The IRS Man Cometh: Public Interest Law Firms Meet the Tax Collector

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Until October 1970 the Internal Revenue Service (IRS) treated public interest law firms applying for tax exempt status the same as other charitable organizations such as churches and public schools. Then, on October 9, 1970, the IRS issued a news release[1] which for the first time raised the issue whether litigation was to be singled out as an activity forbidden to organizations qualifying for tax exempt status under section 501(c)(3) of the *Internal Revenue Code of 1954*.[2] The Service announced that it had temporarily suspended the issuance of advance rulings on claims for tax exempt status by public interest law firms, pending the conclusion of a study then in progress and expected to be completed within 60 days.[3] The major concern of the IRS was the existing "lack of standards or controls"[4] for determining the tax exempt status of the possibly numerous groups desiring to litigate in the public interest.

With this announcement, it appeared that the IRS intended to assume "the impossible task of discerning whether each firm's cases really served the public interest."[5] When the study was completed, however,

1. IRS News Release No. 1069, Oct. 9, 1970, 7 CCH 1970 STAND. FED. TAX REP. ¶ 6937E, at 71,835.

2. All citations of section numbers in text are to the INT. REV. CODE of 1954, *as amended* [hereinafter cited as I.R.C.].

3. IRS News Release No. 1069, *supra* note 1. The news release also stated that the Service was "in no position at this stage to make any judgment about the deductibility of contributions made during the period of study to currently tax exempt firms of the type being studied." *Id.* at 71,836. This statement was partially clarified 6 days later in a second news release when the Service stated that donors to public interest law firms "will be fully protected in making contributions under the advance assurance implicit in outstanding favorable rulings issued to such organizations where the funds are for the support of current operations under the rulings." IRS News Release No. 1072, Oct. 15, 1970, 6 P-H 1970 FED. TAXES ¶ 55,437, at 55,316. This second release, however, was tempered with the statement that "[o]n the other hand, the IRS expressed the hope that major commitments for long-range funding for such organizations would not be undertaken during the present study." *Id.*

4. IRS News Release No. 1069, *supra* note 1.

5. Halpern & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095, 1108 (1971).

the IRS apparently rejected the case-by-case approach to determining the public interest. Instead, on November 12, 1970, it issued eight guidelines under which advance exemption rulings would be issued to public interest law firms.[6] The following analysis will examine the scope, possible impact and necessity of those guidelines. Initially, however, it is necessary to understand the Code structure for determining tax exempt status.

TAX EXEMPTIONS UNDER THE INTERNAL REVENUE CODE

Under section 501(c)(3), the income of the following organizations is exempt from taxation:

> (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

Of equal importance, however, is that under various Code sections, donations to section 501(c)(3) organizations are deductible by the donor.[7] In order to encourage donations, therefore, it is vitally important for certain charitable organizations to secure section 501(c)(3) status.[8]

To qualify for this status, the organization must be both organized and operated for one of the specified purposes. The "organizational

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6. IRS News Release No. 1078, Nov. 12, 1970, and accompanying guidelines, 7 CCH 1970 STAND. FED. TAX REP. ¶ 6943G, at 71,940, *reprinted as* Rev. Proc. 71-39, 1971 INT. REV. BULL. No. 48, at 30-31.

7. *E.g.*, I.R.C. § 170(c)(2) (individual and corporation income tax); *id.* § 2055(a)(2) (estate tax); *id.* § 2522(a)(2) (gift tax).

8. One important alternative to I.R.C. § 501(c)(3) status is an exemption recognition under section 501(c)(4):

> Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare . . . and the net earnings of which are devoted exclusively to charitable, educational or recreational purposes.

While these organizations are not subject to many of the restrictions imposed on section 501(c)(3) organizations—they may attempt to influence legislation, for example—and their income is tax exempt, contributions to them are *not* deductible by the donor. *See* Amdur, *Tax Exemption of Social Welfare Organizations*, 45 TAXES 292 (1967).

It is also possible for a group which qualifies under section 501(c)(3) to divide its organization and have a special "lobbying arm" that would qualify for section 501(c)(4) status. While income to both groups would be exempt from taxation, only donations to the parent group would be deductible. Rev. Rul. 54-243, 1954-1 CUM. BULL. 92. Before the Sierra Club lost its 501(c)(3) status, it had a special organization for lobbying purposes, Trustees for Conservation, that was exempt under 501(c)(4). Note, *The Sierra Club, Political Activity, and Tax Exempt Charitable Status*, 55 GEO. L.J. 1128, 1130 n.10 (1967).

test" detailed in the regulations requires that the group's articles of organization specify that its purposes are within those permissible under the statute, and do not "empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes."[9] The "operational test," also specified in the regulations, requires that for an organization to be "operated exclusively" for an exempt purpose, it must engage "primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3)."[10] An organization does not meet the operational test if it is an "action" organization; that is, if it directs a substantial part of its activities toward attempting to influence legislation or intervening in any political campaign.[11] While the Code states that a section 501(c)(3) organization must be organized and operated "exclusively" for the purposes specified in that section, the courts and regulations have not interpreted this phrase literally. Consequently, it is permissible for such an organization to influence legislation if this activity constitutes only an incidental part of the organization's activities.[12]

Of the exempt purposes of section 501(c)(3), the two most relevant to public interest law firms are "educational" and "charitable." The definition of educational purposes includes:

> The instruction of the public on subjects useful to the individual and beneficial to the community. An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.[13]

Under the same section, "charitable" is construed "in its generally accepted legal sense" and "within the broad outlines of 'charity' as developed by judicial decisions."[14]

> Such term includes: Relief of the poor and distressed or of the underprivileged; . . . lessening of the burdens of Govern-

9. Treas. Reg. § 1.501(c)(3)-1(b)(1)(b) (1959). For an example of the organizational test written into a group's articles of organization, see P. DECKER, STUDENT SUPPORTED PUBLIC INTEREST LAW FIRMS—FROM THE GROUND UP, art. 8, at 54 (1971).

10. Treas. Reg. § 1.501(c)(3)-1(c)(1) (1959).

11. Treas. Reg. § 1.501(c)(3)-1(c)(3) (1959).

12. Treas. Reg. §§ 1.501(c)(3)-1(b)(3)(i), -1(c)(3)(ii) (1959). *See* St. Louis Union Trust Co. v. United States, 374 F.2d 427, 431 (8th Cir. 1967); Seasongood v. Commissioner, 227 F.2d 907 (6th Cir. 1955). *See also* Field, *Tax Exempt Status of Universities: Impact of Political Activities by Students*, 24 TAX LAW. 157, 161 (1970). The ban against intervention in political campaigns is absolute, however. Treas. Reg. §§ 1.501(c)(3)-1(b)(3)(ii), -1(c)(3)(iii) (1959).

13. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)(b) (1959).

14. *Id.* § 1.501(c)(3)-1(d)(2) (1959).

ment; and promotion of the social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.[15]

The procedure for acquiring a section 501(c)(3) exemption is specified in Revenue Procedure 69-3.[16] The organization first applies to a District Director, who can either issue an advance determination letter or forward the application to the National Office. If the National Office renders a favorable decision, a ruling will be issued. If, on the other hand, the conclusion of the National Office is unfavorable to the applicant, or if the District Director issues an adverse determination letter, the applicant has the right to file a protest and to appear at a conference in the National Office.[17]

Once the administrative remedies have been exhausted, there is no explicit IRS provision for judicial review. Such review may be obtained, however, either by the organization's filing of a regular corporate income tax return and then suing for a tax refund, or by a contributor's prosecution of a case after the Service has disallowed the deduction of a contribution to the organization.[18] The obvious problem with these procedures is that it may take years to obtain a court decision, making it difficult, if not impossible, for the organization to raise funds.[19]

It is always possible that a tax-exempt organization will lose its exempt status. That status can be revoked, for example, when a substantial portion of its activities consists of attempts to influence legislation, intervention in a political campaign, or entrance "into a transaction resulting in the inurement of its net earnings to the benefit of a private share-

15. *Id.* The regulation continues:
The fact that an organization which is organized and operated for the relief of indigent persons may receive voluntary contributions from the persons intended to be relieved will not necessarily prevent such organization from being exempt as an organization organized and operated exclusively for charitable purposes. The fact that an organization, in carrying out its primary purpose, advocates social or civil changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under section 501(c)(3) so long as it is not an 'action' organization . . . .

16. 1969-1 CUM. BULL. 389. *See also* Grant, *The Sierra Club: The Procedural Aspects of the Revocation of Its Tax Exemption*, 15 U.C.L.A.L. REV. 200 206-16 (1967); Parker, *Relations with the Internal Revenue Service: Exemption Application, Rulings, and Audits*, in N.Y.U. 9TH CONF. ON CHARITABLE FOUNDATIONS 223 (1969). *See generally* Bacon, *The New Exempt Organizations Program in Audit*, 1 TAX ADV. 69 (1970); Lehrfield & Webster, *Administration by the IRS of Non-Profit Organizations Tax Matters*, 21 TAX LAW. 591 (1968).

17. The conference procedures are outlined in Rev. Proc. 69-2, 1969-1 CUM. BULL. 386, at § 6.

18. Parker, *supra* note 16, at 228; *see* Jolles Foundation v. Moysey, 250 F.2d 166 (2d Cir. 1957); I.R.C. §§ 7422, 6213.

