

DINING - DANCING - CASINO

2022

Barristers Ball

PRESENTED BY THE MCBA
YOUNG LAWYERS DIVISION

Oct 8

Join Us

Saturday, October 8, 6-11 p.m.

Camelback Inn
5402 E. Lincoln Drive
Paradise Valley

Proceeds from the silent auction, raffle and live auction will go to the Maricopa County Bar Foundation Michael D. Ryan Diversity Scholarship

Early Bird Tickets:
\$175 per person
\$680 for a table of 4
\$880 for a VIP table of 4
\$1700 for a table of 10
\$2000 for a VIP table of 10
(prices go up September 1)

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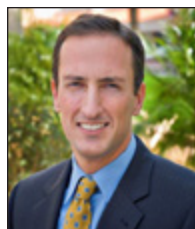
For more information or to register go to maricopabar.org

Q&A



LAWYER LIABILITY AND ETHICS

Resolution From the ABA Implicitly Criticizes Arizona's Ethical Rules



Joseph Brophy

On August 9, 2022, the ABA House of Delegates passed Resolution 402, which reaffirmed the ABA's disapproval of the sharing of legal fees with non-lawyers. Resolution 402, in its entirety, reads: "The sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession. The law governing lawyers that prohibits lawyers from sharing legal fees with non-lawyers and from directly or indirectly transferring to non-lawyers ownership or control over entities practicing law should not be revised."

What kind of an outlaw jurisdiction would allow the sharing of legal fees with non-lawyers or tolerate the ownership or control of a legal practice by non-lawyers, both of which violate ABA Model Rule 5.4? Hopefully all of you guessed Arizona, which was the first jurisdiction in the nation to eliminate Rule 5.4. Utah followed suit shortly thereafter. How did Arizona run afoul of the ABA, even if only by implication, in Rule 402?

Back in 2018, then Chief Justice Bales formed a task force to examine and recommend whether nonlawyers, with specific qualifications, should be allowed to provide limited legal services, including representing individuals in civil proceedings. The task force's general purpose was to make changes to Arizona's ethical rules, with an eye toward providing more affordable legal services. The ABA has made a lot of noise about having similar goals with respect to reducing the costs of legal services.

E.R. 5.4 generally prohibited lawyers from sharing fees with nonlawyers and prohibits nonlawyers from having any financial interest in law firms. Arizona's task force identified ER 5.4 as a barrier to innovation in the delivery of legal services. The task force concluded that although ER 5.4's ostensible purpose is protecting a lawyer's independent judgment, its true purpose and effect is economic protectionism that reduces competition from corporations that employ lawyers to serve their customers. As a result, Arizona repealed E.R. 5.4 to allow legal practices to experiment with alternative business models (including the utilization of non-lawyers) in the hopes that increased efficiencies will reduce the cost of legal services.

The ABA, on the other hand, is a lobbying organization at heart and which is captured, to a large extent, by larger law firms. Those big law firms have been at the forefront of resisting changes to the rules governing the practice of law by non-lawyers and the rules governing law firm ownership.

With apologies to our big firm brethren who may take offense, this resistance is born largely out of fear, not for the ethical implications, but rather that the Big Four accounting firms—EY, Deloitte, KPMG, and PwC—and other alternative legal service providers would take a more direct competitive stance against U.S. law firms.

The ABA does not acknowledge these concerns, but rather claimed, in a report that accompanied Resolution 402, that "affirmation of these core principles and values is important now, particularly at a time when external forces threaten the profession to lessen its commitment to the public and to professional independence." How noble. One ABA delegate accidentally put his finger on the real issue when he called Resolution 402 a "reaffirmation of this long-standing policy of protecting the public from profiteers." The policy behind ER 5.4 was supposed to be preservation of a lawyer's independent judgment, not protection of the client from "profiteers." Which profiteers was the delegate talking about? Presumably he was not referring to lawyers who profit from providing legal services to clients.

The ABA also claimed in the aforementioned report that "non-lawyer involvement in the practice of law is ... a threat to clients and our system of justice." Arizona has roughly 17 Licensed Paraprofessionals, which is a new, non-lawyer position allowed under Arizona's ethical rules. There are also Arizona law firms that have begun testing the waters of alternative business structures, which include non-lawyer owners. While it is still early in this experiment, the sky has not fallen. That could be because it is too early in this experiment to detect a problem or perhaps Arizona has been able to provide sufficient safeguards to mitigate the dangers that ER 5.4 was in place to avoid. It is also possible that Arizona's task force was right in its assessment that ER 5.4 was less about protection of the public than it was about protection of lawyers from competition. Time will tell. ■

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SEPTEMBER CALENDAR

Check out maricopabar.org/events and watch your inbox for the latest updates on dates, times, and locations for events and meetings.