

MISSOURI SUPREME COURT ADVISORY COMMITTEE
FORMAL OPINION 121

The Committee is asked whether an attorney employed by a non-profit corporation which provides a variety of services to battered women violates the Rules of Professional Conduct by representing such women in civil matters related to their being abused, all as part of the services provided by the corporation. Because this question may have implications for attorneys providing legal services to clients in a variety of public interest settings,¹ the Committee has determined that issuance of a Formal Opinion, pursuant to Rule 5.30(a) is appropriate.

The Committee concludes that as long as the services are provided by a bona fide nonprofit corporation which is merely acting as a conduit, no fee is involved, and adequate precautions are taken to avoid lay interference and to preserve the integrity of the relationship between the attorney and the individual client, the attorney does not violate the Rules of Professional Conduct by participating in this arrangement.

The facts presented to the Committee are that the attorney is a salaried employee of a nonprofit, tax exempt Missouri corporation which operates a shelter for battered women. In addition to providing emergency shelter to such women, the charitable organization also provides a variety of support programs for women and their children, including having the staff attorney assist the women in legal matters arising out of their domestic abuse. The attorney's salary is funded by a grant to the corporation from the United States Department of Justice under the Domestic Violence Victim's Civil Legal Assistance Program. The federal grant is specifically conditioned on its being used to hire a full-time staff attorney to provide such services.

No fee for the representation is charged the individual client by either the attorney or the organization.

The organization's Board's stated policy is (1) it will not interfere in the attorney client relationship between the attorney and any individual to whom the attorney provides legal services, (2) it will not in any way impose restrictions on the attorney's exercise of professional judgment regarding the handling of a particular case. Each individual for whom the attorney provides legal services signs an engagement agreement with the attorney specifying that the organization is not undertaking to give legal advice or

¹ The resolution of this issue may affect provision of legal services by attorneys employed by any organization that is incorporated as a non-profit entity. See Wayne Moore, *Are Organizations that Provide Free Legal Services Engaged in the Unauthorized Practice of Law?*, 67 Ford. L. Rev. 2397, 2399-2400 (1999), and Robert Hill and Thomas Calvocoressi, *The Corporate Counsel and Pro Bono Service*, 42 Bus. Lawy. 675, 693 (1987).

represent the woman and that the attorney-client relationship is only between the woman and the attorney.

Missouri statutes prohibit corporations, other than professional legal corporations, from practicing law. See § 484.020 RSMo. Under the facts presented, the question is whether this organization is engaged in the unauthorized practice of law. If it is, the attorney may be in violation of various rules, including Rules 4-5.4 and 4-5.5.

The Committee notes that the question whether a corporation violates the statutes is a legal question ultimately for the courts to decide. The Committee can opine only about the ethical issues but to do so it must necessarily decide how the courts would decide that legal question.

Prohibitions on corporate practice of law have long been recognized in Missouri. See § 484.020 RSMO (2001); *see, e.g., Reed v. Labor and Industrial Relations Committee*, 789 S.W.2d 19, 21 (Mo. Banc 1990); *Liberty Mutual Insurance Company v. Jones*, 344 Mo. 932, 130 S.W.2d 945, 955-956 (Mo. banc 1939); *Clark v. Austin*, 340 Mo. 467, 478-79, 101 S.W.2d 977, 982 (Mo. Banc 1937). It is clear that the definition of practice of law is inherently a judicial function. *In re Thompson*, 574 S.W.2d 365, 367 (Mo. banc 1978); *Clark*, 340 Mo. at 476-477, 479-481, 101 S.W.2d at 981-982, 983-984, but the legislature is permitted to create penalties for unauthorized practice. *Hoffmeister v. Todd*, 349 S.W.2d 5, 11 (Mo. banc 1961). The courts, in construing the provisions of the statute, do so in recognition of their “inherent power to regulate the practice of law.” *Thompson*, 574 S.W.2d at 365.

These prohibitions could be interpreted to mean that any time an employee or agent of a corporation engages in activities that constitute the practice of law, that corporation is to be deemed to be practicing law.² Under this interpretation, when the attorney employed by the Shelter in this case engages in activities that constitute the practice of law, the Shelter would necessarily be deemed to be engaged in such practice in violation of § 484.020, and the attorney would be assisting in that unauthorized practice in violation of Rule 4-5.5.