19. Parker, *supra* note 16, at 288.

holder or individual."[20] Once the exemption is revoked, there is an administrative appeal procedure[21] and, if the Service affirms its decision, the issue may then be litigated.

The Guidelines

As part of the procedure for acquiring section 501(c)(3) status, the IRS has issued guidelines under which public interest law firms can receive advance rulings of exemption. The guidelines issued represent an unorthodox IRS approach to the problem of determining the tax exempt status of charitable organizations. Indeed, it was the controversial nature of special treatment for public interest law firms that prompted Senate hearings on the matter.[22] The guidelines, issued after the hearings were called, were one of the major topics of discussion at those hearings. The eight guidelines promulgated impose a burden upon public interest law firms either applying for, or seeking to maintain, tax exempt status to convince the IRS that all the requisites contained therein are met.

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20. Grant, *supra* note 16, at 210; *see* Rev. Proc. 69-3, 1969-1 CUM. BULL. 389, at § 8.

21. Grant, *supra* note 16, at 210. The question whether the revocation of exemption will be retroactive is also an important issue that can arise after revocation. *Id.* at 211; *see* I.R.C. § 7805(b).

22. *Hearings on Tax Exemptions for Charitable Organizations Affecting Poverty Programs Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare,* 91st Cong., 2d Sess. 16 (1970) [hereinafter cited as *1970 Hearings*, and referred to in text as the hearings].

While it is not within the scope of this analysis to deal with the constitutional validity of the IRS guidelines, their constitutionality was questioned during the Senate Subcommittee Hearings, and the argument against their validity deserves brief mention here. Testimony of Lawrence Speiser, Director, Washington Office of the American Civil Liberties Union, *1970 Hearings, supra,* at 291-95. Based primarily on NAACP v. Button, 371 U.S. 415 (1963) (Virginia statute regulating the legal profession and the activities of lawyers held to violate the first amendment rights of the NAACP because of the restraints the statute placed upon the operation of the association's legal department), the argument is that the first amendment rights of speech, assembly and petition include the right of an organization to litigate to advance its goals, and for individuals and organizations to associate together to support and engage in litigation for constitutional, political and nonpolitical ends. *Cf.* United Mine Workers v. Illinois State Bar, 389 U.S. 217 (1967); Birkby & Murphy, *Interest Group Conflict in the Judicial Arena: The First Amendment and Group Access to the Courts,* 42 TEXAS L. REV. 1018, 1043 (1964); Steiner, *Bargained-For Group Legal Services: Aid for the Average Wage Earner?,* 11 ARIZ. L. REV. 617, 618-19 (1969).

Thus, if it is accepted that public interest law firm litigation is encompassed within first amendment guarantees, and recognized that income tax deductions are a matter of legislative grace, Commissioner v. Sullivan, 356 U.S. 27, 28 (1958), it can further be argued that once Congress has granted the "privilege" of section 501(c)(3) exemptions, it is impermissible for the IRS to condition their benefit and further availability upon the recipient's refraining from exercising first amendment rights (*cf.* Speiser v. Randall, 357 U.S. 513 (1958); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439, 1446 (1968)), at least in the absence of a compelling governmental interest. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Sherbert v. Verner, 374 U.S. 398 (1963). The burden of proving there is a compelling governmental interest should be on the Service, *cf.* Speiser v. Randall, 357 U.S. 513 (1958), even though the general rule is that an organization must prove its pur-

GUIDELINE ONE

> The engagement of the organization in litigation can reasonably be said to be in representation of a broad public interest rather than a private interest. The litigation is designed to present a position on behalf of the public at large on matters of public interest. Typical of such litigation may be class actions in the public interest, suits for injunction against action by government or private interests broadly affecting the public, similar representation before administrative boards and agencies, test suits where the private interest is small, and the like. The activity would not normally extend to direct representation of litigants in actions between private persons where their financial interests at stake would warrant representation from private legal sources. In such cases, however, the organization may serve in the nature of a friend of the court.[23]

Defining the Public Interest

This guideline, probably the most important,[24] raises serious definitional problems. It does not even attempt to define "broad public interest." Instead, the IRS introduction to the guidelines states only that proposed public interest "programs are frequently in support of the interests of a majority of the public, as distinguished from legal representation for a disadvantaged minority, such as the poor, the victims of racial discrimination, or those denied human and civil rights either in criminal or civil matters."[25]

IRS Commissioner Randolph W. Thrower was asked to distinguish the private interest from the broad public interest during a press conference held at the time the guidelines were issued.

> —Well this is what the guidelines—it is clear that the court's system itself is greatly in the public's interest, that matters are resolved by the judicial process—advocacy before a court on the part of each rather than resolved by combat or force. Also lawyers most of all know many clients having substantial financial interest think that their issue is very much in the public interest, as it is. Much private litigation has tre-

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poses are charitable. 6 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 34.09 (1971). Finally, it can be argued that section 501(c)(3) must be narrowly construed to avoid a conflict with the first amendment, and that the Service must refrain from examining each and every case brought by a public interest law firm. *Cf.* United States v. Christian Echoes Nat'l Ministry, Inc., 40 U.S.L.W. 3350 (N.D. Okla. June 24, 1971), *appeal dismissed* (lack of jurisdiction), No. 71-565, 40 U.S.L.W. 3350 (U.S. Jan. 24, 1972).

23. Rev. Proc. 71-39, *supra* note 6, at 31.

24. Goldberg & Cohen, *Public-Interest Law Firms: Their Tax Exempt Status*, 165 N.Y. Law Journal, Jan. 29, 1971, at 4, col. 2. This two-part article begins in 165 N.Y. Law Journal, Jan. 28, 1971, at 1, col. 4.

25. IRS News Release No. 1078, *supra* note 6. The distinction between public interest law firms and legal aid groups was also noted in IRS News Release No. 1069, *supra* note 1. *See* Rev. Rul. 69-161, 1969-1 CUM. BULL. 149 (nonprofit legal aid society providing free legal services to indigents held to qualify for section 501(c)(3) exemption).

> mendous impact upon the public interest. Nevertheless there are many instances where the private interest is not such that there can be represented through the normal commercial sources a public voice. This is what we are talking about—the representation of a public voice that has no *substantial private interest.* That sort of representation for seriously held purposes we think serves a charitable purpose in and of itself.[26] [Emphasis added.]

This response recognizes the impossibility of preventing the representation of some private interest, but draws the line at a "substantial private interest."[27]

When asked for examples of what would be excluded from charitable status due to the existence of a "substantial private interest," the Commissioner responded by alluding to the situation in which two major corporations located along a river, one upstream and one downstream, become involved in a controversy over upstream pollution affecting the downstream manufacturer.[28] In such a situation, while there might be a great public interest in the outcome, he did not deem it appropriate for a public interest law firm to represent either corporation.[29] He was then asked about a similar situation in which a group of small property owners living along the bank of the river wished to file a class action against the upstream corporation. His response was:

> If the totality of the people affected having substantial downstream interest bring this action and their interest normally warrant[s] employment in commercial circles, we would think that would be the appropriate outlet—to use one extreme the landowners around a small lake complaining about another landowner on the small lake or pond. On the other hand if you are dealing with something that affects people so widely that *no single or small group of financial interest[s] predominate,* then I think you have another situation. And that I think is the nature of the class action. No one has significant interest to warrant the litigation. . . .[30] [Emphasis added.]

From this statement it appears that the Commissioner is attempting to draw a line at the point where he feels private interests would predominate. He elaborated on his distinction by further reference to the situa-

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26. *1970 Hearings, supra* note 22, at 25.

27. This distinction appears similar to the prohibition against the "substantial" influencing of legislation. See text accompanying note 12 *supra.*

28. *1970 Hearings, supra* note 22, at 26.

29. *Id.*: In such a situation, however, it would be possible under guideline one for a public interest law firm to present the "public voice" as a friend of the court.

30. *Id.* at 31-32. *But cf.* Zahn v. International Paper Co., 40 U.S.L.W. 2237 (D. Vt. Sept. 30, 1971) holding that each member of a class in a federal district court diversity suit for damages to lakefront landowners caused by a paper company's alleged pollution of Lake Champlain must meet the $10,000 jurisdictional amount of 28 U.S.C. § 1332(a) (1970). For the problem of aggregation of amount in diversity jurisdiction class actions in the federal courts, see Snyder v. Harris, 394 U.S. 332 (1969).

tion in which there was a small private lake with six "private landowners against one of whom the other five complained."[31] This would apparently be a case in which the financial interests of the five predominate, and it would not be appropriate to have public interest law firm representation. If, however, there were a public bathing beach accessible to the whole community around the small lake, or if the five were private landowners along the shores of Lake Michigan,[32] the whole community would have an interest in keeping both lakes free from pollution, and representation by a public interest law firm would be warranted. In the latter situations, apparently no single or small group of financial interests would predominate.[33]

It is questionable, however, whether this guideline or its explanation by the Commissioner enhances existing law.[34] First, the regulations already require that a section 501(c)(3) organization serve a public and not a private interest.[35] Second, the Service has ruled that incidental private benefit will not necessarily disqualify an organization from exemption.[36] The ruling involved a charitable organization formed to preserve a lake as a public recreational facility financed by contributions from lake front property owners, members of an adjacent community and municipalities bordering the lake. The Service recognized that:

> The benefits to be derived from the organization's activities flow principally to the general public through the maintenance and improvement of public recreational facilities. Any private benefits derived by the lake front property owners do not lessen the public benefits flowing from the organization's operations. In fact, it would be impossible for the organization to accomplish its purposes without providing benefits to the lake front property owners.[37]

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31. Testimony of Commissioner Thrower, *1970 Hearings, supra* note 22, at 71.
32. *Id.*
33. Following similar reasoning, it is clearly possible for two public interest law firms to be on opposing sides of the same controversy. First, under the last two sentences of guideline one, two public interest firms could support different sides of any controversy, even though substantially private interests were involved, if the firms acted only in the capacity of a friend of the court. Second, Commissioner Thrower recognized that both sides of a controversy could be directly represented by the firms in certain situations. Using the example of the fluoridation of drinking water, he stated that it would be permissible for one firm to represent those desiring the addition of fluorides to the water, while another represented those desiring fluorides to be kept out. Press Conference of Commissioner Thrower, *1970 Hearings, supra* note 22, at 14, 27. Other areas where public interest law firms could represent both sides include controversies over abortion laws and prayers in schools. Memorandum prepared for the Senate Subcomm. by Mitchell Rogovin, *id.* at 137, 185.
34. Goldberg & Cohen, *supra* note 24, pt. 2, at 4, col. 1; *see* Letter from Mortimer M. Caplin to Commissioner of Internal Revenue, *1970 Hearings, supra* note 22, at 107, 124.
35. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (1959).
36. Rev. Rul. 70-186, 1970-1 CUM. BULL. 129.
37. *Id.*; *see* Rev. Rul. 66-358, 1966-2 CUM. BULL. 218 (sufficient that the benefits flowed "principally" to the public). Both these rulings distinguished Benedict Ginsberg, 46 T.C. 47 (1966), as a situation in which an organization's funds were used "primarily" to foster private interests, and that if there were any

Consequently, it is arguable that rulings and regulations existing prior to the new guidelines prohibited public interest law firms from representing any substantial private interests.

Standing

The purported distinction between public and private interests contained in guideline one raises questions in another area: the rapidly changing law of standing. In its request for an advance ruling that proposed litigation would not occasion loss of its section 501(c)(3) status, the Natural Resources Defense Council, Inc. noted that occasionally it might represent persons asserting private rights.[38] "This may occur, for example, where the assertion of a private right constitutes the only means of achieving standing to seek a public benefit."[39] That such a position is necessary can be seen by two recent decisions of the Court of Appeals for the Ninth Circuit.

In *Sierra Club v. Hickel*[40] the court held that the Sierra Club, a nonprofit California corporation,[41] lacked the requisite standing to challenge a plan for large scale commercial-recreational development in the Sequoia Forest in California. The court, interpreting recent United States Supreme Court opinions,[42] concluded that the Club had displayed no element of legal injury and that it had not been "adversely affected by agency action or aggrieved within the meaning of a relevant statute."[43] Con-

benefit to the general public it was only incidental. *See also* Rev. Rul. 67-446, 1967-2 CUM. BULL. 119. *See generally How Much May a Taxpayer Derive From a Civic "Donation"?*, 33 J. TAX. 227 (1970), which suggests that while a taxpayer may derive some benefit, that benefit should not be the "primary purpose" of the donation.

38. Letter from Mortimer M. Caplin to Commissioner of Internal Revenue, *1970 Hearings, supra* note 22, at 107, 124.

39. *Id.*

40. 433 F.2d 24 (9th Cir. 1970), *aff'd sub nom.* Sierra Club v. Morton, No. 70-34, 40 U.S.L.W. 4397 (U.S. Apr. 19, 1972).

41. The Sierra Club has lost its section 501(c)(3) status and is now classified as a section 501(c)(4) organization. *See* Grant, *supra* note 16.

42. Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

43. Sierra Club v. Hickel, 433 F.2d 24, 32 (9th Cir. 1970). In reaching its decision, the court was forced to distinguish numerous cases cited by the Sierra Club, including Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966) (responsible representatives of the listening public have standing to appear before the F.C.C. to contest renewal of a broadcast license); Scenic Hudson Preservation Conf. v. F.P.C., 354 F.2d 608 (2d Cir. 1965), *cert. denied, sub nom.* Consolidated Edison Co. of New York, Inc. v. Scenic Hudson Preservation Conf., 384 U.S. 941 (1966) (those who by their activities and conduct have exhibited a special interest in aesthetic, conservational and recreational aspects of power development have standing to seek review of F.P.C. licensing order); Powelton Civic Home Owners Ass'n v. Department of H.U.D., 284 F. Supp. 809 (E.D. Pa. 1968) (residents of area affected by proposed urban renewal program have standing under the "private attorney general" concept to raise issues concerning alleged violations of the relocation provision of the Housing Act); Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1969) (towns, local civic organizations, and conservation groups have standing to obtain judicial review of a route selection determination of the Federal Highway Administrator).

cluding that the complaint did not allege the requisite standing on behalf of the Club, the court distinguished two recent decisions:[44]

> In both of these cases, however, the Sierra Club was joined by local conservationist organizations made up of local residents and users of the area affected by the administrative action. *No such persons or organizations with a direct and obvious interest have joined as plaintiffs in this action. . . .*[45] [Emphasis added.]

The inference is that if there had been plaintiffs with a direct *private* interest involved, they would have been accorded standing.

This view was borne out in *Alameda Conservation Association v. California.*[46] There, the Alameda Conservation Association, a nonprofit California corporation, and eight individual plaintiffs were attempting to enjoin a salt company from filling or obstructing San Francisco Bay. The Association alleged that one of its purposes was the protection of the public interest in the waters of the bay. Two of the three judges held that the Association did not possess the necessary standing to maintain the suit, citing, among other cases, *Sierra Club v. Hickel.* All of the judges, however, believed that four of the eight individual plaintiffs possessed the requisite standing. The four plaintiffs to whom the court unanimously granted standing asserted that they owned and lived on property bordering the bay or located on lagoons flushed by the bay.[47]

It thus appears that, in the Ninth Circuit at least,[48] to be accorded standing plaintiffs must demonstrate an invasion of their private inter-

44. Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970); Parker v. United States, 307 F. Supp. 685 (D. Colo. 1969).

45. Sierra Club v. Hickel, 433 F.2d 24, 33 (9th Cir. 1970) (footnote omitted).

46. 437 F.2d 1087 (9th Cir.), *cert. denied,* 402 U.S. 908 (1971). *See also* Citizens Committee v. Resor, 1 ENV. L. RPTR. 20,206 (D. Ore. 1971), where the court, basing its decision on *Sierra Club v. Hickel* and *Alameda,* denied standing to conservation oriented non-profit organizations challenging the validity of a permit issued by the Army Corps of Engineers to allow the filling of a portion of the Columbia River for expansion of the Portland airport.

47. 437 F.2d at 1089, 1091. The judge, who was unwilling to accord standing to the other four plaintiffs, felt that their presence was not necessary for the action to be maintained, that the record before the court was too meager on this issue and that their interests in the action might be too remote. *Id.* at 1092.

48. In West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971), a nonprofit corporation was adjudged to have standing to challenge certain mining and timber-cutting activities in the Monongahela National Forest in order to preserve the wilderness of that area. The court distinguished *Sierra Club v. Hickel*:

> It is significant that the Ninth Circuit distinguished Citizens Committee for Hudson Valley v. Volpe, [425 F.2d (2d Cir.), *cert. denied,* 400 U.S. 949 (1970)] and Parker v. United States, 307 F. Supp. 685 (D. Colo. 1969), from the case it was considering, upon the ground that '[i]n both of these cases . . . the Sierra Club was joined by local conservationist organizations made up of local residents and users of the area affected by the administrative action'. . . .
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> The decision in *Sierra Club* would thus seem to exclude a holding that Conservancy lacks standing because, as we have stated, Conservancy and its members have a special interest in the Otter Creek Area. The area is one of the objects of their principal activities; they use it ex-

ests. The question is therefore raised whether a public interest law firm would lose its tax exempt status by bringing suit on behalf of such plaintiffs. Since private interests are involved, a narrow reading of the first two sentences of guideline one would appear to dictate an affirmative response. The technicalities of standing requirements, however, need not be determinative of whether an action is in the public interest.[49] The IRS should be required to look beyond these technicalities to the broader public purpose underlying public interest litigation, especially litigation in the environmental area.[50] Further, where the courts have found that an organization was litigating a given case as a responsible representative of the public,[51] it would be unnecessary duplication of effort and a show of mistrust of the judicial process for the IRS to separately determine that only a private interest was being served.[52]

Private Damage Actions

In addition to the definitional and standing problems, the effect of the guideline on litigation traditionally brought by civil rights organizations, such as the American Civil Liberties Union, was questioned during the hearings. The expressed fear was that damage actions brought under various civil rights acts or common law tort theories against government officials for alleged deprivation of rights would not be thought to represent a public interest merely because private damages were pleaded.[53] It appears, however, that such a fear is unfounded. First,

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tensively, and they have studied it in detail. Their interest and the injury they would suffer are much more particularized and specific than those of Sierra Club and its members in a portion of Sequoia National Park.

