

In June, 2012 this Executive Committee and the House of Delegates approved a report of the Committee on Committees recommending that the Committee on the Unlawful Practice of Law be continued. The recommendation added that the stated purpose of the UPL Committee “should be revised to reflect the current and anticipated needs of the Association...”

I am now asking the Executive Committee to again look at UPL Committee, as, despite our best efforts, we have been unable to define a purpose for that Committee. It is not that the unlawful practice of law is not an important subject to our Association - - it certainly is. Our problem is that the Committee cannot take on any activity that might put the Association at risk of violation of the anti-trust laws.

In the 1970's, a prior UPL Committee issued advisory opinions and took steps to enforce the statutes prohibiting the unlawful practice of law. In fact, current statutory law continues to give the Association the power to bring actions to enforce this law. However, in 1981, the Executive Committee determined that the advisory and enforcement functions should be discontinued because of anti-trust concerns. In 1992 the Committee was discharged because “changes and developments in this area of law had eliminated the need for a committee with the limited function of the Committee on Unlawful Practice of Law.” In 1995 a new committee was formed. However, its role ended when its report to the House was rejected by that body in 2002. One of its major proposals was to elevate a violation of the law from a misdemeanor to a felony.

The current UPL Committee was formed in 2005 in an effort to allow the Association to continue to focus on unlawful practice issues. However, that Committee has had difficulty in identifying its objective. It is well aware that it cannot take on any activity that might put us at risk of violation of the anti-trust laws.

Shortly after its formation in 2005, the Committee held one or two in person meetings. However, without any focused projects, it did not continue to meet in person. Within the last five years, there have been no in person meetings, and just a few conference call meetings. There have no meetings of any kind during the last two years. The Committee did hold some forums in 2009, but it was unable to do anything beyond holding those forums.

The current committee has achieved one major accomplishment. It submitted a legislative proposal that elevated a violation of the law from a misdemeanor to a felony where the victim suffered a defined harm. This proposal was adopted by the Executive Committee and our bill was enacted into law last year. However, the reality is that this proposal was developed by Richard Rifkin, who had been a member of the Committee before he joined our staff, and who has been the staff liaison since that time. The Committee basically reviewed and edited the documents that Richard had drafted.

If the UPL Committee is to be continued, it needs to be given a mission statement. The Committee on Committees did not identify what purpose it saw for the UPL Committee, as it said that it should meet “the current and anticipated needs of the Association”. Given the Committee's history of inactivity, it seems that the Committee has been unable to identify projects for itself. With the legal restrictions under which it must operate, it is hard to identify a role for the Committee within the Association.

Should we discontinue the UPL Committee, it would not mean that the Association would ignore unlawful practice of law issues. Other substantive committees could examine problems in their areas. For example, the Committee on Immigration Representation could consider unlawful practice in its area. Similarly, the Real Property Section could do the same in its area of expertise. Whether we, as an Association, could take any action should we identify an unlawful practice problem is questionable, but at least we would continue to be aware of problems in areas where they exist.

If this Committee can define a mission for the UPL Committee, then we can follow the advice stemming from the report of the Committee on Committees. If it cannot, I believe that we should reconsider this matter and submit a new recommendation to the House. It is not good for the Association to appoint members to serve on a committee when it cannot inform the members of their responsibilities. It is important that members who accept committee appointments feel valued in that they are told how they can make a contribution to the Association.

Thus, the first question before us is whether we can identify a purpose for the UPL Committee. If we fail to identify a purpose, the second question is whether to recommend that the Committee be sunset.

