

## REPORTS OF STANDING COMMITTEES

### STANDING COMMITTEE ON UNAUTHORIZED PRACTICE OF LAW

*Hugh T. Antrim, chair*

The Standing Committee on Unauthorized Practice of Law (UPL Committee) is charged with two duties. The UPL Committee investigates complaints alleging that individuals or business entities are engaged in the unauthorized practice of law. The UPL Committee also is charged with rendering opinions on whether specific conduct constitutes the unauthorized practice of law.

During the past year, eighty-two new investigations were opened in addition to the forty-three investigations remaining on the UPL Committee's docket from previous years. Of those open investigations, eighty-three were closed during the year, with twenty-nine referred to a commonwealth's attorney for prosecution. The UPL Committee also has the option of referring matters to the attorney general. Four files were referred to that office during fiscal year 2004.

In fiscal year 2003, the UPL Committee issued a proposed Rule 10, which would specifically enable clerks of court and their staff to fulfill their duties as public servants, by assisting self-represented litigants who are using or are interested in the court system and its processes without improperly engaging in the unauthorized practice of law. This proposed new rule was a result of the formation by Chief Justice Carrico in September 2001 of a Pro Se Litigants Planning Committee to review policies, practices and protocols for Virginia's court system to use in the handling of cases in which the parties are self-represented. The committee, chaired by Justice Elizabeth B. Lacy, presented a report containing recommendations, one of which requested that the UPL Committee consider drafting a new Rule of Court concerning the scope of assistance that may be provided by court personnel to self-represented litigants. The UPL Committee issued the proposed rule on April 15, 2003, which was reviewed by Council at its meeting on February 21, 2004. UPR 10 was submitted to the Supreme Court of Virginia for consideration and by order dated June 21, 2004, the Supreme Court rejected the proposed new rule.

One opinion was carried over from Fiscal Year 2002. UPL Opinion 206 was initially issued on May 30, 2002. It addressed whether a lay corporate officer may represent the corporation in an arbitration conducted in Virginia under the Rules of the American Arbitration Association (AAA). The UPL Committee had concluded that it would be unauthorized practice of law for a lay corporate officer to represent his/her corporation in an arbitration proceeding and that Virginia's unauthorized practice rules and opinions would take precedence over AAA's rules in an arbitration proceeding. In light of commentary received following publication of the initial opinion, the UPL Committee withdrew its opinion on September 24, 2003. The UPL Committee revised the opinion to state that that it would not be the unauthorized practice of law for an officer of a corporation who is not a lawyer to represent the corporation in an arbitration proceeding in Virginia. While the definition and Rule 1-101 prohibit a non-lawyer from representing the interests of or appearing on behalf of his employer or a corporation before "a tribunal," the definition of "tribunal" in UPC 1-1 does not include an arbitration proceeding. It follows, therefore, that a nonattorney officer of a corporation can represent that corporation and provide legal advice to the corporation/employer within the context of an arbitration proceeding. The opinion also addresses the question of whether Virginia attorneys or AAA would be subject to sanction for participating in arbitration where the corporation was represented by a non-lawyer officer. On this point, the UPL Committee opines that this is a question beyond the purview of the committee, which becomes moot in light of the committee's opinion regarding the representation itself. Finally, the UPL Committee opines that the Virginia Unauthorized Practice of Law rules and findings in its opinions take precedence over the rules of the AAA. While the UPL Committee acknowledges that AAA rules allow for nonattorneys to represent parties, including corporations, in arbitration proceedings, the committee's finding as to the permissibility of a nonattorney officer of a corporation to do so was based solely on the Virginia Unauthorized Practice Rules and Virginia's definition of the practice of law.

Two new opinions, UPL Opinions 207 and 208, were requested this fiscal year. UPL Opinion 207, issued February 18, 2004, addresses whether an attorney may train a nonattorney social worker to assist members of the general public in filling out warrants in debt, and other forms necessary for pro se representation in small claims court in Virginia. The Standing Committee on Legal Ethics referred this inquiry to the UPL Committee for a determination as to whether it is the unauthorized practice of law for a nonlawyer to assist in the activities described. The applicable authority is found in Virginia's definition of the practice of law, in UPL Opinion 73, and also in five of the nine existing UPRs regarding the preparation of legal documents. Based upon this authority, the opinion finds that the preparation of warrants in debt and other forms necessary for pro se representation in small claims court by a nonattorney worker would be the unauthorized practice of law. In addition, the UPL Committee notes that persons proceeding in small claims court are required to represent themselves, which raises a question of whether such limited assistance by a social worker under the direction of an attorney is permissible. However, the opinion finds that this issue is beyond the purview of the committee. This opinion was submitted to the VSB Council at its meeting on June 17, 2004 and was returned to the committee for further consideration.

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UPL Opinion 208, issued February 18, 2004, addresses whether a layperson private adjuster may properly advise, counsel and represent the legal interests of an insured when the various parties are in dispute. The controlling authority is found in Unauthorized Practice of Law Rule 2-105(A), which provides that a lay adjuster is permitted to engage in all of the activities authorized under all of the other provisions of UPR 2, including investigation, negotiation of settlement and preparation of certain documents, if performed on behalf of a principal “which is making a claim against its own insurance carrier.” Further, UPR 2-103 (A)(2) allows that a lay adjuster may make statements to “others” in the course of settlement negotiations as to the principal’s liability or the law governing the facts so long as the provisions of sections (2)(a-c) are satisfied. Therefore, the committee opined that it is not the unauthorized practice of law for a lay adjuster to represent the interests of a principal, in this case the insured, in negotiation, settlement or investigation of a claim to be paid under the principal’s own insurance policy or contract.

I would like to thank the committee members—Vice Chair Walter A. Wilson III, Timothy P. Chinaris, Joseph C. Fleig, Olin V. Hyde, Craig D. Johnston, Megan E. Kelly, James M. Pates and Jon C. Poulson—for their hard work and dedication to the mission of the UPL Committee. I also wish to thank a particularly dedicated and hardworking staff at the VSB, who have made the work on the committee as streamlined as possible.