Id. at 234-35. *But cf.* Bass Anglers Sportsman's Soc'y v. Scholze Tannery, Inc., 329 F. Supp. 339 (E.D. Tenn. 1971), where the court held that a conservation group did not have standing to bring an action against alleged industrial polluters to recover penalties for the alleged violation of statutes relating to the deposit of refuse in navigable waters, and that the exclusive power of the Justice Department to enforce these statutes precluded any qui tam action for recovery of informer's moiety.

49. *Accord,* Note, *The Tax-Exempt Status of Public Interest Law Firms,* 45 S. CAL. L. REV. 228, 237 n.29 (1972).

50. In the policy declaration of the National Environmental Policy Act, Congress has declared that

> it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony. . . .

42 U.S.C. § 4331(a) (1970). For the IRS response to the Act, see Implementation of National Environmental Goals (Misc. Announ. 1331), Aug. 12, 1971, in J. MERTENS, LAW OF FEDERAL INCOME TAXATION, RULINGS 310-13 (*vol. 1971).

51. *E.g.,* Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97, 105 (2d Cir.), *cert. denied,* 400 U.S. 949 (1970).

52. *See also* Statement of David Sive, *1970 Hearings, supra* note 22, at 244, 254-55, where he points out that courts also have the benefit of using the class action standards provided by the text and decisions under FED. R. CIV. P. 23.

53. Statement of Lawrence Speiser, Director, Washington Office American Civil Liberties Union, *1970 Hearings, supra* note 22, at 282, 284.

present regulations clearly state that defending human and civil rights secured by law is a charitable purpose.[54] Second, the introduction to the guidelines states:

> These proposed [public interest] programs are frequently in support of the interests of a majority of the public, as distinguished from legal representation for a disadvantaged minority, such as the poor, the victims of racial discrimination, of those denied human and civil rights either in criminal or civil matters. Legal representation for the latter class has long been recognized as a charitable activity and the IRS has long ruled that organizations so engaged are exempt under Section 501 (c)(3) of the Code in accordance with judicial precedents.[55]

Consequently, it is highly arguable that organizations such as the ACLU and NAACP are without the purview of the guidelines.

Judging the public interest

Finally, there is the question of who is to determine what is in the public interest. Initially, it appears that the position of the IRS is that the public interest law firm, when applying for an exemption, will determine whether its legal representation is in the public interest.[56] As Commissioner Thrower explained during his press conference held at the time the guidelines were issued, "so long as within such an organization it has been responsively determined that the litigation would benefit the public and there is assurance that the organization is not operated for private gain, it can be classified as exclusively charitable."[57] This is somewhat misleading, however. The firm does not make the final decision, for clearly the IRS does not have to grant an exemption,[58] and can revoke an exemption once granted.[59]

Consequently, the issue is whether the IRS is the proper body to judge when the program of litigation of a public interest law firm is designed to serve the public interest. During his testimony in the hearings, Commissioner Thrower recognized that the Service was

> not making a determination based upon whether the cause itself appears to us to be a public benefit or not, so long as it is seriously and responsibly determined by the organization, by the litigants, to be for the public interest. We are not picking or choosing—I might say this presented our difficulty, the pressure upon us to pick and choose and make decisions on the basis of the merits of a cause.[60]

54. See text accompanying note 15 *supra.*
55. Rev. Proc. 71-39, *supra* note 6, at 30.
56. Introduction to the Guidelines, Rev. Proc. 71-39, *supra* note 6, at 31.
57. Press Conference, *1970 Hearings, supra* note 22 at 14, 16.
58. See text accompanying note 17 *supra.*
59. See text accompanying note 20 *supra.*
60. Statement of Commissioner Thrower, *1970 Hearings, supra* note 22, at 54, 60.

Thus, while the Service realizes that a public interest standard does not involve the merits of a claim, the basic fallacy in the Service's position is the belief that the organization will determine the public interest. In practice, neither the public interest law firm nor its client "determines" the public interest. The firm, serving as a vehicle for presenting the views of its clients to courts and administrative agencies, enables those bodies to perform their proper function. Thus,

> [t]he service to the public interest is the provision of an opportunity which would not otherwise exist for the duly constituted public authorities to identify and vindicate the public interest. If the position taken by the so-called 'public interest law firm' is unjustified, counsel for the other side and the court or administrative agency are well equipped under our adversary system to foresetall [*sic*] a miscarriage of justice or a perversion of the public interest.[61]

Just as it is not the function of the public interest law firm to determine the public interest, it is submitted that neither should this be the province of the Internal Revenue Service. The IRS need not be concerned about the "lack of standards or controls"[62] or the need for a definite test to determine what litigation serves the public interest. Courts, by dismissing a suit or imposing costs, have developed effective means to deal with plaintiffs whose motives are improper or who do not adequately represent the public or other class interests.[63]

This does not mean that the Service has no role to play, however, for courts will not necessarily dismiss a case because only private interests are represented. Consequently, it has been suggested that the function of the Service here is to determine by the audit process that the firm is both organized and operated for section 501(c)(3) purposes, and that the main thrust of the firm's litigation is not intended to benefit any private individual or group.[64] By determining that the firm's activities are in furtherance of its stated exempt purposes and that the firm is not litigating primarily on behalf of "private interests," the Service will not be attempting to define the public interest.

Ultimately, courts and administrative agencies are responsible for determining the public interest.[65] If a basic premise of our society is that all citizens should have access to the decision-making branches of gov-

61. Letter from Louis F. Oberdorfer to Commissioner Thrower, *1970 Hearings, supra* note 22, at 62, 63.

62. See text accompanying note 4 *supra.*

63. Garrett, *Federal Tax Limitations on Political Activities of Public Interest and Educational Organizations,* 59 GEO. L.J. 561, 576 (1971).

64. Memorandum prepared for the Senate Subcomm. by Mitchell Rogovin, *1970 Hearings, supra* note 22, at 137, 183. *See, e.g.,* Horace Heidt Foundation v. United States, 170 F. Supp. 634 (Ct. Cl. 1959), holding that incidental benefits accruing to the founder of a charitable organization were sufficient to preclude a charitable purpose.

65. For comments on public interest law firm representation before legislative bodies, see text accompanying notes 131-49 *infra.*

ernment whose policy decisions affect their lives, then courts and administrative agencies will be better able to discharge their responsibility if all sides of a question are heard.[66] By providing this access through legal representation, public interest law firms are by definition acting to serve the public interest. Aside from raising constitutional questions,[67] for the Service to restrict this access and set itself up as the infallible arbiter of which litigation represents the public interest is "a presumptuousness which will stifle the fearless exchange of competing views in the 20th Century marketplace of ideas."[68]

GUIDELINE TWO

> The organization does not accept fees for its services except in accordance with procedures approved by the Internal Revenue Service.[69]

The Commissioner was asked during the hearings what procedures the IRS was considering. He replied that the Service had no position with respect to a departure from the general rule that public interest representation was not a fee situation so that an organization wishing to get prompt approval of its section 501(c)(3) status should include a proposal not to accept fees.[70]

It has been suggested that foundation funds for public interest law firms are limited, and that foundations may lose interest in funding such law firms.[71] In any event, it is obvious that public interest law firms must look to all possible alternative means of support. Furthermore, neither tax law nor existing policy require the Service to treat public in-

66. Statement of Charles R. Halpern, *1970 Hearings, supra* note 22, at 204, 205.
67. See note 22 *supra*.
68. Memorandum prepared for the Senate Subcomm. by Mitchell Rogovin, *1970 Hearings, supra* note 22, at 137, 189.
69. Rev. Proc. 71-39, *supra* note 6, at 31.
70. Statement of Commissioner Thrower, *1970 Hearings, supra* note 22, at 54, 79. The Commissioner had stated earlier that the IRS had "received particularly useful assistance from Russell E. Train, Chairman of the Council on Environmental Quality." *Id.* at 66. Mr. Train made the following suggestions to the IRS for limitations in respect to environmental litigation:

> 2. Litigation should not be brought which results in a monetary benefit to the group's contributors or, except in the limited circumstances described in paragraph 4 below, to the group itself.
>
> . . . .
>
> 4. Any suits involving rights asserted against private parties should not involve damage claims or other monetary demands, except in unusual circumstances. The group must be a nonprofit organization and should not seek to sustain itself through litigation or subsidize its activities by a monetary recovery from a given defendant except in those cases where attorney's fees may be awarded by the court or a fine is to be shared with the Government under the applicable statute.

Council on Environmental Policy, Charitable Status of Private Litigation to Protect the Environment, *1970 Hearings, supra* note 22, at 461, 463. *See generally* Comment, *The Private Bar, the Public Interest, and Tax Incentives: Monetary Motivation for Action*, 13 ARIZ. L. REV. 953 (1971).
71. Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1113-14 (1970).

terest law firms more restrictively than other section 501(c)(3) organizations.[72]

Under existing regulations,[73] it is possible for such organizations as museums, educational institutions and hospitals[74] to exact fees without losing their tax exempt status. Public interest law firms should be treated similarly, and their "fees should be exempt from taxation, provided that they are used to further the firm's exempt purposes."[75]

One basic problem in any future application of this guideline is that the Service has painted with too broad a brush and has made no attempt to distinguish between several possible fee situations. One possible situation is that in which an organization such as the Sierra Club would pay a "fee" to a public interest law firm that was instrumental in litigating a case. Another is the instance where a group of clients represented in a class action by a public interest law firm have obtained some form of recovery and feel that they should reimburse the firm from that recovery.[76] A third possible situation involves a firm suing pursuant to a statute or equitable rule providing for statutory or court-awarded attorney's costs or "fees."[77] Under guideline 2, a public interest law firm would jeopardize its tax exempt status by accepting fees in any of these situations without prior IRS approval.

