The commentary to Rule 49 states that the rule does not apply to referral services but does not otherwise exempt non-profit organizations, except in limited circumstances not relevant here.<sup>9</sup>

Read together, these provisions literally say that a non-profit corporation that furnishes attorneys who practice law by offering services to the public is engaged in the unauthorized practice of law because the corporation is not a member of the D.C. Bar.

The New York Court of Appeals ruled in *In re Co-operative Law Co.* that a corporation that employed attorneys who represented members of the public was engaged in the unauthorized practice of law unless specifically exempted by rule or statute.<sup>10</sup> The court reasoned that an attorney had the professional and ethical duty to be subject solely to the direction of the client.<sup>11</sup> As an employee, however, the attorney is also subject to the direction of the corporation, which may conflict with the client’s interest.<sup>12</sup>

I responded to the staff attorney that the case must be out of date. Lawyers can now incorporate.<sup>13</sup> Many of the law firms in town are incorporated. The attorney replied that this is a result of special statutes or court rules with which the AARP does not comply.<sup>14</sup> Generally, these provisions mandate that the corporation be subject to the disciplinary jurisdiction of the courts, such as by requiring all shareholders, officers, and directors be admitted to the practice of law.<sup>15</sup> The AARP is not subject to the discipline of the courts.

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5. 92 N.E. 15 (N.Y. 1910).

6. Rules of the D.C. Ct. App. Rule 49(a) (1998).

7. *See id.* Rule 49(b)(1).

8. *See id.* Rule 49(b)(2)(F).

9. *See id.* Rule 49 cmt.

10. *See Co-operative Law Co.*, 92 N.E. at 16.

11. *See id.*

12. *See id.*

13. *See, e.g.*, N.Y. Bus. Corp. Law §§ 1501(b), 1503(a) (McKinney 1986) (permitting and regulating the incorporation of law firms in New York). *See generally* Martin M. Shenkman, *Decisions: Choice of Entities for Law Firms*, 7 N.J. Law.: Wkly. Newspaper 1683 (1998) (discussing reasons for choosing to incorporate a law firm).

14. *See generally* J.F. Rydstrom, Annotation, *Practice by Attorneys and Physicians as Corporate Entities or Associations Under Professional Service Corporation Statutes*, 4 A.L.R.3d 383 (1966) (citing various professional service corporation statutes applying to attorneys).

15. *See id.* at 390. *See, e.g.*, N.H. Rev. Stat. Ann. § 294-A:20 (1987) (requiring that “not less than ½ of the directors of a professional corporation and all the officers

A quick review of the case law seemed to validate the staff attorney's concern. A long line of cases dating prior to 1970 held that corporations representing unrelated clients by means of attorney employees were engaged in the unauthorized practice of law unless specifically exempted from the law.<sup>16</sup>

Prior to the 1970s, the public generally obtained legal representation from lawyers in solo practice or lawyers participating in partnerships with other lawyers. All non-lawyers participating in these practices were acting in support of the lawyers and under their direct supervision. Profits from the practice of law were shared only among lawyers. The Code of Professional Responsibility reflected this mode of delivering legal services.

In the past twenty-eight years, however, there has been a revolution in the methods of delivering legal services. This change has been led by programs that serve low-income people. With the passage of the Legal Services Corporation Act<sup>17</sup> in 1974, federally funded legal services programs gradually began blanketing the country. The Act and accompanying rules require that these programs be incorporated with boards of directors consisting of some non-lawyers.<sup>18</sup> The issue of the unauthorized practice of law was raised with regard to legal services programs, but is no longer a problem.<sup>19</sup> This was resolved primarily through explicit exceptions to the UPL statutes or rules<sup>20</sup> or through state statutes which created the legal services program.<sup>21</sup>

Law school clinics began to proliferate in the 1970s. Law schools recognized the need for law students to have some practical experience in the law before embarking on their own private practices.<sup>22</sup> Many law schools, however, are part of larger universities that are

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other than the secretary or an assistant secretary and the treasurer or an assistant treasurer shall be qualified persons with respect to the corporation").

16. See *People v. Merchants' Protective Corp.*, 209 P. 363, 364 (Cal. 1922); *In re Opinion of the Justices*, 194 N.E. 313, 317 (Mass. 1935); *Unger v. Landlords' Management Corp.*, 168 A. 229, 231 (N.J. Ch. 1933); John E. Theuman, Annotation, *Restrictions on Right of Legal Services Corporation or "Public Interest" Law Firm to Practice*, 26 A.L.R.4th 614 *passim* (1983).

17. Pub. L. No. 93-355, § 2, 88 Stat. 381 (1974) (codified as amended at 42 U.S.C. § 2996 (1994)).

18. See *id.* § 2996c(a).

19. See, e.g., *Dixon v. Georgia Indigent Legal Servs., Inc.*, 388 F. Supp. 1156, 1166 (S.D. Ga. 1974), *aff'd*, 532 F.2d 1373 (5th Cir. 1976) (rejecting a claim of unauthorized practice of law); *Azzarello v. Legal Aid Soc'y*, 185 N.E.2d 566, 570-71 (Ohio Ct. App. 1962) (same); *Scruggs v. Houston Legal Found.*, 475 S.W.2d 604, 605-07 (Tex. Civ. App. 1972) (same).

