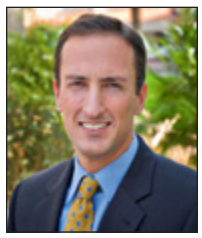
Q&A

LAWYER LIABILITY AND ETHICS

California Not Ready for Alternative Legal Structures



Joseph Brophy

Two years ago, Arizona was the first jurisdiction in the nation to eliminate Rule 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. Although Arizona was the first jurisdiction to do so, the idea did not start there. It started in California. Perhaps you are wondering where California is on this issue? Read on.

In July 2018, Professor William Henderson of Indiana University delivered to the Board of Trustees for the State Bar of California a landscape analysis of the current state of the legal services market. The trustees asked for the report to facilitate their goal of enhancing access to justice with an eye towards making regulatory changes to allow new business models for delivering legal services. In response to Professor Henderson's report, the State Bar of California formed a task force to examine the issues raised by the report, including allowing outside ownership of law firms.

The proposed changes to California's ethical rules received significant blowback for all of the reasons one would expect – concerns over the ethical implications of allowing non-lawyers to either participate in law firm ownership or to perform legal services normally reserved to lawyers. Or, as the Supreme Court of Arizona concluded, good old-fashioned protectionism from the California legal industry. Nevertheless, the trustees for the State Bar of California persisted and submitted to the California legislature proposed reforms similar to those adopted by Arizona and recommended by Professor Henderson.

In September of this year, California Governor Gavin Newsom signed a bill blocking the California bar from moving forward with the reforms it recommended. Why did California reject the very reforms advanced by a movement of which California was in the vanguard? The ostensible reason (and I am not making this up) was that the California legislature concluded that the California State Bar is so horrible at attorney regulation, that the legislature does not believe the bar to be capable of handling the additional burden of regulating non-attorneys or alternative legal organizations.

The legislature cited a report dated April 14, 2022 from the California State Auditor stated that: (1) the State Bar prematurely closed cases that warranted further investigation and potential discipline; (2) found one attorney who was the subject of 165 complaints over seven years, many of which the State Bar dismissed outright or closed after a mere letter to the attorney while never imposing any discipline on the attorney; and (3) the State Bar relied too much on nonpublic measures, such as private letter, that do not provide sufficient deterrence for misbehaving attorneys. In one particularly egregious example, the State Bar closed multiple complaints alleging that an attorney failed to pay clients their settlement funds. When the State Bar finally examined the attorney's bank records, it found that the attorney had misappropriated nearly $41,000 from several clients.

Additionally, the auditor found that the State Bar had not consistently identified or addressed the conflicts of interest that exist between its own staff members and the attorneys they investigate. In more than one-third of the cases the auditor reviewed, the State Bar did not document its consideration of conflicts before it closed cases in which potential conflicts existed. The State Bar also failed to proactive seek out information regarding disciplinary actions in other jurisdictions, instead relying on either attorneys or other jurisdictions to provide information regarding out of state disciplinary action.

There is no reason to disbelieve the conclusions of the California State Auditor that the California State Bar struggles to pick up on patterns of behavior with certain attorneys, among other problems. In fact, the State Bar largely agreed with the auditor's conclusions! But one must question the convenience of the timing of the auditor's report, which allowed the California's legislature and governor to avoid upsetting the many large California firms who oppose an Arizona-style approach to alternative legal organizations and positions, and who also make significant political donations. Given California's purported "leadership" in this area, it calls to mind St. Augustine's famous prayer: "O Lord make me chaste, but not yet."

Ruben Duran, the chair of the California State Bar's board of trustees, who is either a fan of St. Augustine or just great an impressions, assured everyone that "when the time is right, we look forward to California-focused conversations and movement to harness the creativity, public-service mindset and innovation that runs through many sectors in this state, including practicing lawyers, the judiciary, and others dedicated to ensuring everyone who needs it can access and afford competent, ethical and effective assistance for their legal problems." When the time is right, but not yet. ■

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Court Brushes Off Constitutional

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regimes where no warrant is ever required may be reasonable where special needs ... make the warrant and probable-cause requirement impracticable, and where the primary purpose of the searches is distinguishable from the general interest in crime control."