One probable concern of the Service, reflected in the sweeping language of this guideline, is that public interest law firms may be "busi-

72. Halpern & Rogovin, Memorandum *re* Recovery of Fees by Tax-Exempt Public Interest Law Firms, *1970 Hearings, supra* note 22, at 198.

73. Treas. Reg. § 1.501(c)(3)-1(e)(1) (1959):

> An organization may meet the requirements of section 501(c)(3) although it operates a trade or business as a substantial part of its activities, if the operation of such trade or business is in furtherance of the organization's exempt purpose or purposes and if the organization is not organized or operated for the primary purpose of carrying on an unrelated trade or business. . . .

74. *See* Rev. Rul. 69-545, 1969-2 CUM. BULL. 117.

75. Statement of Sheldon S. Cohen, *1970 Hearings, supra* note 22, at 330, 336.

76. Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959) provides:

> The fact that an organization which is organized and operated for the relief of indigent persons may receive *voluntary contributions* from the persons intended to be relieved will not necessarily prevent such organization from being exempt as an organization organized and operated exclusively for charitable purposes. . . . [Emphasis added.]

77. *See, e.g.*, Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (absence of express statutory authorization for award of attorney's fees in a suit under the Securities Exchange Act does not preclude award to stockholders establishing a violation of the Act); Newton v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (prevailing plaintiffs may recover attorneys fees under Title II of Civil Rights Act of 1964, 42 U.S.C. §§ 2000(a) *et seq.* (1970)); Hill v. Franklin County Bd. of Educ., 390 F.2d 583 (6th Cir. 1968) (attorneys fees are within district court judge's discretion in action proving discriminatory employment practices); Bradley v. School Bd. of Richmond, 53 F.R.D. 28 (E.D. Va. 1971) (in class action to end racial discrimination in public schools, court of equity had power to allow reasonable attorney fees, expenses for travel, hotel accommodations and restaurant meals, fees for testimony of expert witnesses, costs of investigation, office supplies and transcripts). *See also* Train, *supra* note 70 suggesting that attorney's fees be allowed in certain situations.

nesses" in disguise. Perhaps it is felt that the only difference between public and private firms is that attorneys for the former are paid by salary as opposed to partnership shares of a firm's income. Arguably, however, existing regulations make it clear that any "fees" received by a public interest law firm cannot inure to the benefit of any particular attorney and may be used only to further the firm's exempt charitable purposes.[78]

A question left unanswered by this guideline is whether "fees" not approved in advance by the Service will be considered and taxed as "unrelated business income."[79] This is a possibility since the Tax Reform Act of 1969[80] extended the unrelated business income tax to most tax exempt organizations. In fact, it might be preferable to treat fees considered improper by the Service as unrelated business income rather than to deny or revoke tax exempt status for accepting such fees. In general, however, it is unnecessary for the Service to draw distinctions between public interest law firms and other charitable organizations in the fee area, so long as it is made clear that any money received must be applied to furthering the firm's charitable goals.

GUIDELINE THREE

> The organization does not attempt to achieve its objectives through a program of disruption of the judicial system, illegal activity, or violation of applicable canons of ethics.[81]

This guideline generated numerous negative comments during the hearings,[82] and Commissioner Thrower was questioned closely as to the Service's intent. He noted that the emphasis should be placed on the word *program*, and that the Service was not primarily concerned with "incidental" or "isolated" activities of individual lawyers.[83] Any organization which consciously adopted such a program could not be charitable and therefor should not qualify as charitable under the law.[84] He did not foresee the Service attempting to discipline attorneys, since this was a subject more properly addressed to the courts and bar associations.[85]

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78. Treas. Reg. § 1.501(c)(3)-1(c)(2) (1959).
79. *See* I.R.C. §§ 511-513.
80. Pub. L. No. 91-172, § 121, 83 Stat. 536, I.R.C. § 511(a)(2)(A). *See* Eliasberg, *Exempt Organizations and Charitable Contributions: The Tax Reform Act of 1969—Sections 501(c) and 170*, 23 U. So. CAL. 1971 TAX INST. 357 (1971); Moore, *Current Problems of Exempt Organizations*, 24 TAX L. REV. 469 (1969).
81. Rev. Proc. 71-39, *supra* note 6, at 31.
82. *See, e.g.*, Statement of Sheldon S. Cohen, *1970 Hearings, supra* note 22, at 330, 337. Mr. Cohen stated that public interest lawyers have served as a good example to the public and members of the bar rather than a threat to the judicial system, and that this guideline "amounts to little more than an apparently needless and doubtless unintentional slur on those members of the bar who are now working for public interest law firms."
83. Statement of Commissioner Thrower, *1970 Hearings, supra* note 22, at 54, 69. From the Commissioner's testimony it appears that the word "program" is meant to apply to all three proscribed activities.
84. *Id.* at 68.
85. *Id.* at 69.

It is questionable, however, whether the IRS should even consider revoking the tax exempt status of the organization because of the conduct of a particular attorney.[86] In this regard, it has been proposed that a firm's tax exempt status not "be subject to IRS sanctions unless (1) the standard has been adopted by the legislature or the courts, (2) the violation continues after the firm has clearly been put on notice, and (3) the unethical conduct is such that it substantially affects the entire operation of the firm."[87]

It is possible that one of the Service's primary concerns in implementing this restriction is whether the public interest law firm can achieve its charitable purposes without violating certain ethical practices such as improper solicitation of clients. While the ethical problems of public interest law are treated at length elsewhere in this symposium,[88] it is worth reiterating the idea that it is bar associations, and not the IRS, that have been established to deal with ethical problems.[89] Consequently, while the ethical considerations involved in public interest law should be the subject of continuing discussion, the IRS is not the proper body to determine whether ethical practices have been violated. Once such a determination has been made, however, it might then be proper for the Service to review the firm's tax exempt status.

GUIDELINE FOUR

> The organization files with its annual information return a description of cases litigated and the rationale for the determination that they would benefit the public generally.[90]

Under section 6033 of the Code, certain section 501(c)(3) organizations[91] must file an annual information return.[92] This guideline simply adds another item to be filed with that return. Once it was made clear by Commissioner Thrower that "benefit the public generally" did not foreclose the possibility that the litigation could benefit a minority group,[93] no serious objections to this guideline were raised during the

86. Testimony of Lawrence Speiser, Director, Washington Office American Civil Liberties Union, *1970 Hearings, supra* note 22, at 291, 296.

87. Letter from Monroe Friedman, Stern Community Law Firm, to William Bechtel, Staff Director of the Senate Subcomm., *1970 Hearings, supra* note 22, at 507.

88. *See* Comment, *The Public's Interest in the Ethics of the Public Interest Lawyer*, 13 ARIZ. L. REV. 886 (1971).

89. *See, e.g.*, ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINION NO. 1050 (1968).

90. Rev. Proc. 71-39, *supra* note 6, at 31.

91. The section 501(c)(3) organizations not required to file this return are listed in I.R.C. § 6033(a)(2). Unless the firm received funds from a federal, state or local government, or was primarily supported by contributions from the general public, it is unlikely that a public interest law firm would fit within the exceptions.

92. Treas. Reg. § 1.501(a)-1(a)(3)(i) (1959).

93. Statement of Commissioner Thrower, *1970 Hearings, supra* note 22, at 54, 70.

hearings. Filing a description of cases litigated enables the Service to monitor the firm's activities and to revoke its exemption if it engages in prohibited activities.[94] This guideline in effect, therefore, serves largely as a vehicle for the Service to implement guideline one.

What is possibly objectionable in guideline 4 is the requirement that the firm must submit a "rationale" for the determination that its cases are in the public interest. Arguably, the very fact that the firm has brought a case is just such a determination. Furthermore, in a recent IRS publication, it is stated that a public interest law firm should submit "a description of the cases litigated *or to be litigated* and how they benefit the public generally."[95] Not only is it questionable whether firms will be willing to divulge information regarding pending cases, but it is possible that for them to do so would violate the attorney-client privilege.[96]

GUIDELINE FIVE

> The policies and programs of the organization are the responsibility of a board or committee representative of the public interest, which is not controlled by employees or persons who litigate on behalf of the organization nor by any organization that is not itself an organization described in Section 501(c)(3) of the Internal Revenue Code.[97]

During the hearings, Commissioner Thrower attempted to explain guideline 5 in response to questions by Senator Nelson. The Commissioner first noted that the public interest law firm would determine both the membership of the board and whether that membership was representative of the public interest.[98] The following exchange occurred:

> Senator NELSON. I take it then, if I understand you correctly, that when the IRS decides whether the board represents the public interest that that is subject to challenge—that they are not going to pre-clear the board?
> Commissioner THROWER. No.[99]

One possible interpretation of this confusing testimony is that, in effect, the IRS is reserving the power of determining whether the board or committee is representative of the public interest.[100] For while the organization determines initially that the membership of the board represents

94. Goldberg & Cohen, *supra* note 24, pt. 2, at 4, col. 3.
95. Internal Revenue Service, How to Apply for Recognition of Exemption for an Organization 11 (Pub. No. 557, June 1971). (emphasis added).
96. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 4 (1970): A Lawyer Should Preserve the Confidences and Secrets of a Client.
97. Rev. Proc. 71-39, *supra* note 6, at 31.
98. Testimony of Commissioner Thrower, *1970 Hearings, supra* note 22, at 54, 79.
99. *Id.*
100. Another possible interpretation of this exchange is that the IRS will refuse to say in advance whether the board represents the public interest, but that once a decision is made that the board does not, the firm will be able to challenge the decision of the Service.

the public interest, this decision then appears subject to the veto power of the IRS. If this interpretation is correct, one must question the ability of the IRS to judge whether an individual is representative of the public interest.