20. See N.H. Rev. Stat. Ann. § 292:1-a (1987); R.I. Gen. Laws § 11-27-18 (1994).

21. See, e.g., *Carter v. Berberian*, 434 A.2d 255, 257 n.1 (R.I. 1981) (explaining that Rhode Island Legal Services, Inc. was formed by a special act of the Rhode Island General Assembly, Act of Feb. 28, 1969, Acts and Resolves of 1969 at 1425).

22. See Daniel J. Givelber et al., *Learning Through Work: An Empirical Study of Legal Internship*, 45 J. Legal Educ. 1, 4-7 (1995).

incorporated and governed, at least in part, by non-lawyers. The deans and trustees of universities are also likely to be non-lawyers.

Many social services agencies are hiring lawyers in order to provide holistic services to their clients. For example, AIDS clinics, agencies serving the homeless, and women's crises shelters are hiring one or two lawyers for this purpose.<sup>23</sup> Most of these agencies are section 501(c)(3) corporations<sup>24</sup> that are usually governed, at least in part, by non-lawyers who have oversight responsibility for the lawyers.

An entire array of national public interest organizations that engage in impact litigation, such as the ACLU, Lawyers Committee for Civil Rights, and former LSC-funded support centers may be subject to challenge.<sup>25</sup> Most of these programs are section 501(c)(3) organizations with at least some non-lawyer board members.

Finally, many corporations have joined the pro bono movement by allowing lawyers in their general counsels' offices to represent third parties (usually indigent clients) on a pro bono basis. For example, Ford Motor Company's Office of General Counsel has several computers linked to the Legal Hotline for Older Michiganians.<sup>26</sup> Once connected to the Hotline computer through a modem, staff in the General Counsel's Office provide legal advice to older people who call the Hotline for help. Similarly, the Aetna Insurance Company has operated a free clinic for seniors in Hartford, Connecticut for many years.<sup>27</sup>

Because all the programs described above use attorneys who are employees of a corporation which is governed, in part, by non-lawyers, the specter lurks that the practice of law may be subject to the control or interference of non-lawyers. Unfortunately, the law has not kept up with these changes in delivery systems, resulting in the predicament I faced in December of 1997.

A closer reading of the UPL cases reveals that there were several issues that concerned the courts. In the leading case, *In re Co-opera-*

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23. See, e.g., William J. Dean, *Pro Bono Digest: A Guide to the City's Opportunities*, N.Y. L.J., May 5, 1995, at 3 (describing The Door—A Center for Alternatives, a program which offers comprehensive services to young people including legal advocacy); William J. Dean, *Pro Bono Digest: Highlights of the 1994 Conference*, N.Y. L.J., May 6, 1994, at 3 (providing an example of the holistic legal services offered to AIDS patients).

24. See 26 U.S.C. § 501(c)(3) (1994) (granting tax-exempt status to certain types of community or charitable organizations).

25. See, e.g., *In re Education Law Ctr., Inc.*, 429 A.2d 1051, 1059 (N.J. 1981) (rejecting a claim of unauthorized practice of law against one of the National Support Centers formerly funded by the Legal Services Corporation).

26. See *Corporate Counsel Association Elects Sara Holtz President*, Liability Week, Nov. 7, 1994 (reporting that Ford Motor Co. received the American Corporate Counsel Association Foundation's Pro Bono Award for this legal hotline), available in 1994 WL 2541813.

27. Commission on Legal Problems of the Elderly, American Bar Ass'n, *The Law and Aging Resource Guide* at CT-3, CT-4 (1992).

*tive Law Co.*, a company was formed to provide legal services.<sup>28</sup> The Board of Directors hired attorney employees to deliver the services and all profits inured to the benefit of the corporation's investors.<sup>29</sup> The court held that the corporation violated the law which made it "unlawful for any corporation to practice law, to render or furnish legal services or advice, to furnish attorneys or counselors for that purpose, or to advertise for or solicit legal business."<sup>30</sup> The basis for the court's decision was that

[t]he practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for the purpose.<sup>31</sup>

The essence of this perception of the practice of law is the special duty an attorney owes to his or her client. The court feared that the corporation's board or shareholders might try to interfere with the attorney-client relationship.<sup>32</sup> Since the attorneys were employees, they were subject to the control and direction of their employer. This created the possibility that non-lawyer board members and shareholders might attempt to influence the independent judgment of the lawyers. Because the fees charged for the legal services belonged to the corporation, the corporation's interest in making a profit might diverge from the attorney's primary purpose of aiding in the administration of justice, a far higher calling.<sup>33</sup> The court was truly concerned that the money making interest of the corporation could prostitute the practice of law.<sup>34</sup> Also, the actions of the owners and governing body of the corporation would be immune from the sanctions of censure or disbarment that govern lawyers, as a disbarred employee could simply be replaced.

