

AMERICAN BAR ASSOCIATION**ILLINOIS STATE BAR ASSOCIATION
NEW YORK STATE BAR ASSOCIATION
NEW JERSEY STATE BAR ASSOCIATION
TORT TRIAL & INSURANCE PRACTICE SECTION
SOLO, SMALL FIRM AND GENERAL PRACTICE DIVISION****REPORT TO THE HOUSE OF DELEGATES****RESOLUTION**

RESOLVED, That the American Bar Association reaffirms Resolution 00A10F as follows:

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.

REPORT

The proposed resolution reaffirms certain core principles and values of the legal profession identified in a 2000 ABA House of Delegates adopted Resolution (the “2000 HOD Resolution”). Resolution 00A10F reads in part:

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.

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.

I. The 2000 House of Delegates Resolution

Resolution 00A10F urged jurisdictions to implement and preserve certain core principles and values of the legal profession. Those principles and values include: (1) specifically identified practice values such as undivided loyalty to a client, competence, and confidentiality; (2) lawyers being a single profession subject to individual jurisdictions’ law governing lawyers; (3) preservation of the legal professions’ core principles and values being essential to the proper functioning of the American justice system; (4) disciplinary agencies vigorously enforcing their jurisdictions’ law governing lawyers; (5) jurisdictions reevaluating and refining, if necessary, the definition of the “practice of law”; (6) jurisdictions retaining and enforcing laws prohibiting the practice of law by entities other than law firms; (7) maintenance of the principle that sharing legal fees with, and the ownership and control of the practice of law by, non-lawyers is inconsistent with the core values of the legal profession; and (8) preserving a value that holds that sharing legal fees with non-lawyers and directly or indirectly transferring ownership and control of entities practicing law is prohibited and such prohibitions should not be revised.

Resolution 00A10F was a response to certain proposals made by the ABA’s Multi-Disciplinary Practice Commission to facilitate the provision of nonlegal services by law firms (and conversely, the provision of legal services by nonlegal providers). Resolution 00A10F was an important statement of professional independence and a clear recognition of the preeminence of the public interest in the practice of law. It remains sound today.

II. The 2022 Proposed Resolution

The proposed resolution reaffirms portions of Resolution 00A10F, namely, the following principles and values: (1) sharing legal fees with non-lawyers and the ownership and control of the practice of law by non-lawyers are inconsistent with the core values of

the legal profession; and (2) prohibitions against lawyers 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.

Reaffirming policy in support of these two principles is not intended to minimize the other identified principles and values. As explained below, referencing these two specific principles and values is important as a means to provide continued guidance to the ABA, for example, when it considers revisions to existing Model Rules of Professional Conduct (the “Model Rules”) or other positions of the Association. Maintaining this important line, as further explained below, is not an obstacle to and still permits a wide range of innovative solutions to address ongoing issues in assuring access to justice for all.

III. The Need for Policy Reaffirmation

Since the House of Delegates passed Resolution 00A10F, there have been several initiatives within the ABA that would have facilitated or encouraged changes in Resolution 00A10F’s policy and in the Model Rules in order to allow for greater involvement of non-lawyers in the provision of legal services outside the environs of a professionally independent law firm and outside the supervision and governing rules enforced by state supreme courts and bar authorities. Critically, as Resolution 00A10F recognized in identifying the legal profession’s core values, a reevaluation and refinement of the practice of law can occur without threatening the enforcement the law governing lawyers and the advancement of greater access to justice. Innovation can be effectuated without abandoning core values that have strong implications for assuring that the practice of law remains a learned and independent profession that serves the public and defends justice.

Several possible justifications have been identified which some may argue support a divergence from established ABA policy on non-lawyer involvement including, e.g., improving service to clients, meeting law firm capital and profitability needs, advancing access to justice, and broadening diversity.¹ Yet, the perceived benefits in these areas that may result from changing the established policy are outweighed by the significant concurrent negative impact to the public and the legal profession.²

¹ See e.g. ABA Interim Report of the Commission on Multijurisdictional Practice, November 2001 (https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_final_interim_report_2.pdf); Jennifer Smith, *Law Firms Split Over Nonlawyer Investors*, Wall St. J., Apr. 3, 2012, at B1; John Eligon, *Selling Pieces of Law Firms*, N.Y. Times, Oct. 29, 2011; 22M607 (Utah, Narrowing the Access-to-Justice Gap by Reimagining Regulation—Report and Recommendations from THE UTAH WORK GROUP ON REGULATORY REFORM, August 2019 (<https://drive.google.com/file/d/1s37mTLDWArrCGdl0gA4YPV8lqXM6chCr/view>); Arizona – AZ Supreme Court Task Force on the Delivery of Legal Services *October 4, 2019 Report and Recommendations* (<https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf>); Goodbye Rule 5.4: Legal Ethics Change in Arizona, *Arizona State Law Journal*