The notion that a public interest law firm should not be controlled by private interests is sound. It was perhaps unnecessary, however, for the IRS to completely forbid control "by employees or persons who litigate on behalf of the organization." Such a requirement could effectively preclude a possible alternative to the traditional pattern of litigation by a public interest law firm by making it difficult, if not impossible, for a sole practitioner to engage in public interest litigation on a tax exempt basis.[101] The sole practitioner would be forced to appoint a "board of directors" the only task of which, in effect, would be to oversee his activities. It might prove difficult for him to find people who not only are willing to sit on such a "board" but also are representative of the public interest.

It is recognized that there are many problems involved with a sole practitioner enjoying section 501(c)(3) status. He would, first of all, be required to meet all the requirements of that section.[102] Second, any funds he received from any source could not "inure to his benefit," except for purposes of a "reasonable salary."[103] The potential unfortunate effect of denial of section 501(c)(3) status to the sole practitioner, however, would be on the source of funds. Without assurance of deductibility, potential donors might be unwilling to finance charitable programs they would otherwise be willing to support. Making it difficult for the sole practitioner to engage in tax exempt public interest work is unfortunate, for in smaller communities this might be the only viable approach to certain problems.[104]

101. Letter from Stuart H. Johnson to Senator Nelson, *1970 Hearings, supra* note 22, at 359, 360.

102. See text following note 8 *supra.*

103. See text accompanying note 130 *infra.*

104. If, in connection with a single case, the sole practitioner "sets up an *ad hoc* organization for tax purposes with a Board consisting of concerned citizens, Guideline 5 may pose serious difficulties in the discharge of his professional responsibilities in conducting the suit in case of a conflict of opinion between the attorney and some members of the board." Letter from Stuart H. Johnson to Senator Nelson, *1970 Hearings, supra* note 22, at 359, 360.

A strict application of guideline 5 could conceivably bring into question the traditional practice of certain civil rights groups. For example, in such groups as the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP), the "volunteer lawyers" are extremely active in determining what controversies will be litigated. Statement of Lawrence Speiser, Director, Washington Office American Civil Liberties Union, *1970 Hearings, supra* note 22, at 282, 288. While it appears that neither the ACLU nor the NAACP, which are not section 501(c)(3) organizations, are covered by the guidelines, *see* text following note 55 *supra,* they both have "litigating arms" that at present have section 501(c)(3) status. Under the last clause of guideline 5 forbidding control by non-section 501(c)(3) organizations, both the NAACP Legal Defense Fund and the ACLU Foundation could lose their section 501(c)(3) status if the Service chooses to rigidly apply the guideline in the future.

Were guideline 5 to be strictly applied, the interdisciplinary approach to public interest law might be made more difficult. In one formulation of this approach, the lawyer would recruit different nonlegal team members as each issue arose. The result would be, for tax purposes, a law firm hiring experts in an advisory capacity only, and therefore no problem under the guideline. Yet the very concept of the *team* approach might lead one to the opposite conclusion.[105] If the members of an already existing interdisciplinary team wanted to advise the firm as to what cases it should litigate, this might be considered impermissible control by "employees" of the organization. If the team members wanted to be responsible for the "policies and programs" of the firm but not decide the actual cases to be litigated, a strict reading of guideline 5 would require that they sit on the firm's board of directors. They would then be subject to challenge by the IRS as not being representative of the public interest.

Whether or not the team members sit on the board, the firm must take some care to avoid the ethical problem of "lay control."[106] Since a lawyer must exercise independent professional judgment on behalf of a client,[107] once the "attorney-client privilege" has attached, the firm's lawyers must avoid being influenced by others than the client.[108]

GUIDELINE SIX

> The organization is not operated, through sharing of office space or otherwise, in a manner so as to create identification or confusion with a particular law firm.[109]

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105. The value and purpose of such a team is the input of a variety of issues, the solutions of which lead to a more effective resolution of the major problem. The question in text may turn on the precise composition and use of an interdisciplinary team. If a law firm had a permanent team, serious difficulties with guideline 5 would arise because the team would have substantial influence on both the choice and direction of litigation, even though the board might retain a veto power. On the other hand, if the team were recruited only after the board had selected the problem to be attacked, the scope of the team's influence would be limited to that area and therefore not likely to run afoul of guideline 5. Assuming that the board left the team to pursue its own course once the problem to be attacked had been selected, both the value of team efforts and the guideline would be served. This latter approach is probably preferred. *See generally* Comment, *Interdisciplinary Collaboration in Public Interest Law*, 13 ARIZ. L. REV. 909 (1971).

106. *See* Comment, *The Public's Interest in the Ethics of the Public Interest Lawyer*, 13 ARIZ. L. REV. 886 (1971).

107. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 5 (1970).

108. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION 5-23, DISCIPLINARY RULE 5-107 (1970). The American Bar Association has recently dealt at some length with the problem of the relationship between the board of directors of a legal aid society and the society's attorneys. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 324 (1970). *Cf.* Comment, *supra* note 88, at 896-901.

It is suggested that if a public interest law firm made an attempt to have a board of directors representative of the public interest, and that if this board were to adopt the principles of OPINION No. 324, guideline 5 would be unnecessary. In fact, it can be argued that public interest firms are already bound by these principles insofar as the relationship between the board and the firm's participating attorneys is concerned.

109. Rev. Proc. 71-39, *supra* note 6, at 31.

No reference is made in Commissioner Thrower's testimony to the purpose of this guideline. It has been suggested that it is designed to prevent a firm, engaged in both commercial and public interest litigation, from using its public interest work to "benefit" the commercial activities of the firm.[110] Furthermore, the operation of guideline 6 would apply equally to a sole practitioner able to achieve section 501(c)(3) status. Both the firm and the sole practitioner would be forced to set up entirely separate office facilities, thus possibly lessening the funds actually available for public interest litigation.

This could be especially harsh for the sole practitioner operating, for example, with a smaller funding grant than a large firm. It also could be more difficult for the sole practitioner to prevent his name from becoming "identified" with his public interest work. Thus, it is unlikely that a person such as Ralph Nader could ever use his name in the title of a private firm while he was actively engaged in public interest work, for the private firm might "benefit" from association with the Nader name. As with guideline 5[111] this could have an unfortunate effect in smaller communities where it is already difficult to find attorneys willing or able to do public interest work.[112]

At present, it is possible for a public interest law firm to "contract out" work to private organizations.[113] Thus, it would appear permissible, for example, to engage a private concern to perform public opinion polling or economic analysis. It might not be permissible under this guideline, however, for a public interest law firm to contract for the services of a private law firm to aid in conducting a complicated or important case. If, for example, a small public interest law firm wished to challenge the land acquisition program of a state highway department, it might wish to engage a private law firm with great expertise in real property or zoning law to assist in the lawsuit. Under guideline 6, great care would have to be taken to prevent "identification or confusion" with the private firm. Yet, a suit in this situation may be as much in the public interest as if the public interest firm brought the case by itself. Consequently, and because adequate safeguards exist in the present regulations to section 501(c)(3),[114] this guideline is unnecessary.

GUIDELINE SEVEN

There is no arrangement to provide, directly or indirectly,

110. Goldberg & Cohen, *supra* note 24, pt. 2, at 4, col. 3.
111. See text accompanying note 104 *supra*.
112. Guideline 6 would also make any tax incentive plan difficult. *See* Comment, *supra* note 70.
113. "An organization will not jeopardize its exemption under section 501(c)(3) of the Code, even though it distributes funds to nonexempt organizations, provided it retains control and discretion over use of the funds for section 501(c)(3) purposes." Rev. Rul. 68-489, 1968-2 CUM. BULL. 210.
114. *See* Treas. Reg. § 501(c)(3)-1(d)(1)(ii) (1959).