In the UPL cases involving corporations, the courts seem to look at three things:

1. Are lay persons in a position to influence the legal judgment of lawyers and can this actually occur? Examples of this are corporations that have lay persons on their board of directors or in the attorneys' supervisory hierarchy.<sup>35</sup>

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28. 92 N.E. 15, 15 (N.Y. 1910).

29. *See id.*

30. *Id.*

31. *Id.* at 16.

32. *See id.*

33. *See id.*

34. *See id.*

35. Using different approaches, Rules 1.8(e)(2) and 5.4 (c) of the D.C. Cir. Rules of Professional Conduct prohibit lay interference with the exercise of a lawyer's professional judgment. *Cf. In re Opinion of the Justices*, 194 N.E. 313, 317 (Mass. 1934) (interpreting a UPL rule substantially similar to that of the Washington, D.C. Bar);

2. Do fees derived from the attorneys' work fund the salaries and expenses associated with the practice of law or do the fees generate profits or fund activities or costs unrelated to the practice of law?<sup>36</sup>

3. Is the corporation holding itself out as practicing law? Evidence of this would include publicity which states that the corporation (as opposed to its lawyers) represents third parties.<sup>37</sup>

#### I. LAY INTERFERENCE WITH THE INDEPENDENT JUDGMENT OF LAWYERS

The first concern I examined was the role of lay persons in AARP's litigation. The court in *In re Education Law Center, Inc.*<sup>38</sup> ruled that the Education Law Center ("ELC") was not engaged in the unauthorized practice of law because the board of directors, which did include some lay persons, only set overall program priorities and did not make decisions about individual cases.<sup>39</sup> The ELC was, and presumably still is, a section 501(c)(3) organization that did both legal and non-legal work, but legal work predominated.<sup>40</sup> It did not charge clients for its services and the financial status of the client was not a factor in the selection of cases.<sup>41</sup> Cases were taken solely on the basis of whether they raised important educational issues.<sup>42</sup> A Litigation Review Committee, composed entirely of attorneys from the Board, selected cases.<sup>43</sup> Once the case had been selected and an attorney-client relationship was established, the Litigation Review Committee had no further involvement in the case.<sup>44</sup> Once the staff lawyer was retained, the client's interests guided all decisions made by the lawyer even if the law reform issues had "evaporated."<sup>45</sup> The retainer agreement explicitly stated that the ELC did not practice law or represent clients; the client was represented by an attorney employee of the ELC.<sup>46</sup>

The court agreed that there is a danger that the attorney employees could be subject to pressures from the corporation which might inter-

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Unger v. Landlords' Management Corp., 168 A. 229, 230 (N.J. Super. Ct. App. Div. 1933) (same).

36. Rule 5.4(a) of D.C. Cir. Rules of Professional Conduct prohibits attorneys from sharing fees with a non-lawyer. Cf. *In re Otterness*, 232 N.W. 318, 319 (Minn. 1930) (interpreting a UPL rule that is substantially similar to that of the Washington, D.C. Bar); *People v. Lawrence Peska Assocs.*, 393 N.Y.S.2d 650, 652 (1977) (same).

37. See Rules of the D.C. Ct. App. Rule 49(a) (1998); cf. *People v. Association of Real Estate Taxpayers*, 187 N.E. 823, 826 (Ill. 1933) (interpreting a UPL rule that is substantially similar to that of the Washington, D.C. Bar); *People v. People's Trust Co.*, 180 A.D. 494, 497 (N.Y. 1917) (same).

38. 429 A.2d 1051 (N.J. 1981).

39. See *id.* at 1059.

40. See *id.* at 1054.

41. See *id.*

42. See *id.*

43. See *id.*

44. See *id.*

45. *Id.* at 1054-55.

46. See *id.* at 1055 n.3.

fere with their attorney-client relationship.<sup>47</sup> The mere fact that the ELC did not charge fees was not enough to exempt the ELC from the UPL provisions.<sup>48</sup> On the other hand, the court recognized that the special needs of public interest organizations may require them to include non-lawyers on their boards to represent community viewpoints and provide expertise on non-legal matters.<sup>49</sup> The court ruled that considerations of public policy would allow such an arrangement if certain rigorous standards were met: (1) the role of the corporation is that of "a conduit or intermediary to bring the attorney and client together";<sup>50</sup> (2) "[o]nce a staff attorney is retained by a client, there can be no interference in the attorney-client relationship by the organization";<sup>51</sup> (3) "the corporation must be liable for any damages arising from the attorney's malpractice";<sup>52</sup> (4) "[d]eterminations of which cases to accept and all decisions concerning how such cases are to be handled" are made by lawyers, either on staff or the board;<sup>53</sup> and (5) the board "take[s] special precautions not to interfere with its attorney's independent professional judgment in . . . handling [a] matter."<sup>54</sup> The court said it is permissible for non-lawyers to participate in setting broad policies about the litigation and use reasonable procedures to review the attorneys' actions to insure they adhere to the boards' policy directives.<sup>55</sup>

The court in *In re New Hampshire Disabilities Rights Center, Inc.*<sup>56</sup> adopted a different approach. The Disabilities Rights Center ("DRC") was a non-profit organization funded by the federal government to provide free legal services to developmentally and mentally disabled persons.<sup>57</sup> Some of its Directors or officers were non-lawyers.<sup>58</sup> Then writing for the Supreme Court of New Hampshire, the current U.S. Supreme Court Justice Souter cited a series of U.S. Supreme Court cases<sup>59</sup> for the proposition that the First Amendment right to association includes the right to collectively undertake to ob-

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47. *See id.* at 1055.