The Missouri Supreme Court has applied a “functional” analysis in unauthorized practice cases. In one of the Court’s early cases, *McKittrick v. Dudley*, 340 Mo. 852, 102 S.W.2d 895 (1937), the Court stated: “We are concerned only with the substance of the transaction under review. ‘...Courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things.’” 340 Mo. at 840; 102 S.W.2d at 90, *quoting from Mugler v. Kansas*, 123 U.S. 623, 661 (1887). The Court has continued to eschew a literal approach, preferring instead to “attempt[] to maintain a ‘workable balance’” between the interests at stake. *In re Mid-America Living Trust Associates, Inc.*, 927 S.W.2d 855, 859 (1996); *see*

² See, Moore, *supra* note 2, at 2398.

also *In re First Escrow, Inc.*, 840 S.W.2d 839, 846 (1992). For example, the courts have used this pragmatic, balancing approach to avoid the literal proscriptions of the statute to create an exception for laypersons who prepare documents incidental to another legitimate business, *Hulse v. Criger*, 363 Mo. 26, 45, 247 S.W.2d 855, 862 (1952); for non-lawyers who sign habeas corpus petitions, *State v. Carroll*, 817 S.W.2d 289, 291 (Mo. App. W.D. 1991); and for insurance company employees who represent insureds. *In re Allstate*, 722 S.W.2d 947 (Mo. banc 1987).

The application of constitutional rights must also be considered. Although, not directly on point, the series of cases beginning with *NAACP v. Button*, 371 U.S. 415 (1963) and extending through *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964), *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967), *United Transportation Union v. State Bar*, 401 U.S. 576 (1971) and *In re Primus*, 436 U.S. 412 (1978), limited a state's ability to place restrictions on the manner in which public interest organizations provide legal services to their members and constituents.

While these cases clearly provide some degree of protection to public interest groups providing legal services to individuals, the precise breadth and scope of these rulings is uncertain. It is possible, since the source of the protections derive from the First Amendment rights to freedom of association and petition, *see e.g., United Mine Workers*, 389 U.S. at 221-223; *Button*, 371 U.S. at 430, to view the protection as limited, extending only to membership organizations or traditional legal service providers. On the other hand, some would broadly interpret the constitutional protection afforded by this line of cases, extending it to virtually any nonprofit organization with a public purpose.

The Missouri Supreme Court has recognized that "it would be difficult to give an all-inclusive definition of the practice of law," *Liberty Mutual*, 344 Mo. at 956, 130 S.W.2d at 954; *Clark v. Austin*, 340 Mo. at 477-78, 101 S.W.2d at 982, and that attempting to do so would be "unwise." *Hoffmeister v. Todd*, 349 S.W.2d at 15. Thus, instead, the Committee utilizes the approach frequently taken in such matters by the Court. This involves using a functional, non-literal approach, giving due regard to the sensitive constitutional considerations previously discussed.

The Missouri courts, in discussing unauthorized practice of law as it relates to corporations, have identified four primary concerns to be addressed by the statutory and judicial restriction on such practice. The first concern is fee splitting. This concern with splitting fees is reflected in the express prohibitions contained in § 484.150, RSMo, and Rule 4-5.4. *See also, Allstate* at 95 and *First Escrow* at 848. But fee-splitting is not at issue in this case. No fees are being paid to the attorney or the corporation, and no financial or economic benefit accrues to the Shelter from any legal representation.³ Accordingly, this policy does not help to support a finding that the corporation would be

³ This opinion does not address the issue of whether the Shelter can recover attorney fees that might be awarded to the client.

engaged in the unauthorized practice of law or that the attorney's participation would violate the Rules of Professional Conduct.

Second, the courts have recognized that, in exercising their responsibilities to determine what is the unauthorized practice of law, "[t]he duty of [the] Court is not to protect the Bar from competition but to protect the public from being advised or represented in legal matters by incompetent or unreliable persons." *First Escrow*, 840 S.W.2d at 840, *quoting from Hulse*, 363 Mo. at 39, 247 S.W.2d at 857-858; *accord*, *Mid-America living Trust*, 927 S.W.2d at 857. This concern is essentially irrelevant here because a licensed attorney is actually providing the legal services. Thus, the interest in competent representation by a qualified attorney does not assist in determining whether the Shelter should be deemed to be practicing law.