APPENDIX

EXCERPTS FROM JUNE 2012 REPORT COMMITTEE ON COMMITTEES

COMMITTEES WHERE COMCOM RECOMMENDS SOME MANNER OF CHANGE IN STATUS:

1. UNLAWFUL PRACTICE OF LAW:

Unlawful practice of the law is an important and topical issue for the Association, its members, the legal profession generally, and the public. The action of the Executive Committee in approving the report of the Committee on Committees with respect to the UPL Committee in 2009 underscores the importance with which the subject of UPL is viewed by the Association. Moreover, the report of the Special Committee on Immigration Representation and the issues raised by the Elder Law survey serve to reinforce the need for the Association to maintain an active presence in this area. (Please see full ComCom report on UPL attached as [Appendix B pp. 10-14](#) for a full analysis of this Committee).

However, the relative lack of activity by the UPL Committee in recent years (notwithstanding that they did develop a legislative proposal [approved by EC in January 2012] to increase penalties for some aspects of unlawful status from misdemeanor to felony status) does raise concerns as to how best to provide that presence. Addressing the nuances of UPL in various fields and defining what constitutes unlawful practice requires active committee involvement and expertise from a variety of practice areas, such as the elder and immigration areas referenced above. Other areas, such as real property and trusts and estates were also discussed by ComCom as fields in which UPL arises often. To provide the UPL Committee with the necessary expertise, we are of the opinion that its membership should be augmented with representatives from other relevant committees and sections. To ensure that all relevant fields are covered, in advance of making appointments to the UPL Committee, the President and Executive Director are encouraged to contact pertinent sections and committees to determine the existence of UPL issues in their respective fields and to make appointments to the UPL Committee accordingly. The Committee's charge should also be revised and updated to reflect current and projected activities.

RECOMMENDATION: That the "Committee on Unlawful Practice of Law" should be continued as a standing committee, but its stated purpose should be revised to reflect the current and anticipated needs of the Association, and its membership should be augmented with representatives from other relevant committees and sections to provide expertise with regard to practice areas such as elder law, immigration, real property and trusts and estates. To ensure that all relevant fields are covered, in advance of making appointments to the UPL Committee, the President and Executive Director are encouraged to contact relevant sections and committees to determine the existence of UPL issues in their respective fields and to make appointments to the UPL Committee accordingly.

COMMITTEE ON COMMITTEES FINAL REPORT

On

COMMITTEE ON UNLAWFUL PRACTICE OF LAW

History: The Committee on Unlawful Practice of Law was established May 31, 1996 as a special committee. It was made a standing committee in June of 2010.

Name of Reporter: John A. Williamson – (518) 482-5638; jaw 51046@aol.com

Date of Report: June 8, 2012

Current Budget: Currently unfunded as it has no recent expenditures

Committee Chair: **Current Chair: Mark Solomon;** (607) 277-2919;
mark@msololaw.com
Past Chair: Nancy Langer; (716) 984-5146;
nmlanger@aol.com

NYSBA Liaison: **Richard Rifkin;** (518) 487-5614; rrifkin@nysba.org

Exec.Comm- Liaison: **Arlene Gordon-Oliver;** (914) 682-2113;
ago@gordonoliverlaw.com

Committee Staffing: Richard Rifkin

Recommendation: Unlawful practice of the law is an important and topical issue for the Association, its members, the legal profession generally, and the public. It requires active committee involvement to address its various facets and concerns. To accomplish this objective, the Committee on Unlawful Practice of Law should be continued as a standing committee, but its stated purpose should be revised to reflect the current and anticipated needs of the Association, and its membership should be augmented with representatives from other relevant committees and sections to provide expertise with regard to practice areas such as elder law, immigration, real property and trusts and estates. To ensure that all relevant fields are covered, in advance of making appointments to the UPL Committee, the President and Executive Director are encouraged to contact relevant sections and committees to determine the existence of UPL issues in their respective fields and to make appointments to the UPL Committee accordingly.

Explanation for the Recommendation:

Mission Statement: Dated 1996: The New York State Bar Association Committee on Unlawful Practice of Law will serve to promote the policy of the State of New York, as set forth in the Judiciary Law, to protect the public from those who would practice law without a license. To that end, the Committee will seek to monitor the unauthorized practice of law and to inform those who are charged by law with the enforcement of the UPL statutes, including the State Attorney General and local District Attorneys, of possible violations of law.