48. *See id.* at 1056.

49. *See id.* at 1058.

50. *Id.* (quoting *Touchy v. Houston Legal Found.*, 432 S.W.2d 690, 695 (Tex. 1968)).

51. *In re Education Law Ctr., Inc.*, 429 A.2d at 1058.

52. *Id.*

53. *Id.*

54. *Id.* at 1059 (quoting ABA Comm. on Ethics and Professional Responsibility, Formal Op. 324 (1970)).

55. *See id.* at 1058 (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 324 (1970)).

56. 541 A.2d 208 (N.H. 1988).

57. *See id.* at 209.

58. *See id.* at 211.

59. *See id.* at 212-13 (citing *Mine Workers v. Illinois Bar Ass'n.*, 389 U.S. 217 (1967); *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963)).

tain meaningful access to the courts.<sup>60</sup> Judge Souter used this right to authorize the DRC to represent disabled persons who were not poor.<sup>61</sup> The only relevant exception to New Hampshire's UPL statute was a provision that allowed corporations to provide legal services to the poor.<sup>62</sup> Judge Souter ruled that this exception did not apply to the DRC, but that the DRC had a separate constitutional right to serve those disabled persons who were not poor.<sup>63</sup> The rationale used by Judge Souter seems a bit contrived. The U.S. Supreme Court cases that he cited applied to individuals whose associational rights arose from their membership in their union.<sup>64</sup> The DRC served the general public and did not limit its services to members.<sup>65</sup>

In applying the above guidance to our own situation, we felt that the litigation unit should be moved from the AARP to the AARP Foundation, which is a section 501(c)(3) corporation affiliated with the AARP. The purpose of the AARP Foundation is to carry out certain charitable activities other than legislative lobbying, and to use government and foundation grants to carry out important programs for older people; the AARP Foundation receives a substantial portion of its income from the AARP. The transfer was made to clearly separate litigation activities from the legislative and public policy activities of the AARP which could be perceived as having the potential to influence the conduct of litigation.

The AARP Foundation, located in the District of Columbia, is governed by a non-lawyer Board of Directors and is administered by a non-lawyer who is my direct supervisor. I am the head of the newly formed AARP Foundation Litigation unit ("AFL") and am admitted to practice in D.C.

We interpreted *In re Education Law Center* to allow this new arrangement so long as the five conditions above were strictly followed.<sup>66</sup> Therefore, a special charter was prepared for the litigation unit.<sup>67</sup> The charter provides that the mission of the litigation unit is "to conduct high visibility litigation to benefit AARP members and to pursue law reform litigation in promoting the welfare of older persons in AARP strategic issue areas."<sup>68</sup> Like in the ELC case, the financial status of the client is not important. Cases are selected on the basis of whether they raise important issues, benefit a large number of older people, or give visibility to a problem faced by many older people.<sup>69</sup>

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60. *See id.* at 213.

61. *See id.* at 213-14.

62. *See id.* at 210-11.

63. *See id.* at 215-16.

64. *See id.* at 212-13.

65. *See id.* at 214.

66. *See supra* notes 50-54 and accompanying text.

67. *See* Charter of AARP Foundation Litigation (1998) (on file with the author).

68. *Id.* art. II.

69. *See id.* art. III, § 1.

The AFL also educates the public and conducts other legal advocacy but does not lobby.<sup>70</sup>

Like the ELC, the AARP Foundation Board and non-lawyer administrator set the AFL's litigation priorities.<sup>71</sup> Specifically, the AFL's litigation must primarily focus on age discrimination in employment, pensions and other employee benefits, consumer fraud including predatory lending, and health and long-term care issues. The charter provides, however, that no attorney of the AFL shall permit any person outside of the AFL to interfere with or attempt to influence his or her independent professional judgment regarding selection, management, or progression of a case once an AFL attorney has been retained by a client.<sup>72</sup> Furthermore, the AARP Foundation is liable for any damages arising from an AFL attorney's malpractice and maintains malpractice insurance for this purpose. Thus, the AFL charter squarely addresses conditions (2), (3), and (5) above.<sup>73</sup>

The AARP Foundation Board and non-lawyer administrator can: (1) monitor whether the AFL is following the litigation priorities; (2) approve performance requirements and monitor whether they have been achieved; and (3) supervise and evaluate staff so long as they do not try to influence decisions that can properly be made only by an attorney.<sup>74</sup> This is consistent with the non-lawyer governance allowed by the court in the ELC case.<sup>75</sup>