A third concern referred to by the courts is assuring that "the confidential relation between attorney and client" is preserved. *McKittrick*, 340 Mo. at 861, 102 S.W.2d at 900. As structured, the arrangement between the attorney and the Shelter requires that the attorney represent the client directly, without involvement by the corporation or its Board. The client will never be represented by a faceless corporation, but will at all times be served by a duly licensed attorney. The Committee has been assured that the attorney's sole obligation will be to the client, and all the normal features of that confidential, fiduciary relationship will be preserved. Thus, this arrangement addresses the concern that a confidential relationship is preserved.

The fourth concern often stated in support of the restrictions on corporate practice of law is ensuring exercise of independent professional judgment and that the attorney is not engaged in the representation of conflicting interests. Thus, in determining whether that prohibition extends to non-profit entities, the Committee needs to examine the possible risks of conflicts and whether any such risks can be adequately dealt with short of prohibiting such representation altogether.

Missouri courts have long recognized the conflict of interest risks where attorneys employed or retained by corporations also provide legal services to clients of the corporation. In cases involving attorneys working for trust companies (*Mid-America Living Trust*, *St. Louis Union Trust Co.*), debt-collection (*McKittrick*) and escrow (*In re First Escrow, Inc.*) companies, the courts have recognized the divided interests where an attorney is simultaneously working for such a company and attempting to represent the company's clients. *Mid-America Living Trust*, 927 S.W.2d at 866-869. In fact, the Court noted that "[e]very court that has considered the issue has found an inherent conflict of interest when a service provider's own attorneys purport to represent or furnish legal services to the provider's customers. Such dual representations have drawn universal condemnation" *First Escrow*, 840 S.W.2d at 848.

These conflicts may also arise from the fact that the corporation is attempting to sell a product to the client, like trust or escrow services. As the Court in *St. Louis Trust* noted,

“the settler of a trust wants the most service that can be had from the trustee at the least expense to his estate. Just as naturally the trustee wants as broad powers with as little liability and as much compensation as may be consistent with getting and holding the trust business. Thus, in the very inception of a trust agreement, there are certain interests of the settler and the trustee that are conflicting.” 335 Mo. at 869, 74 S.W.2d at 359. Accordingly, “[i]t is obvious that the salaried employee of the trust company cannot be completely disinterested.” *Id.*, quoting from Frederick C. Hicks and Elliott R. Katz, *The Practice of Law by Laymen and Lay Agencies*, 41 Yale L.J. 82, 83 (1931-32).

Moreover, in some of the cases, there was very limited contact between the attorney and the purported client. See, e.g. *Mid-America Living Trust*, 927 S.W.2d at 870; *McKittrick*, 340 Mo. at 862, 102 S.W.2d at 901. The courts have been concerned that, in these situations, a true attorney-client relationship is lacking and that the attorney employed or retained by the corporation is more inclined to advance the corporation’s interests over those of the client where, as is often the case, they conflict. These are significant concerns.

Courts in other jurisdictions have recognized that, where non-profit legal services organizations employ attorneys who render services to individual clients, the entity “derives no benefit from its activities in making possible needed legal assistance to indigent persons.” *Azzarello v. Legal Aid Society of Cleveland*, 117 Ohio App. 471, 475, 185 N.E.2d 566, 568 (1962); see also *Touch v. Houston Legal Foundation*, 432 S.W.2d 690, 695 (Tex. 1968) (“no benefit can be or is expected by or can possibly result from the legal service rendered to indigent persons by the [corporation], nor is any such benefit intended). The court in *Azzarello* noted that “[t]he lawyer who renders the service for the indigent person is his lawyer, the relationship is that of attorney and client to whom the lawyer owes the same fidelity as if the client was able to pay the proper fee and the client has engaged the services of the lawyer himself.” 117 Ohio App. At 478, 185 N.E.2d at 570.

In many cases involving legal services organizations, the courts have looked at the structure of the services being provided and the nature of the relationship between the parties. In virtually all the cases involving legal services organizations the courts have recognized that, in effect, the corporation was acting as a “conduit” or “channeling agency” to bring the attorney and the client together. See *id.* (“channeling agency”), see also *Touchy*, 432 S.W.2d at 695 (“conduit or intermediary”). The corporation is merely the vehicle “through which the funds of donors or public departments are given in response to a recognized public need.” *Id.* In such cases, it is the individual attorney, and not the corporation, who represents the client. *Id.* Once the attorney has undertaken representation, the corporation has no further role. This arrangement significantly decreases the risk of lay involvement in the representation of clients or of the attorney serving conflicting interests. Given the assurances by the attorney in this case that the attorney will maintain an attorney-client relationship with the client and that the Shelter

will have no role in the attorney-client relationship, the Committee believes these cases reflect the situation here and are persuaded by their analysis.