Bress noted several archetypal situations in which such searches are approved. Most pertinent to the tire-chalking issue, he noted, "the Supreme Court has permitted various types of dragnets in which police indiscriminately stop motorists without individualized suspicion or a warrant, when the stops are not used for the primary purpose of detecting general criminal wrongdoing." He pointed to such examples as permanent highway immigration checkpoints, sobriety checkpoints, and roadblocks aimed at determining whether drivers were properly licensed. He also noted that the Ninth Circuit had approved a dragnet checkpoint outside a national park where park officers asked motorists if they had been hunting in an effort to preventing illegal poaching.

Several guiding principles govern such warrantless searches. They must have "a sufficient connection to the governmental interests they serve and cannot advance as their primary purpose uncovering evidence of ordinary criminal wrongdoing." Courts must "balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion." And such searches must be reasonable in scope and execution.

Bress had "little difficulty concluding that tire chalking does seek evidence of ordinary criminal wrongdoing" but instead helps the city manage its vehicular traffic and its parking spots. "Chalking is part of San Diego's broader effort to ensure the free flow of traffic and mitigate the harms of congested city streets," he wrote. "Chalking also functions as a deterrent, encouraging compliance with City parking regulations." He emphasized that "the *only* information that tire chalking could reveal is how long a vehicle remained parked in a city parking space."

Bress next analyzed reasonableness, beginning "with the gravity of the public concerns that chalking serves." He conceded that parking enforcement is not as grave a concern as, for instance, keeping drunk drivers off the road. Nevertheless, its concerns are not themselves trifling. "It does not take an advanced degree in urban planning," he wrote, "to appreciate the significance of free-moving vehicular traffic and parking availability to the basic functioning of a municipality and the quality of life of its residents, businesses, and visitors."

Failing to ensure compliance with parking regulations could "lead to double-parking, cruising, and illegal parking." That, in turn, can "increase traffic congestion and can delay public transit; pose safety risks to pedestrians, bicyclists, and motorists; reduce air quality; and impede the movement of emergency vehicles."

Bress concluded that "chalking bears a tight nexus to parking management" and "has no apparent spillover use outside of its stated purpose." And it would be impracticable to require the city to seek warrants to monitor its thousands of parking spaces for overtime violations.

Bress then turned to tire-chalking's de minimis intrusion on personal liberty. "Suffice it to say," he wrote, "it is hard to imagine a 'search' that involves less of an intrusion on personal liberty than the temporary dusting of chalk on the outer part of a tire on a vehicle parked in a public space." He noted, "Chalking involves no detention of persons or property; it does not damage property or add anything permanent to it; and the search does not create substantial anxiety, as some searches may."

"The interference with liberty that chalking causes is infinitesimal," Bress concluded.

He recognized that the Sixth Circuit recently ruled in *Taylor v. City of Saginaw* that tire-chalking is not protected by the administrative-search exception. "We respectfully part ways with the Sixth Circuit's decision," he wrote. "While we are reluctant to create a possible circuit split, we do not find *Taylor*'s analysis persuasive."

Circuit Judge Patrick J. Bumatay dissented. "No matter how well meaning, modest, or longstanding the intrusion into personal effects," he wrote, "the Fourth Amendment commands that all government searches, with some narrow exceptions, be supported by a warrant and individualized suspicion of wrongdoing."

He likened tire-chalking to the general warrants used by the British crown against the American colonists, which "allowed government officers to search a property or person for evidence of wrongdoing without designating what they were looking for or why they had suspicion to search." "That government officials must have reason to suspect lawbreaking before initiating a search stems directly from our Founding generation's aversion to Crown officials' abuse of investigative tools to search and seize at will and without explanation," he wrote.

Canvassing American history, he concluded that "our Founding generation had a deep-seated aversion to suspicionless searches." He wrote, "Unless the chalking policy can satisfy one of the limited exceptions to the individualized-suspicion requirement, it must be held unconstitutional."

He disagreed with the majority that the administrative search doctrine protects tire-chalking. He found that the "policy isn't designed to address a pressing and exceptional governmental interest," and opined that "neither the Supreme Court nor our court has ever approved of an administrative search for such pedestrian concerns like the City asks us to." He explained, "An administrative search must be limited to specific, imminent, and vital interests—rather than the routine, ordinary challenges often faced by governments."

And Bumatay was unpersuaded by the majority's de-minimis rationale. "While chalking tires may not constitute the greatest affront to personal liberty," he wrote, "our duty is to safeguard against even stealthy encroachments on the Fourth Amendment." He found chalking presumptively unreasonable because it targets lawfully parked vehicles. "Simply put," Bumatay wrote, "the City's interests in perpetuating its parking enforcement regime don't chalk up."

Bress was unimpressed. "Merely citing the

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