From time to time the Committee will render and publish opinions regarding circumstances which, in the Committee's view constitute the unlawful practice of law, provided such opinions are of an advisory nature and so indicate in a clear and unequivocal fashion.

The Committee will also inform members and other interested citizens as to means available to bring unlawful practice of law complaints to the attention of the proper authorities.

Website Review: The committee has a website which sets forth its history of the past several years including activities as described in its 2006 report to the House of Delegates and its 2008 report to the Executive Committee.

Preparation of Report: In preparing this report, I received and reviewed the chair's questionnaire, the staff liaison's questionnaire, minutes of meetings held in 2006 and 2007, the committee's website, a recent survey by the Elder Law Section dealing with unlawful practice in that field, an excerpt from the current report of the Special Committee on Immigration Representation regarding unlawful practice issues in that area, as well as the Committee on Committee's report to the Executive Committee in 2009 concerning the UPL Committee. I also spoke with the committee chair, the current staff liaison and his predecessor, who also is the Association's General Counsel, and who provided staff services to the committee for a number of years.

The committee consists of 27 members, and as noted above, has had no expenditures in recent years, as it has not had any physical meetings in the past three years, only telephone conferences in connection with a legislative proposal developed in 2011 to raise penalties for some unlawful practice acts from misdemeanor to felony status.

To provide perspective regarding the committee, the following history should prove helpful. Dating back at least to the 1960s and 1970s, a Committee on Unlawful Practice of Law had been active in terms of investigating on behalf of the Attorney General allegations of unlawful practice and issuing advisory opinions as to what might or might not constitute unlawful practice in various fields. However, U.S. Supreme Court opinions which raised the specter of treble damage

antitrust actions for the organized bar involved in policing UPL caused the Association to cease such activities. The committee, having discontinued these major functions, became relatively dormant and was discharged in 1992.

The committee was subsequently reformed as a special committee in 1996, with the stated purpose as set forth above. This was based on a recommendation by the Ad Hoc Committee on Non Lawyer Practice. In June 2000, the House of Delegates approved the report of the Special Committee on the Law Governing Firm Structure and Operation (the MacCrate report) which studied issues related to multi-disciplinary practice involving lawyers participating in business entities owned or controlled by non-lawyers. One of the recommendations approved by the House called for an appropriate committee within the Association to develop statutory amendments to refine the definition of the practice of law in New York. The UPL Committee was given this assignment and presented its report defining the practice of law to the House of Delegates in 2002. However, the House recommitted the report to the committee for further review based upon concerns raised during its discussion. The matter still rests with the committee and a further report regarding this issue has not been submitted to either the Executive Committee or the House.

The committee did report to the House in April 2006, presenting a series of recommendations which were approved. These included the holding of a series of hearings around the state to gather data, and hear testimony from the public, attorneys, and non-lawyer providers of legal services; canvass local bar associations regarding the receipt and handling of UPL complaints; obtain input from Association sections regarding unauthorized practice concerns; review cases in which the Attorney General, bar associations, or district attorneys have brought charges of unauthorized practice; develop recommendations and goals to increase the role of law students and paralegals working under the supervision of attorneys; open a dialogue with the Legislature, the Attorney General, and the Administrative Board to work toward consensus on a comprehensive plan to address unauthorized practice; and, with respect to suspended or disbarred attorneys, recommend definite standards for permissible activities and guidelines to be followed.