The role of persons outside of the AFL in the selection of cases and in bringing the attorney and client together was more problematic (i.e., conditions (1) and (4) above).<sup>76</sup> The AARP Foundation Board established a conflict checking process which, in addition to checking for conflicts that all lawyers must avoid, also checks whether: (1) the AFL's position in a case is contrary to the AARP's or the AARP Foundation's public policy, or (2) the case involves a defendant that either provides benefits to AARP members or is an ally of the AARP or the AARP Foundation in achieving other public policy goals.<sup>77</sup>

These two conditions reflect broad policy directives that define the types of cases that AFL can handle within its priority issue areas. These policies seem reasonable. A public interest law firm should not have to advocate a position that is contrary to its public policy positions. For example, the AFL should not have to represent an employer who is accused of age discrimination, if the AARP's policy is to support employees who allege they are victims of age discrimination.

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70. See *id.* art. III, § 2. The ELC also conducts non-legal and other legal activities. See *In re Education Law Ctr., Inc.*, 429 A.2d 1051, 1054 (N.J. 1981).

71. See Charter of AARP Foundation Litigation art. IV, § 7.

72. See *id.* art. IV, §§ 8, 9; *id.* art. V, § 3.

73. See *supra* notes 51, 52, 54 and accompanying text.

74. See Charter of AARP Foundation Litigation art. IV, § 7 (1998).

75. See *supra* notes 50-54 and accompanying text.

76. See *supra* notes 50, 53 and accompanying text.

77. See Charter of AARP Foundation Litigation art. IV (1998).

Furthermore, the AFL should not be allowed to sue the AARP, the AARP Foundation, or their allies or partners when the AARP Foundation and the AARP are providing most of its funding.

Because AFL staff are not always aware of all of the AARP's and the AARP Foundation's policy positions, partners, and allies, the conflict check process requires the AFL to check with key staff of the AARP Foundation and the AARP to determine whether a case violates either of these key considerations. This conflict-check process must, however, be conducted carefully so as to avoid running afoul of other ethical considerations.

The ABA Committee on Ethics and Professional Responsibility, in Formal Opinion 324, considered the issue of whether the board of a legal services program that included non-lawyers could review individual cases to determine which cases staff attorneys could handle.<sup>78</sup> The Committee found this practice to be unethical.<sup>79</sup> The executive committee of a metropolitan bar association wanted to impose a condition on a local legal services agency that its attorneys could not represent an organization unless approved by its board.<sup>80</sup> The executive committee was trying to prevent the program from representing certain controversial organizations.<sup>81</sup>

Although the focus of the ABA Ethics Committee's opinion was on the board's potential bias and not on the unauthorized practice of law, the opinion is still useful for our purposes. The ABA Ethics Committee opined that the board can set financial and similar eligibility criteria that clients must meet, allocate available resources and manpower, and determine the types or kinds of cases that could be handled and the types of clients who could be represented—all of which it defined as broad policy considerations.<sup>82</sup> Also, they said the board can employ reasonable procedures to insure that its broad policies are carried out.<sup>83</sup> This can include asking staff attorneys to provide the board with certain information about their clients and cases.<sup>84</sup>

The board, however, could not choose cases or clients on a case-by-case basis because of the danger that the selection would not be made on the merits of the case but based on whether such representation might engender criticism from certain influential segments of the community.<sup>85</sup> This would be an improper interference with the staff attorney's professional judgment by a person who employs the lawyer to represent another and would foreclose justice to the very people the

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78. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 324 (1970).

79. *See id.*

80. *See id.*

81. *See id.*

82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.*

program was intended to represent.<sup>86</sup> The Committee also made it clear that once an attorney began representing the client, the board could not interfere with the attorney's independent professional judgment.<sup>87</sup> Note that the court in the ELC case did say that a board-appointed committee comprised entirely of lawyers from the board and/or the staff could make case-by-case decisions about which impact cases a program should handle.<sup>88</sup>

The opinion suggests the AFL's conflict check must be carefully administered.<sup>89</sup> So long as the AFL uses a fact gathering process to determine if a case falls within the board's broad guidelines and the mission of the program, the process is probably ethical. Should those outside of the AFL, however, attempt to challenge the acceptance of a case based on whether the case can be won, the nature or reputation of the represented parties, the strategy to be used, or a similar issue, this would surely be an attempt to influence judgments that only the client's attorney should make.

An issue that seems to fall within the gray area of Ethics Opinion 324 is whether the conflict check process may review the risk the litigation poses to the success of concurrent strategies being conducted by other units within the AARP or the AARP Foundation. For example, what if the litigation may undermine sensitive negotiations or lobbying efforts in which the AARP is engaged? This issue could be framed as a broad policy issue, specifically that litigation should not be pursued if the AARP or the AARP Foundation believes that another strategy should be tried first. The AARP has had success negotiating or lobbying before resorting to litigation. On the other hand, it is important that this conflict-check process is not used by those outside of the AFL to control case selection on a case-by-case basis.

