

A CLOSE LOOK AT THE RULE PROHIBITING A NON-PROFIT CORPORATION *PRO SE* APPEARANCE

I. INTRODUCTION

Recently, a series of federal court decisions have addressed the question of a non-profit corporation's¹ ability to practice law.² Specifically, the courts have focused on the ability of an organization to be represented in court by a non-attorney. These decisions have recognized a general rule that a for-profit corporation may not represent itself in *propria persona*, and have applied this rule to non-profit corporations. The focus of this article is to expose the rationale and discuss the rule regarding a non-profit corporation's inability to represent itself in litigation. To achieve this goal, the traditional for-profit corporation rule will be briefly described, how this rule has been applied in the non-profit setting will be discussed, and finally this article will indicate exceptions to the general rule and special policy benefits afforded non-profit corporations in legal matters.

II. THE TRADITIONAL RULE

The traditional rule regarding for-profit corporations is that they must be represented by a licensed attorney in courts of law.³ This rule was recognized very early in American jurisprudence in *Osborn v. President, Directors & Co. of the Bank of the United States*.⁴ In dictum, Chief Justice Marshall stated, "It is admitted, that a corporation can only appear by attorney."⁵ This rule has been deemed consistent with 28 U.S.C. § 1654 (1982), which states, "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." This is true in spite of 1 U.S.C § 1

1. For the purposes of this article the words non-profit should be taken synonymously with not-for-profit, and the non-profit corporation rule is also applicable to non-profit unincorporated associations or groups.

2. *E.g.*, *Move Organization v. United States Dep't of Justice*, 555 F. Supp. 684 (E.D.Pa. 1983).

3. *See* Comment, *Representation of a Corporation by Its Lay Employees*, 5 J. LEGAL PROF. 217 (1980). *See also* Annot., 19 A.L.R.3d 1073 (1968).

4. 22 U.S. (9 Wheat.) 326 (1824).

5. *Id.* at 365.

(1982), which states, "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."⁶ Additionally, this general rule against non-attorney representation is not only recognized in the federal courts, but also has been recognized by state courts.⁷

A number of courts have stated their rationale for upholding the rule prohibiting for-profit corporations from representing themselves *pro se*. One such rationale noted by the courts is that a corporation is merely fictional, lacking substance, and therefore is incapable of representing itself.⁸ Courts have so held, even when the individual attempting to represent the corporation is that corporation's president and majority stockholder.⁹ A second rationale for prohibiting a non-attorney to represent the corporation is that it will result in confusion of the legal issues before a court.¹⁰ In addition, by allowing a non-attorney to represent the corporation, a great deal of control over the management and administration of a case is lost because the non-attorney is not an officer of the court.¹¹ Finally, an overriding justification for this rule seems to be that if a party chooses the benefits of incorporation, then he "must now bear the burdens of that incorporation."¹² Such rationale is obviously persuasive, and lends credibility to the rule that for-profit corporations must be represented in court by attorneys.

III. RULE FOR NON-PROFIT CORPORATIONS

As described earlier, the general rule concerning representation of a for-profit corporation has been applied to non-profit corporations.

6. This apparent contradiction was recognized and discussed in *Move*, 555 F. Supp. at 691.

7. 5 J. LEGAL PROF. at 221.

8. *K.M.A. Inc. v. General Motors Acceptance Corp.*, 652 F.2d 398, 399 (5th Cir. 1981); *Brandstein v. White Lamps*, 20 F. Supp. 369, 370 (S.D.N.Y. 1937).

9. *K.M.A., Inc.*, 652 F.2d at 399; *United States v. 9.19 Acres of Land*, 416 F.2d 1244, 1245 (6th Cir. 1969).

10. *Simbraw, Inc. v. United States*, 367 F.2d 373, 375 (3d Cir. 1966); *Turner v. American Bar Ass'n*, 407 F. Supp. 451, 476 (N.D. Tex. 1975), *aff'd sub nom. Pilla v. American Bar Ass'n*, 542 F.2d 56 (8th Cir. 1976), also *aff'd mem. sub nom. Taylor v. Montgomery*, 539 F.2d 715 (7th Cir. 1976).