The committee met regularly in 2007 to pursue these purposes and gather necessary background data. In 2008, the committee presented a report to the Executive Committee, in which it summarized the information gathered to that point and noted that the organized bar generally appeared to be unaware or unconcerned about the vulnerable population at risk of being taken advantage of by non-lawyer providers of legal services, particularly in the areas of immigration, bankruptcy and residential real estate transactions. The committee recommended that the statewide hearings envisioned in its 2006 report to the House be replaced with a series of forums which would allow the committee to delve more deeply into the concerns that it had uncovered in those areas. The forums would focus on the three noted practice areas, and allow the committee to bring together appropriate individuals both within and outside the Association and develop

appropriate recommendations for consideration by the Executive Committee and House of Delegates.

The UPL Committee was thereafter reviewed by the Committee on Committees, which recommended to the Executive Committee in January 2009 that the UPL Committee's mission statement be revised to reflect what was then its current activities, specifically to investigate the issues around and develop a definition of the unauthorized practice of law; work with the Legislature, the Attorney General and the Administrative Board to develop a comprehensive plan to address the unlawful practice of law; and with respect to suspended or disbarred attorneys, recommend definite standards for permissible activities and guidelines to be followed. Noting the need for sensitivity to antitrust concerns, the report recommended that consideration be given to including in the mission statement wording that UPL activities would be conducted in compliance with all applicable antitrust laws, and current operating methods be institutionalized and made part of the structure of the UPL Committee to insure compliance with the antitrust laws. It was also recommended that consideration be given to making the UPL Committee a standing committee given the continuing need for its important work. The recommendations of the Committee on Committees were approved and I was informed that the UPL Committee was designated a standing committee in 2010.

As noted above, the UPL Committee has been relatively dormant in recent years, although it did develop a legislative proposal approved by the Executive Committee in January 2012 to increase penalties for some aspects of unlawful practice from misdemeanor to felony status. The relevant bill is presently pending in the Legislature.

While the committee has otherwise been inactive, the chair and the staff liaisons agree that it does have an important role to play in the Association given the nature of concerns that exist regarding unlawful practice issues. The chair sees a definite clearinghouse function for the committee in terms of gathering relevant information and then informing and educating the Bar as well as encouraging the proper authorities to prosecute appropriate cases where warranted. He also noted that if the Legislature enacts the Association's legislation to increase penalties for some UPL activities, it will create an impetus to have a better definition of what constitutes UPL.

With regard to the definition of UPL, the recent report of the Special Committee on Immigration Representation deals in part with UPL concerns and a need to better define what are mere ministerial functions that a non-lawyer can perform as opposed to the legal guidance that should rest with attorneys. Similarly, the Elder Law Section is surveying its members regarding what should be ministerial actions and what should be the province of attorneys with respect to Medicaid matters.

The action of the Executive Committee in approving the report of the Committee on Committees with respect to the UPL Committee in 2009 underscores the

importance with which the subject of UPL is viewed by the Association. Moreover, the report of the Special Committee on Immigration Representation and the issues raised by the Elder Law survey serve to reinforce the need for the NYSBA to maintain an active presence in this area.

However, the relative lack of activity by the UPL Committee in recent years does raise concerns as to how best to provide that presence. Addressing the nuances of UPL in various fields and defining what constitutes unlawful practice requires expertise from a variety of practice areas, such as the elder and immigration areas referenced above. Other areas, such as real property and trusts and estates, come to mind as well. To provide the UPL Committee with the necessary expertise, its membership should be augmented with representatives from other relevant committees and sections. To ensure that all relevant fields are covered, in advance of making appointments to the UPL Committee, the President and Executive Director are encouraged to contact pertinent sections and committees to determine the existence of UPL issues in their respective fields and to make appointments to the UPL Committee accordingly. The Committee's charge should also be revised and updated to reflect current and projected activities.

In summary, the need to address UPL in a meaningful way remains an important concern for the Association, although the UPL Committee has been relatively dormant the past few years. To remedy this, the UPL Committee should be continued as a standing committee and its membership augmented with the necessary expertise from other committees and sections, and this should be accompanied by revision of the committee's charge to reflect its current and anticipated activities.