## II. ATTORNEYS' FEES BENEFITING THE CORPORATION

The second important issue in UPL cases concerns how attorneys' fees are handled.<sup>90</sup> While the AFL does not charge its clients attorneys' fees, it will seek statutory fees and market-rate attorneys' fees from the opposing party.

The court in *In re Otterness*<sup>91</sup> ruled that a corporation owned and managed, at least in part, by non-lawyers could not benefit from attorneys' fees received by a staff attorney for the representation of third

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86. *See id.*

87. The Committee said it might be proper for the board to require its approval before a particular case is expanded into a class action where class actions are not a primary goal of the program. This would not be allowed, however, in cases like AFL where this type of litigation is the primary goal of the program.

88. *See In re Education Law Ctr., Inc.*, 429 A.2d 1051, 1058 (N.J. 1981).

89. *See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 324* (1970).

90. *See supra* note 36 and accompanying text.

91. 232 N.W. 318 (Minn. 1930).

parties.<sup>92</sup> The case involved a bank that hired a lawyer to serve as Vice President.<sup>93</sup> Part of the lawyer's duties was to foreclose mortgages on behalf of customers of the bank.<sup>94</sup> Attorneys' fees from these cases went to the bank.<sup>95</sup> The court held that for the bank to employ an attorney to practice law for others, for the benefit and profit of the bank, amounted to the unauthorized practice of law.<sup>96</sup>

Formal Opinion 95-392 of the ABA Committee on Ethics and Professional Responsibility explains the basis for prohibiting a corporation from benefiting from the fees received by an attorney employee.<sup>97</sup> This case involved a for-profit corporation that did not generate enough legal work to keep its in-house counsel busy.<sup>98</sup> It wanted to "rent" these attorneys out to third parties who would be charged more than the cost to the corporation of employing the lawyers.<sup>99</sup> The corporation planned to retain these profits.<sup>100</sup> The Committee said this arrangement would violate Rule 5.4 of the Model Rules of Professional Conduct which prohibits the sharing of fees with a non-lawyer.<sup>101</sup> The Committee feared that if the corporation profited from the attorneys' representation of third parties, the non-lawyer management of the corporation would have an incentive to select the matters the lawyers undertake, determine the amount of time the lawyers spend on these matters, and decide the fees that should be charged for these services.<sup>102</sup> The Committee said that these are decisions lawyers should make and, if made by a lay person, would constitute improper interference with a lawyers' professional judgment.<sup>103</sup> In other words, there would be a risk of "transforming the practice of law into an ordinary commercial business, with the resulting unrestricted emphasis on the hard sell and the bottom line."<sup>104</sup> The Committee said the arrangement would be ethical if the fees charged were only those necessary to reimburse the corporation for its costs of employing the lawyers.<sup>105</sup>

Similarly, the D.C. Bar Legal Ethics Committee, in Formal Opinion 135, ruled that a for-profit corporation can allow employee attorneys

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92. *See id.* at 319.

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.* at 319-20.

97. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 392 (1995).

98. *See id.*

99. *See id.*

100. *See id.*

101. *See id.*

102. *See id.*

103. *See id.*

104. *Id.* (quoting Roy D. Simon, Jr., *Fee Sharing Between Lawyers and Public Interest Groups*, 98 Yale L.J. 1069, 1132 (1989)).

105. *See id.*

to represent third parties for a fee so long as the fees only compensate the lawyer and the lay staff he or she supervises in performing legal work.<sup>106</sup> In addition, other non-lawyers must not be compensated or otherwise profit from the fees.<sup>107</sup>

Non-profit organizations, however, are allowed to collect more in attorneys' fees than the amount necessary to reimburse their costs. In ABA Formal Opinion 93-374, the Committee ruled that the concerns subsequently addressed in ABA Formal Opinion 95-392 do not exist when the corporation is not for profit and the fees are court awarded (i.e., awarded by virtue of fee-shifting statutes or paid by the opposing party).<sup>108</sup> The opinion considered the situation where an attorney worked for a pro bono organization whose membership or governing body was not solely composed of lawyers.<sup>109</sup> The Committee did not feel that attorneys' fees in these circumstances created a significant incentive for non-lawyers to interfere with the lawyers' independent judgment.<sup>110</sup> First, the attorneys' fees would only be awarded if the attorney employee prevailed in the matter; second, the fees were not paid by the client; and third, the court supervision of the fee award would insure the fees would be fair. These factors create significant barriers to a non-lawyer whose intent is to maximize fees by selecting cases, controlling the progress of the litigation, or setting fees. The Committee felt that a separate prohibition in the Model Rules against lay interference with a lawyer's independent judgment<sup>111</sup> was sufficient for a staff lawyer to resist any such interference from lay management, particularly where the lawyer was not directly dependent on the fees for his or her salary.<sup>112</sup>

The Committee said the prohibition on fee sharing was also intended to reduce the incentive for non-lawyers to engage in the unethical solicitation of cases, as non-lawyers are not subject to the discipline of the courts for such transgressions.<sup>113</sup> The Committee, however, cited case law which allows lawyers and non-lawyers acting on behalf of non-profit public interest organizations more leeway in soliciting cases than for-profit entities as an indication that unethical solicitation is not as great a concern with public interest entities.<sup>114</sup>

The Committee felt the prohibition on fee sharing was also intended to discourage excessive fees.<sup>115</sup> But as discussed above, that is

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106. See D.C. Bar Legal Ethics Comm., Op. 135 (1984).