> a deduction for the cost of litigation which is for the private benefit of the donor.[115]

This guideline attempts to prevent a private party from funding a tax exempt public interest law firm for the purpose of seeking redress of a private grievance while at the same time obtaining a charitable deduction under section 170 for funds contributed to the firm.[116] The Commissioner stressed that the key word is "arrangement."[117] For illustration he returned to the hypothetical small private lake bordered by six private landowners.[118] Where five of the property owners are initiating an action against the sixth for polluting the lake, he did not deem it proper "for five to negotiate a contribution to a public interest law firm in response to which [it] would bring litigation involving pollution to that lake."[119]

While the principle underlying this guideline is sound in theory, in practice there remains the problem of distinguishing a "private" from a "public" benefit. Using an illustration similar to the Commissioner's, assume that emissions from a copper smelter are corroding the paint on a nearby landowner's house and are in possible violation of a state anti-pollution statute. Under this guideline, the landowner could not make a deductible "contribution" to a public interest law firm, and somehow "arrange" for the firm to force the smelter to install anti-pollution equipment and to bear the cost of having the home repainted. Nor, following the Commissioner's reasoning, could five similarly affected landowners join together in an effort to realize the same objective. If, however, the homes or the health of a majority of the community were involved, it is suggested that requiring the smelter to install corrective devices might be directed toward a "public" benefit and donations to a public interest law firm to be used to bring an appropriate action would be permissible. Furthermore, it could be argued in such a situation that correcting a violation of a state statute is always in the public interest, even though a private benefit is involved. Consequently, it appears that any attempt to distinguish between "private" and "public" interests or benefits can only be made arbitrarily, at least where the number of people concerned is a decisive factor. It is submitted, therefore, that any guideline that must rely on such a distinction is unworkable in practice, if not in theory.[120]

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115. Rev. Proc. 71-39, *supra* note 6, at 31.
116. Testimony of Commissioner Thrower, *1970 Hearings, supra* note 22, at 54, 70.
117. *Id.* at 71.
118. See text accompanying note 31 *supra.*
119. Testimony of Commissioner Thrower, *1970 Hearings, supra* note 22, at 54, 71.
120. For an argument that the IRS has arrived at an adequate functional definition of "charity" for public interest law firms, see Note, *supra* note 49, at 237.

GUIDELINE EIGHT

> The organization must otherwise comply with the provisions of section 501(c)(3) of the Code, that is, it may not participate in, or intervene in, any political campaign on behalf of any candidate for public office, no part of its net earnings may inure to the benefit of any private shareholder or individual, and no substantial part of its activities may consist of 'carrying on propaganda, or otherwise attempting to influence legislation.'[121]

This guideline states no more than is already required of section 501(c)(3) organizations,[122] and is wholly unnecessary.[123] It does, however, emphasize the general applicability of section 501(c)(3) requirements to public interest law firms. It must be kept in mind that these are requirements intially imposed by Congress, although they have been further refined and interpreted by the Service and the courts.

Political Campaigning

The bar against participation or intervention in campaigns for public office was added to section 501(c)(3) by the 1954 Code, originating as a floor amendment by Senator Lyndon B. Johnson.[124] One reason expressed for the ban is that the tax system should not interfere with equal participation in the political process by all members of a community.[125] While a politically neutral tax structure might have been a worthwhile goal in the past, in light of the increasing costs of running for public office and the difficulties encountered by candidates in raising funds through traditional means,[126] it is perhaps time for a re-examination of this provision of the Code.

There are many situations, moreover, especially on the local level, in which it might be in the public interest for a public interest law firm to

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121. Rev. Proc. 71-39, *supra* note 6, at 31.

122. See I.R.C. § 501(c)(3), reprinted in text preceeding note 7 *supra*.

123. Guideline 8 is omitted in the pamphlet sent to organizations applying for exemption. Internal Revenue Service Pub. No. 557, *supra* note 95.

124. *See* 100 CONG. REC. 9604 (1954) (remarks of Senator Johnson). The Tax Reform Act of 1969 added this restriction to I.R.C. §§ 170, 2055 & 2522 as a condition to the deductibility of gifts by the donee organization. Tax Reform Act of 1969, Pub. L. No. 91-172, § 201, 83 Stat. 549, *amending* I.R.C. §§ 170(c)(2), 2055(a)(2), 2522(a)(2). Treas. Reg. §§ 1.501(c)(3)-1(b)(3)(ii), -1(c)(3)(iii) (1959), add the words "directly or indirectly" to the prohibition. *See generally* Field, *supra* note 12, at 160.

In Rev. Rul. 67-71, 1967-1 CUM. BULL. 125, a nonprofit organization created to improve a public educational system was held not to be exempt under section 501(c)(3) when it campaigned on behalf of candidates for election to a school board.

125. Note, *Regulating the Political Activity of Foundations*, 83 HARV. L. REV. 1843, 1855 (1970). In Slee v. Commissioner, 42 F.2d 184, 185 (2d Cir. 1930), Judge Learned Hand stated: "Political agitation as such . . . must be conducted without public subvention; the Treasury stands aside from [it]."

126. For a debate over partial funding of Presidential campaigns by allowing individuals to contribute $1 by checking a box on their Federal income tax returns, see NEWSWEEK, Dec. 13, 1971, at 23.

become involved in political activity. Allowing a public interest law firm more freedom to act independently in political controversies could possibly provide representation for groups previously unrepresented by organized interests. Such a situation could occur where an entrenched incumbent has completely ignored the interests of a segment of the community. Because of prevailing political attitudes and discrimination, it has often been impossible for the interests of that segment to be adequately represented in such a campaign. Perhaps, in such situations, it would be appropriate for a public interest law firm to enter the political arena, either as a watchdog to insure that the election laws are obeyed, or perhaps going so far as actively supporting an opposition candidate.[127]

It must be recognized, however, that there are valid objections to allowing such organizations to engage in partisan political activity.[128] Furthermore, in light of the fact that one major thesis of this analysis is that public interest law firms should not be accorded different treatment than other section 501(c)(3) organizations solely because the firms engage in litigation, it is inconsistent to argue that the firms should be accorded special treatment in this area. Suffice it to say that if representation of groups heretofore underrepresented by organized interests is deemed to be in the public interest, a public interest law firm would be severely handicapped by this provision of the Code.

Private Benefit

The restriction against the earnings of a public interest law firm inuring to the benefit of any private individual is basic to the concept of "charity," and, subject to the definitional problems previously discussed,[129] it is unobjectionable in its application to firms litigating in the public interest. It should be pointed out, however, that this in no way precludes the payment of reasonable salaries, expenses and such items as per diem costs incurred in attending board meetings.[130]

Influencing Legislation

The limitations on "carrying on propaganda or otherwise attempting to influence legislation" have been the subject of extensive analysis and

127. While there are many degrees of "active" support, ranging from endorsements to funding, it is not within the scope of this analysis to discern possible limitations on the scope of permissible activity. It is merely suggested that the flat ban on all political activity should be reexamined.

128. *See, e.g.*, Note, *supra* note 49, at 248, where it is concluded that the prohibition against partisan political activity by section 501(c)(3) organizations is "justifiable because the government should not support the political activities of contending political groups." Field, *supra* note 12, discusses at length the effects of this limitation on the tax exempt status of universities.

129. See text accompanying notes 24-37 *supra*.

130. *See, e.g.*, Mabee Petroleum Corp. v. United States, 203 F.2d 872 (5th Cir. 1953) (payment of reasonable salaries to officers of charitable corporation does not constitute inurement of net corporate income to the recipient); St. Ger-

discussion.[131] Briefly, under the present regulations, a section 501(c)(3) organization may not devote a *substantial* part of its activities to influencing legislation by propaganda or otherwise.[132] The major problem has been in attempting to delimit the word "substantial." Having previously used a flat 5 percent of time and money test,[133] the Service now looks to an organization's "total activity."[134]

This limitation can present serious problems to a public interest law firm. One problem is "ethical," in that the function of this limitation may well be a substantial increase in litigation resulting from the foreclosure of other avenues of redress. In certain situations, for example, a public interest firm's clients may best be represented by drafting legislation and then pressing for its passage on the local, state or federal levels. Such an approach might not only be best for the individual client, but for the broader public as well, in that the burden on the judicial system will be reduced and that comprehensive legislation can have a broader reach than a court decision.

Another problem can be illustrated by the example of a public interest law firm concerned with air pollution in a certain area. If the firm were to conduct nonpartisan analysis, study and research of the problem, and then publish the results of such efforts for the benefit of the general public, this would constitute permitted "educational" activity.[135] Once the firm began to "advocate the adoption of any legislation or legislative action to implement these findings,"[136] however, it would run the risk of having this conduct characterized as "substantial" influencing of legislation, which could lead to the loss of tax exempt status.[137] It might be considered permissible, however, for a representative of the firm to

main Foundation, 26 T.C. 648 (1956) (upholding the payment of reasonable personal living expenses to staff members who were not paid regular salaries).

131. *See, e.g.*, Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 439 (1960); Sharp, *Reflection on the Disallowance of Income Tax Deductions for Lobbying Expenses*, 39 BOST. U.L. REV. 365 (1959); Note, *Regulating the Political Activity of Foundations*, 83 HARV. L. REV. 1843 (1970); Note, *The Revenue Code and a Charity's Politics*, 73 YALE L.J. 661 (1964).

132. Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (1959).

133. Seasongood v. Commissioner, 227 F.2d 907 (6th Cir. 1955).

134. Letter from District Director to Sierra Club, Dec. 16, 1966, *reprinted*, Note, *Political Activity and Tax Exempt Organizations Before and After the Tax Reform Act of 1969*, 38 GEO. WASH. L. REV. 1114, 1124-25 (1970), *quoting* 6 P-H 1966 FED. TAXES ¶ 54,644, at 54,527.

135. *See, e.g.*, Rev. Rul. 70-79, 1970-1 CUM. BULL. 127, 128, which states that "[a]ssisting the municipalities of a particular region in the study of problems such as water and air pollution, transportation, water resources, and waste disposal is charitable within the meaning of the applicable regulations since it lessens the burdens of government." This ruling also permitted publication of the completed study.