11. *Mercu-Ray Indus., Inc. v. Bristol-Myers Co.*, 392 F. Supp. 16, 20 (S.D.N.Y. 1974), *aff. mem.*, 508 F.2d 837 (2d Cir. 1974).

12. *Id.* at 20; See also *Walacavage v. Excell 2000, Inc.*, _____ Pa. Super. _____, 480 A.2d 281, 284 (1984).

The most notable application of the rule is found in *Move Organization v. United States Department of Justice*.¹³ This case involved the highly publicized police actions in Philadelphia, Pennsylvania in the spring of 1976. In *Move*, a civil rights organization filed suit against federal and state agencies seeking damages for a number of alleged brutal actions taken by law enforcement officials.¹⁴ After discussing the allegations contained in the complaint, the federal district judge dismissed the complaint. As grounds for dismissal, the judge stated, "the courts have repeatedly held that corporations and other organizations must be represented by counsel."¹⁵ Through his dismissal the judge effectively applied the general rule regarding for-profit corporations to the non-profit setting.

In an earlier decision regarding this rule, the Seventh Circuit Court of Appeals in *Strong Delivery Ministry Association v. Board of Appeals of Cook County*,¹⁶ agreed with the district court's decision that a non-profit corporation must be represented by an attorney.¹⁷ The appeals court affirmed the dismissal of the complaint for failure of the corporation to be represented by a licensed attorney.¹⁸ This occurred even though the lay person attempting to represent the non-profit corporation was its founder and president.¹⁹

More recent opinions also have recognized and applied the rule against non-attorney representation. In *First Amendment Foundation v. Village of Brookfield*,²⁰ the district court stated that the general rule regarding corporations was applicable to partnerships and unincorporated organizations.²¹ The court characterized the appearance of a non-attorney on behalf of the plaintiff, First Amendment Foundation, as improper, and dismissed the case without prejudice.²²

Further, the Ninth Circuit in *Church of the New Testament v. United States*,²³ recognized the rule regarding improper representation. In this case, the pastor of the church sought to represent the church

13. 555 F. Supp. 684 (E.D.Pa. 1983).

14. *Id.* at 685-686.

15. *Id.* at 693.

16. 543 F.2d 32 (7th Cir. 1976).

17. *Id.* at 35.

18. *Id.* at 33.

19. *Id.*

20. 575 F. Supp. 1207 (N.D.Ill. 1983).

21. *Id.* at 1207.

22. *Id.* at 1207-1208.

23. 783 F. 2d 771 (9th Cir. 1986).

and its members in judicial proceedings. Specifically, the church was seeking a declaratory judgment against the Internal Revenue Service for failure to recognize its tax-exempt status.²⁴ After affirming the district court's dismissal for lack of subject matter jurisdiction under the Declaratory Judgment Act, the court turned its attention to the issue of improper representation.²⁵ It said, "[u]nincorporated associations, like corporations, must appear through an attorney; *except in extraordinary circumstances*, the corporation cannot be represented by lay-persons."²⁶ The court obviously recognized the general rule, but carefully couched the language to allow for exceptions. The effect of these recent decisions has been to apply the traditional rule of for-profit corporations being represented by counsel in the non-profit setting.

The rationale in support of applying the rule in non-profit corporate settings is obviously similar to the reasons for its application to for-profit corporations. In fact, concern over frivolous pleadings may be magnified in the non-profit setting.²⁷ A logical explanation for this phenomenon is the general lack of legal sophistication which is often associated with non-profit organizations. Although much of the same rationale can be found to apply to the non-profit setting, special considerations should be taken into account upon application of the rule against non-profit corporations appearing in *propria persona*.

IV. SPECIAL CONSIDERATIONS

A. *Exceptions to the General Rule*

Although the general rules regarding non-profit corporations are settled, a number of factors are worthy of attention. To this point, this article has focused on the general rule of attorney representation, however, exceptions to the general rule of for-profit corporations provide a means of scrutinizing the applicability of this rule in the non-profit setting. To a limited extent, for-profit corporations have been allowed to appear without being represented by an attorney. The most obvious example is *pro se* representation in small claims court.²⁸ Also, some decisions seemingly contradict the absolute rule and recognize that corporations may be represented in court by a non-attorney.²⁹ Finally, lay

24. *Id.* at 772.