107. See *id.*

108. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 374 (1993).

109. See *id.*

110. See *id.*

111. See Model Rules of Professional Conduct Rule 5.4(c) (1998).

112. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 374.

113. See *id.*

114. See *id.* (citing *NAACP v. Button*, 371 U.S. 415 (1963)).

115. See *id.*

not a concern in court-awarded fees or fees agreed to by the parties in a settlement.<sup>116</sup> The prohibition was also intended to reduce the incentive for non-lawyers to refer cases to incompetent lawyers who might be willing to share a larger portion of the fee.<sup>117</sup> Yet, considering that fees are awarded only if the attorney prevails, and incompetent attorneys are less likely to prevail, the Committee felt that this concern is minimal, particularly where the attorney is an employee of the organization governed by the non-lawyer.<sup>118</sup>

Thus, numerous courts have awarded attorneys' fees to non-profit organizations for legal services performed by staff.<sup>119</sup> In the rare case where the receipt of fees by a non-profit organization controlled, in part, by lawyers was held to constitute the unauthorized practice of law, the court found the non-profit structure to be a fiction that masked the general practice of law for fee-paying clients.<sup>120</sup> The courts have ruled that non-profit, public-interest groups may receive fees based on the market-rate value of the services rendered and not merely on the cost to the corporation of employing the attorneys.<sup>121</sup> In the case where the organization furnishing legal services is controlled, in part, by non-lawyers and also conducts other activities, market-rates are allowed so long as all fees are put into a fund used exclusively for litigation.<sup>122</sup> The rationale for allowing legal aid organizations and public interest law firms to receive market rate fees is that many of the fee shifting statutes provide for the payment of market-rates and courts have found no basis in their legislative history for using a cost-based approach or for distinguishing based on the nature of the entity receiving the fees.<sup>123</sup>

Courts extend this same policy to organizations like the AARP Foundation because their litigation units provide the same services

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116. See *supra* note 108 and accompanying text.

117. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 374.

118. See *id.*

119. See, e.g., *McLean v. Arkansas Bd. of Educ.*, 723 F.2d 45, 48-49 (8th Cir. 1983) (affirming an award of attorney's fees under 42 U.S.C. § 1988 regardless of fundraising efforts by the legal services organization); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1139, 1154 (2d Cir. 1983) (adjusting the amount of an award of attorney's fees awarded to non-profit lawyers); *Oldham v. Ehrlich*, 617 F.2d 163, 165 n.3, 168-69 (8th Cir. 1980) (holding that "a legal aid organization merits an attorney's fee fully as much as does a private attorney").

120. See, e.g., *Carter v. Berberian*, 434 A.2d 255, 257 (R.I. 1981) (holding that public censure of an attorney was warranted because the purported non-business corporation should have been incorporated as a professional-service corporation).

121. See, e.g., *Blum v. Stenson*, 465 U.S. 886, 892-96 (1984) (awarding market-rate fees).

122. See *American Fed'n of Gov't Employees Local 3882 v. Federal Labor Relations Auth.*, 944 F.2d 922, 934-35 (D.C. Cir. 1991); *Jordan v. United States Dep't of Justice*, 691 F.2d 514, 516 n.14 (D.C. Cir. 1982); see also Ethics Comm., District of Columbia Bar, Op. 176 app. (1986) (listing Federal Circuit Court decisions allowing the award of attorneys' fees at market rates).

123. See *Blum*, 465 U.S. at 894-96.

and have the same mission as these other public interest entities. Therefore, so long as the money is earmarked solely for use by the litigation unit, the circumstances of organizations like the AFL are identical to that of legal aid organizations.

The courts in D.C. go further by allowing the parent organization to divert money it would otherwise give to the litigation unit, thus requiring the unit to draw on its litigation fund instead.<sup>124</sup> Thus, the non-legal activities and staff of a non-profit organization are allowed to profit from attorneys' fees in the sense that they no longer have to fund the litigation unit from sources other than attorneys' fees. The court in *Local 3882* reasoned that the case law already allows a non-profit corporation to benefit from attorneys' fees received by its employee attorneys by allowing it to recoup its costs; therefore, the size of the recoupment should not matter and the non-profit corporation should be allowed to recoup the market rate instead of its out-of-pocket costs.<sup>125</sup>