That is not to say that the possibility of conflict of interest is non-existent where non-profit entities are involved. As the court recognized in *In re Education Law Center*, 86 N.J. 124, 132, 429 A.2d 1051, 1055 (1981), “[w]e share the ... concern that the provision of legal representation by staff attorneys of a corporation creates the danger that those attorneys may be subject to pressures from the corporation and that the attorney-client relationship may be interfered with.” As the court noted, “if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.” 86 N.J. at 134, 429 A.2d at 1056, *quoting from* ABA Code of Professional Responsibility, EC 5-22 (1980). “A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers,” 86 N.J. at 135, 429 A.2d at 1057, which might include “furthering their own economic, political, or social goals without regard to” client interests. *Id.* The court further recognized that these concerns may be as applicable to non-profit public interest organizations as they are to for-profit corporations. 86 N.J. at 136, 429 A.2d at 1057. Because those risks were not insignificant, the court “was not prepared simply to exempt from the prohibition...[non-profit corporations] that wish to practice law, albeit without charge to clients and in the public interest.” *Id.* The court did recognize, however, that, where the involvement of the corporation is limited to serving as a conduit to bringing the attorney and client together, and where the attorneys are fully responsible for the representation without interference or control by the corporation, the risks are sufficiently diminished to prevent the potential abuses. 86 N.J. at 137, 429 A.2d at 1058.

Here, the Shelter will be acting largely as a conduit and will obtain no benefit from the representation other than seeing that victims of domestic violence get adequate representation.⁴ The attorney will at all times be fully responsible for the representation, and there will be no involvement or interference by the Shelter in the individual representation of clients. All information provided to the attorney will remain fully confidential, and the attorney will exercise independent professional judgment solely on behalf of the client. The Committee believes that if the Rules of Professional Conduct that already constrain the attorney from allowing interference with independent professional judgment, *see e.g.*, Mo. Sup. Ct. R. 4-1.8(f) and 5.4(c), are carefully followed, they are sufficient to insure that these interests will be adequately served.


The Committee concludes that the structure of this arrangement avoids the unauthorized practice of law by the Shelter in this case. Treating the representation here as falling

⁴ In this way, this case is more like the legal services cases such as *Button, Educational Law Center* or *New Hampshire Disabilities Rights Center* because the Shelter, as a social services agency whose primary goal is to provide assistance to victims of domestic violence, has less incentive to interfere than organizations which have a political agenda.

outside the proscriptions of unauthorized practice of law also serves the important public interest in making competent counsel available to all segments of the community, an interest reflected in the Rules of Professional Conduct. *See, e.g.*, Rule 4, Preamble, and Rule 4-6.1, Comment.

The Committee concludes that where an attorney is employed by a bona fide nonprofit charitable or social service corporation to provide legal services to its clients, such activity does not constitute unauthorized practice of law by the corporation, and attorneys engaged in such practice are not to be deemed to be assisting in the unauthorized practice of law, as long as adequate precautions have been taken to insure that the corporation entity is serving merely as a conduit for the representation, is not in any way involved in or in control of the representation, no fee is involved, and adequate precautions are taken to avoid lay interference and to preserve the integrity of relationship between the attorney and the individual client.⁵ Since the arrangement presented to the Committee by the inquiring attorney meets these requirements, the Committee concludes that the attorney would not violate any provision of the Rules of Professional Conduct found in Missouri Supreme Court Rule 4 by participating.⁶

Supreme Court Advisory Committee


John C. Dods, Chair

Dated: April 5, 2006

⁵ The Committee is mindful of the potential that some will seek to extend this Opinion beyond its appropriate reach. As the court noted in *Bray v. Brooks*, 41 S.W.3d 7, 13 (Mo. App. 2001), “[i]n today’s sophisticated marketing era only the imagination limits the possibilities of offering legal services without charge but in conjunction with or as a free benefit to some other product or service.” But the Committee believes any such concerns are addressed by the limitations in this opinion and can be further addressed, if necessary, on a case-by-case basis.

⁶ The Committee acknowledges the extensive research, analysis and preparation of this opinion done by Ellen Suni, Dean of the School of Law of the University of Missouri at Kansas City, for which we express our thanks and appreciation.