25. *Id.* at 773.

26. *Id.* (emphasis added).

27. *See Move* at 693.

28. 5 J. LEGAL PROF. at 224-225.

29. *See In re Victor Publishers, Inc.*, 545 F.2d 285, 286 (1st Cir. 1976) (per curiam)

representation is sometimes allowed before administrative tribunals.³⁰ These exceptions appear to show a general willingness to allow non-attorney representation of a for-profit corporation in a courtroom setting, as long as the advocate is competent. These exceptions seem to be equally applicable to the non-profit setting, and may be the exceptions the Ninth Circuit was referring to in *Church of the New Testament*.

A unique exception to the general rule concerning non-profit corporations has been statutorily created in New York. The applicable part of the New York statute states:

§ 1403 Corporations for the prevention of cruelty

(b) Special Powers. (1) A corporation formed for the purpose of preventing cruelty to children may prefer a complaint before any court, tribunal or magistrate having jurisdiction, for the violation of any law relating to or affecting children, and may aid in presenting the law and facts to such court, tribunal or magistrate in any proceeding therein.

(2) A corporation formed for the purpose of preventing cruelty to animals may prefer a complaint before any court, tribunal or magistrate having jurisdiction, for the violation of any law relating to or affecting the prevention of cruelty to animals, and may aid in presenting the law and facts to such court, tribunal or magistrate in any proceeding therein.

(3) A corporation for the prevention of cruelty to children may be appointed guardian of the person of a minor child during its minority by a court of record, or a judge thereof, and may receive and retain any child at its own expense on commitment by a court or magistrate.

(4) All magistrates and peace officers shall aid such a corporation, its officers, agents and members in the enforcement of laws relating to or affecting children, and for the prevention of cruelty to animals.³¹

Important observations may be made about the New York statute. First, it allows non-attorneys to present law and facts to the court in a criminal proceeding. Second, it explicitly requires the legal establishment to aid a non-profit corporation. Finally, the statute authorizes the non-

(see footnote at 286); *In re Las Colinas*, 453 F.2d 911 (1st Cir. 1971), *cert. denied*, 405 U.S. 1067 (1972) (see party representing the corporation).

30. 5 J. LEGAL PROF. at 225.

31. N.Y. *Not-For-Profit Corp. Law* § 1403 (McKinney 1970).

profit corporation to represent the rights of other parties, not just those of the corporation. This final observation skips over the issue of self representation, and moves forward into the area of non-profit corporations representing other interests. This statute clearly provides standing to non-attorneys who would be prohibited by the general rule concerning for-profit corporations.³²

B. Public Policy

Aside from these exceptions, there is public policy in favor of legally aiding non-profit corporations. The most obvious and arguably most important example of this policy is the federal tax-exempt status which is allowed non-profit corporations.³³ A second example of the preferred status of non-profit organizations is found in *In re Primus*.³⁴ In this case, the United States Supreme Court held that an attorney, acting as a representative of a non-profit organization, may inform individuals of their potential legal rights, and that the attorney's actions were protected from disciplinary proceedings for solicitation by the First Amendment.³⁵ These two examples demonstrate legislative and judicially created methods of encouraging the aid of non-profit organizations in advancing their interests within a legal setting. The recognized exceptions to the rule of corporate representation by attorneys, and the clear public policy in favor of non-profit organizations mandates a close examination of the applicability of the corporate representation rule to the non-profit setting.

V. CONCLUSION

Generally, a for-profit corporation must be represented in court by a licensed attorney. The current trend toward applying this rule to non-profit corporations is still in its early stages. A balance between the desire to aid non-profit corporations and the need for consistency and control in our courtrooms is currently being established. Before application of the rule regarding non-attorney representation becomes entrenched in the legal system, legal rulemakers should closely scrutinize

32. See *Rapp v. Rapp*, 438 N.Y.S.2d 154, 156 (N.Y.Fam.Ct. 1979).

33. See 26 U.S.C. § 501 (1982).

34. 436 U.S. 412 (1978).

35. *Id.* at 432-433.

the importance and impact that such a decision would have upon non-profit corporations.

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