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ABA Stance On Role Of Nonlawyers Is Too Black And White

By **Peter Jarvis and Trisha Rich** (August 31, 2022, 4:03 PM EDT)

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Resolution 402, adopted by the American Bar Association's House of Delegates **in August**, provides that 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" and that there should consequently be no changes to the ABA Model Rules of Professional Conduct that would promote either development.

The adoption of this resolution thus continues the HOD's stated opposition to nonlawyer ownership or receipt of a portion of the legal fees by nonlawyers that dates back to at least 1983. At that time, the HOD rejected the version of Model Rule 5.4 proposed by the Kutak Commission on Evaluation of Professional Standards that would have permitted these activities subject to specific controls.

In effect, Resolution 402 asserts that there can never be controls sufficient to permit these activities.

This is not the place for a full discussion of all issues relating to Resolution 402. Nonetheless, and as lawyers who regularly advise lawyers and law firms about professional and ethical responsibilities, we would like to make five brief points.

First, and perhaps most obviously, too many ships have already sailed to bottle up substantial further efforts and experimentation of the kind that Resolution 402 opposes.

As the resolution itself notes, substantial steps in very different directions have already been taken in Arizona and Utah, and a number of other states are likely to follow suit. Resolution 402 also notes that nonlawyer participation in these activities exists in the U.K. and Australia and does not assert that they have actually led or are about to lead to disaster in either jurisdiction.

Second, the assertion in Resolution 402 that individuals who are not licensed as lawyers cannot safely and reasonably be relied upon to conform their conduct to what is required of lawyers is, at a minimum, subject to serious question.

There will always be the good, the bad and the ugly in every walk of life, and if there is solid empirical proof that lawyers are inherently more honest or law-abiding than other mere mortals, we would like to see it.

We also tend to doubt that nonlawyers would accept any such offer of proof, and there does not seem to be any such proof from the District of Columbia — which allows limited nonlawyer participation — or from the U.K. or Australia.

But more importantly, lawyers and their firms already make substantial use of nonlawyers as employees and independent contractors on an increasingly broad array of tasks, and both lawyers and their firms can and do rely upon their nonlawyer employees and independent contractors to comply with the rules governing lawyers. In fact, ABA Model Rule 5.3 requires lawyers to maintain

policies and procedures to assure nonlawyer compliance.

In addition, nonlawyer employees are already entitled under ABA Model Rule 5.4(a)(3) or its equivalents in most U.S. jurisdictions to profit-sharing arrangements — something that Resolution 402 asserts will wreak havoc on core values of the profession. To the best of our knowledge, no such havoc appears on the horizon.

Third, we have neither reason nor need to quarrel with the assertion in Resolution 402 that the alternative business structures established in Arizona since the state changed its rules last year seem heavily directed toward making money rather than toward serving those who are presently least served or most underserved by the existing legal system.

We do not doubt, however, that the same can truthfully be said of most lawyers and their firms. And by further bringing additional business expertise and efficiencies into the provision of legal services, there is at least the potential for serving those who are not presently served or who are underserved and for bringing down the cost of legal services to many.

Fourth, even if it is assumed that nonlawyers will not be able on average to provide the same quality of legal services that lawyers on average provide, this does not mean that there is no place for nonlawyers to do anything.

Consider, by analogy, the growth of neighborhood urgent care centers as alternatives to hospital emergency rooms and doctors' offices. It seems reasonable to suppose that the average patient who walks into an urgent care center knows that they will see a nurse or other practitioner who is not an M.D.

When cost, convenience and time considerations are taken into account, however, it is generally, if not always, rational for individuals to choose urgent care centers, at least as their first resort, even if those urgent care centers may not be able to detect everything that a doctor could detect.

It makes no sense to tell individuals who wish to use urgent care centers that they cannot do so because they might be better off seeing a doctor if they could conveniently find and afford one in a more perfect world.

The case for requiring individuals with legal service needs to either have those needs met only by licensed lawyers that they may not be able to find or afford or, if they cannot or will not find licensed lawyers, to deny them access to any legal services at all is certainly not one that we wish to make.

Finally, we agree with Resolution 402 that these kinds of changes may require rethinking how lawyers are regulated and that there probably are few, if any, state supreme courts eager to take on the regulation of significant numbers of nonlawyers.

But change requires thinking about new ways of doing things to meet new circumstances. And there is no inherent obligation, in any event, that lawyers and nonlawyers all be regulated by the same groups or individuals — just as there are differences in the regulation of doctors, nurses, pharmacists and others in the health care field.

This is not an all-or-nothing situation, and we have yet to know how things will best work out. We prefer to wait and see what develops.

In touting the passing of Resolution 402, Stephen Younger, a past president of the New York State Bar Association and one of the sponsors of Resolution 402, told Bloomberg Law that it was "a huge victory for all lawyers."[1] We need not doubt the sincerity of his belief in order to disagree that the resolution is in the interest of lawyers or the public.

As U.S. Supreme Court Justice Neil Gorsuch recently noted in the Wyoming Lawyer:

> At some point just about every American will interact with our civil justice system. Whether it happens because of an eviction, a custody battle, a tort suit, or a contract claim, one thing is clear: Legal disputes are just as much a part of life as death and taxes. Yet today, legal services are increasingly difficult to obtain. A 2017 study found that low-income Americans fail

> to obtain adequate professional assistance with their legal problems 86% of the time. The vast majority don't even try to obtain professional help, and those who do are often turned away. According to another study, at least one party lacks legal representation in nearly 80% of civil cases in this country. The root cause for this state of affairs is not hard to discern: Legal services are expensive. Lawyers charge hundreds of dollars per hour for even the simplest of legal services. Even a single legal bill can prove financially devastating to many Americans.[2]

Justice Gorsuch is right. Legal services for too many citizens are too often either unaffordable or unavailable on too many issues.

In all likelihood, allowing nonlawyers to play a greater role in the delivery of legal services will be a necessary part of moving us forward.

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[1] https://news.bloomberglaw.com/business-and-practice/aba-sides-against-opening-law-firms-up-to-new-competition.

[2] Neil M. Gorsuch, "Bridging the Affordability Gap: It's Time to Think Outside the Box," 45 Wyoming Lawyer 16 (Apr. 2022) (footnotes omitted).