The D.C. Bar's Legal Ethics Committee was slightly more persuasive in its rationale for this policy. They said that the D.C. Court of Appeals chose not to adopt the ABA's Model Disciplinary Rule 2-103(D) which prohibited certain lay organizations from profiting from recommending legal services to an individual in need of legal assistance.<sup>126</sup> They used this omission to interpret DR 3-102, which prohibits sharing a fee with a non-lawyer.<sup>127</sup> Reading these rules together, the Committee found that non-profit umbrella lay organizations that have a public interest litigation unit can profit from attorneys' fees so long as the funds are not shared with the umbrella organization.<sup>128</sup> When the fees are segregated and cannot be used by the lay organization, the fees are not literally shared, even though the lay organization may benefit by not having to spend as much money on its litigation unit.<sup>129</sup> The Committee did not believe this would encourage lay persons to influence the judgment of lawyers, particularly when the umbrella organization and the third parties that the organization serves share the same interests.<sup>130</sup> (This view would support the AARP Foundation's policy to only accept cases for litigation which support its public policies.) Finally, the Committee said that many of the federal fee shifting statutes require that the fees be set at market-value rates.<sup>131</sup> Thus, to prohibit non-profit organizations from accepting

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124. See *Local 3882*, 944 F.2d at 934-35.

125. See *id.* at 936.

126. Legal Ethics Comm., District of Columbia Bar, Op. 176 (1986).

127. See *id.*

128. See *id.*

129. See *id.*

130. See *id.*

131. See *id.*

market rates would “create a conflict between federal law and ethical requirements.”<sup>132</sup>

To address these concerns, all attorneys’ fees received by the AFL are separately accounted for. All fees received plus any earnings from interest or investments must only be used for the expenses of the AFL. None of these fees can go into the general operating account or reserves of the AARP or the AARP Foundation. The AARP Foundation and the AARP, however, can reduce its funding for the AFL and require the AFL to rely on its litigation funds.

### III. A CORPORATION HOLDING ITSELF OUT AS PRACTICING LAW

The third consideration mentioned above is that a corporation can not hold itself out as practicing law.<sup>133</sup> This consideration arises from the wording that is used in most UPL provisions.<sup>134</sup> While few UPL decisions are based solely on this ethical violation, it is sometimes cited along with one of the two prime considerations<sup>135</sup> as evidence of UPL activity.<sup>136</sup> An example of this violation would be publicity that states that the corporation provides legal services.<sup>137</sup> In drafting brochures, web sites, press releases, or any other statement about the AFL, care must be taken to avoid a declaration that the AFL provides legal services. Rather, the text should read that AFL *lawyers* provide legal services. Caution dictates that explicit language should be added stating that the AFL does not practice law, but attorneys employed by the AFL do.

Similarly, the client retainer agreement should state that the client is being represented by specifically named attorneys and not by the AFL. This creates a potential inconvenience if an attorney leaves the AFL and must be replaced by another. Generally, this substitution will require a motion approved by the court if the case is already in litigation; this would not be required if the client were represented by an entity such as an incorporated law firm.

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132. *Id.*

133. *See supra* note 37 and accompanying text.

134. *See, e.g.*, Rules of the D.C. Ct. App. Rule 49(a) (1998) (“No person shall . . . in any manner hold out as authorized or competent to practice law in the District of Columbia unless enrolled as an active member of the District of Columbia Bar. . . .” The term “person” includes corporations).

135. *See supra* notes 35-36 and accompanying text.

136. *See, e.g.*, *Carter v. Berberian*, 434 A.2d 255, 256 (R.I. 1981) (stating that the findings of facts included a finding that the organization “offered to perform legal services”).

137. *See, e.g.*, *People v. Association of Real Estate Taxpayers*, 187 N.E. 823, 826 (Ill. 1933) (stating that respondent, through its advertisements, held itself out to the public as practicing law).

## IV. CONCLUSION

The concept of the unauthorized practice of law is outdated insofar as it applies to entities that provide free legal services. UPL statutes should be drafted so it is clear that they do not prohibit non-profit, public-interest organizations with lay persons in management or on their boards from employing attorneys to represent third parties in public interest litigation.

That an organization provides free legal services reduces the greatest concern that courts have about unauthorized practice, namely the fear that the law will be used to generate profits for non-lawyers, instead of access to justice for clients.

The existing ethical rules are perfectly adequate to control any possible transgressions by a free legal services program. Model Rule 5.4(a), which prohibits the sharing of attorneys' fees with non-lawyers, is sufficient to insure that any attorneys' fees received by the non-profit organization from fee shifting statutes or opposing parties is not shared with non-lawyers.<sup>138</sup> Model Rules 1.8(f) and 5.4(c), which in different ways prohibit non-lawyers from interfering with the independent judgment of a lawyer, protect attorney employees from wrongful interference by lay management or board members of the non-profit organization.<sup>139</sup>

As the case law discussed in this Article shows, the application of UPL to public interest litigation groups is analogous to an analysis based on Rules 1.8(f), 5.4(a), and 5.4(c). Thus, the UPL concept as it applies to free legal services programs is redundant and unnecessary. In summary, innovative methods of increasing access to legal services should not be constrained by outdated UPL rules.

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138. See Model Rules of Professional Conduct Rule 5.4(a) (1998).

139. See *id.* Rules 1.8(f), 5.4(c).

*Notes & Observations*