136. *Id.*

137. The section 501(c)(3) status of the Sierra Club was first questioned by the IRS the day after the Club ran full-page advertisements in the Washington Post and New York Times urging defeat of proposed legislation to construct two power dams on the lower Colorado River. Note, *supra* note 8, at 1129 n.6. *See also* Note, *The Sierra Club Controversy*, 55 CALIF. L. REV. 618 (1967).

testify on behalf of the proposed legislation if he were requested to appear at a legislative hearing.[138]

Relevant in this regard is the distinction between permissible "education" and forbidden "propaganda."[139] If the firm were to hold a press conference for the purpose of publicizing the results of its air pollution study while the legislature was not in session, the Service would undoubtedly consider this part of the educational process. If, however, the legislature were in session and considering a bill on the subject, a press conference at this time might be considered propaganda. Similarly, it might also be considered improper for the firm to conclude its study while the legislature was in session, and "coincidentally" have portions of the study published. This distinction can thus provide a stumbling block to effective representation of the public interest.

Another problem for public interest law firms is the scope of the limitation on lobbying. The regulations define "legislation" to include action by all federal, state and local "governing" bodies.[140] Since guideline one contemplates direct representation before administrative boards and agencies, it could be argued that a public interest law firm could appear before an administrative agency and present its position on broad questions of "public interest." This would be permissible only if agencies are not thought of as "governing" bodies. Such problems serve to highlight the unfortunate effect of this Code provision on public interest law firms. While appearing before a legislative body or administrative agency may be a viable alternative for a particular client, the ambiguous relationship of guidelines one and eight forces firms to concentrate on litigation in lieu of other alternatives.[141]

One sensible alternative approach to the Code's present limitations on lobbying was contained in the bill to establish a National Legal Services Corporation, a proposed section 501(c)(3) organization.[142]

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138. In Rev. Rul. 70-449, 1970-2 CUM. BULL. 111, the Service ruled that an exempt organization is not engaged in prohibited legislative activity if a representative testifies as an expert witness on pending legislation affecting the organization at the request of a legislative committee.

139. *See, e.g.*, Solicitor's Opinion No. 1362, 2 CUM. BULL. 152, 154 (1920).

140. Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii)(b) (1959), states that legislation "includes action by Congress, by any State legislature, by any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment or similar procedure."

141. This is especially relevant for an interdisciplinary approach where one member of the team is a "legislative specialist." *But cf.* Comment, *Interdisciplinary Collaboration in Public Interest Law*, 13 ARIZ. L. REV. 909 (1971). It is also possible that this provision of the Code could be considered to infringe upon the client's first amendment right to petition the government for redress of grievances. *Cf.* NAACP v. Button, 371 U.S. 415 (1963), *discussed supra* note 22. *But cf.* Cammarano v. United States, 358 U.S. 498 (1959), where the Court upheld the constitutionality of regulations denying a business expense deduction for money spent in lobbying against a referendum harmful to petitioner's business. *See generally* Note, *supra* note 49, at 246-47.

142. The National Legal Services Corporation, proposed by the Economic Opportunity Amendments of 1971, S. 2007, was vetoed by President Nixon.

> The Corporation shall ensure . . . that all attorneys *who are not representing a client or group of clients* refrain, while engaged in activities carried on by legal services programs funded by the Corporation, from undertaking to influence the passage or defeat of any legislation by the Congress or State or local legislative bodies, by representation to such bodies, their members, or committees, unless such bodies, their members, or their committees request that the attorney make representations to them . . . .[143] [Emphasis added.]

The inference to be drawn from this language is that an attorney can attempt to influence legislation on behalf of a client or group of clients when such is essential to the overall success of their case. This realistic approach is beneficial in ensuring that a client will receive the most appropriate aid for his particular problem.[144]

Congress could greatly broaden the freedom of tax exempt organizations to engage in lobbying,[145] and bills have been introduced to amend the Code to permit communication between certain tax exempt organizations and legislative bodies and committees.[146] Such congressional initiative is feasible in light of the fact that section 501(c)(3) organizations

> have as a common characteristic some recognized charitable purpose at their end. Only the means used to achieve those ends are being brought into question. On this basis they are immediately distinguishable from the economic pressure group which seeks private gain or preferred treatment, the hate group which seeks antisocial ends, or the political party or group in support of a candidate which seeks political position and power.[147]

This position is reinforced by analogy to the fact that since 1962 there have been allowed as "ordinary and necessary" business expense deductions certain expenses incurred in connection with legislative appearances by taxpayers when it is of direct interest to their trade or business.[148] It

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117 CONG. REC. S21129 (daily ed. Dec. 10, 1971); [1971] U.S.C. CONG. & ADMIN. NEWS 3673. Section 906(e), the lobbying provision of the bill, was not mentioned as objectionable in the veto message, and might therefore withstand the veto if incorporated in another measure. *See* S. REP. No. 92-523, 92d Cong., 1st Sess. (1971); H.R. REP. No. 92-682, 92d Cong., 1st Sess. (1971). *See generally* Comment, *Federal Funds for Public Interest Law: Plausibility, Politics and Past History*, 13 ARIZ. L. REV. 932 (1971).

143. S. 2007, 92d Cong., 1st Sess. § 906(e) (1971).

144. *See also* Kantor, *Legislative Advocacy*, 5 CLR'GH. REV. 574, 578 (1972), suggesting that legislative advocacy by OEO Legal Services lawyers should have equal status with litigation as an advocacy tool in order to provide a comprehensive attack on the problems of the poor.

145. Note, *supra* note 134, at 1134: Other suggestions include drawing a distinction as to the type of lobbying which could be carried on without taxation and making the "substantial" test completely quantifiable.

146. *See, e.g.*, S. 1408, 92d Cong., 1st Sess. (1971).

147. Clark, *supra* note 131, at 453.

148. I.R.C. § 162(e). This section's limitations against deductions in connection with any attempt to influence the general public, *id.* § 162(e)(2)(B), could also be applied to public interest law firms.

can be argued that it is no less proper for a public interest law firm to devote more than an insubstantial portion of its total activity in legislative appearances on behalf of a client or group of clients than it is for a business which is seeking private gain or preferred treatment. Finally, it is somewhat anomalous to permit the firm to attempt to influence courts and "non-governing" administrative agencies to act in their client's favor while being denied the ability to try and produce favorable legislative action.[149]

CONCLUSION

Unlike many sectors of the tax field, the question of litigation and the public interest is an area in which serious social and philosophical problems are involved.[150] This serves to increase the need for workable rules. For the public, such rules protect the taxpayer's investment in charity; for the organizations, such rules safeguard the continuation of a favorable policy and "provide the basis for maintaining confidence for those who support charity."[151] It is submitted, however, that the IRS guidelines are neither necessary nor workable.

They are unnecessary because litigation can be encompassed within existing regulations. Unlike other provisions of the Code, public policy dictates that the exemption of income devoted to charity be construed broadly.[152] The definition of "charitable" in the regulations[153] can easily be construed to contemplate the initiation of litigation. The protection of human and civil rights contemplated by the regulation's use of the word "defend" does not necessarily mean passive defense of an indictment or an action brought by another. Human and civil rights inherent in the law can also be defended by affirmative litigation which both establishes and vindicates those rights.[154] Similarly, the fact that charitable organizations can *advocate* social and civil changes[155] can be used to bolster the argument permitting litigation under existing law, especially since courts often provide the only effective forum for public interest advocacy.[156]

149. Weaver, *Taxes and Lobbying—The Issue Resolved*, 31 GEO. WASH. L. REV. 938, 939 (1963).
150. *See* Bacon, *The New Exempt Organization Program in Audit*, 1 TAX ADV. 69, 70 (1970).
151. Cohen, *The IRS and Its Program for Exempt Organizations: Foundations and Others: A Review and a Forecast*, in N.Y.U. 9TH CONF. ON CHARITABLE FOUNDATIONS 243 (1969).
152. Helvering v. Bliss, 293 U.S. 144, 151 (1934).
153. See text & note 15 *supra*.
154. Letter from Louis F. Oberdorfer to Commissioner Thrower, *1970 Hearings*, *supra* note 22, at 62, 64.
155. Treas. Reg. § 1.501(c))(3)-1(d)(2) (1959).
156. Goldberg & Cohen, *supra* note 24, pt. 1, at 4, col. 2. These authors recommend that in order to provide the most secure position for litigating organizations a new category—"litigation in the public interest" might be added by Congress to the exempt purpose list of section 501(c)(3).

The guidelines are not workable since, ultimately, they are based upon a distinction between a "public" and a "private" interest—a distinction that the Internal Revenue Service cannot and should not make. Public interest law firms are unique among charitable organizations in that their work is constantly scrutinized by the courts and the press.[157] Through the courts and the press, the public will be informed as to what types of activities these firms are pursuing. This exposure to public view may be the best way to hold public interest law firms accountable to the community at large and to ensure that the interest represented is truly that of the general public.[158]

157. Statement of Sheldon S. Cohen, *1970 Hearings, supra* note 22, at 330, 335.
158. Stone, *Federal Tax Support of Charities and Other Exempt Organizations: The Need for a National Policy*, 20 U. So. CAL. 1968 TAX INST. 27, 42 (1968).