² Indeed, where programs have been implemented to experiment with these sorts of reforms, the impact does not appear to support that even *these* benefits will result. As an example, the State of Washington ended its “Limited License Legal Technology Program” in June 2020 based on overall cost and the small number of participants. That program’s impact on access to justice had been earlier identified as providing no improvement in access to justice. Donaldson, *Law by Non-Lawyers: The Limit to Limited License Legal*

Perhaps the most prevalent justification offered by the proponents of non-lawyer profit-sharing reform has been that it will lead to greater access to justice. Recently by a 45-0 vote, the Florida Bar's Board of Governors urged the state Supreme Court to reject changes to its rules that would have allowed the sharing of fees with non-lawyers. As one member of that Board who moved for the proposal's rejection explained to the Florida Bar Journal, such a regime would create "profound conflicts of interest . . . between lawyers and their ethical obligations and nonlawyers that the court can't regulate who are entirely driven by profits" and fails to take into account "what some of the proposals have done to other professions, including doctors, without improving access to the consumers."³ As a consequence, the Florida Supreme Court agreed not to proceed with these reforms.⁴

The over-arching goal of advancing the administration of justice (e.g., through improving access to justice) should always be a priority of the ABA and affiliated bar associations, and progress continues to be made.⁵ But in light of existing ABA policy, the ABA should leave no doubt that, in considering the means to do this, there should be no changes to Association policy against fee splitting with non-lawyers and non-lawyer

Technicians Increasing Access to Justice, 42 Seattle University Law Review 1 (2018). In addition, in Arizona, as of the end of 2021, fifteen alternative business structures ("ABS") had been approved (another five appear to have been approved since then). However, the approved ABSs do not appear to be focused on traditionally underserved practice areas—those areas where the need for access has long been identified as greatest—like domestic relations, small claims, and landlord and tenant. Of the fifteen ABSs identified on the Arizona judicial branch's webpage, four focus on estate planning and wealth management; three deal with personal injury cases; three focus on taxation, business, and accounting services; two address general civil law issues (including LegalZoom); and two address immigration. Only one ABS specifically notes it will provide limited scope representation. <https://www.azcourts.gov/Portals/26/ABS%20Directory%205-20-2022.pdf> (last visited July 28, 2022).

³ Gary Blankenship, "Board of Governors Unanimously Opposes Non-Lawyer Firm Ownership, Fee Splitting Ideas," Fla. Bar J. (Nov. 10, 2021), <https://www.floridabar.org/the-florida-bar-news/board-of-governors-unanimously-opposes-non-lawyer-firm-ownership-fee-splitting-ideas/>. See also Letter from Florida Bar President Michael G. Tanner to Honorable Charles Canady, Dec. 29, 2021, <https://www.floridabar.org/news/publications/publications002/special-committee-to-improve-the-delivery-of-legal-services/#reports>.

⁴ Mark D. Killian, "Supreme Court Declines to Adopt Recommendations on Nonlawyer Ownership, Fee Splitting, and Expanded Paralegal Work," Fla. Bar J., Mar. 8, 2022, <https://www.floridabar.org/the-florida-bar-news/supreme-court-declines-to-adopt-recommendations-on-nonlawyer-ownership-fee-splitting-and-expanded-paralegal-work/> Other bar associations have taken a position on these issues the same as or similar to that taken by the Florida Bar, including the New York State Bar Association (supporting the Commission to Re-Imagine the Future of New York Courts' Working Group on Regulatory Innovations' recommendation to reject non-lawyer ownership of law firms) and the Illinois State Bar Association (rejecting proposals from the Chicago Bar Association to allow non-lawyer ownership of law firms and fee sharing). Moreover, in California, the State Bar of California Paraprofessional Program Working Group recently announced that, after much negative feedback, it will not recommend that non-lawyers be allowed to own a stake in law firms. See *California Pivots on Nonlawyer Owned Firms*, Bar Leader Weekly, Issue 295. See also March 3, 2022 letter from the Supreme Court of Florida to Joshua E. Doyle, Executive Director of the Florida Bar, available at https://www.abajournal.com/files/Florida_Supreme_Court_letter.pdf.

⁵ These include, e.g., rural and urban practice initiatives, virtual court appearance programs, expanded pro bono efforts, greater availability of Limited Scope Representation, and the like.

ownership of entities delivering legal service. Reaffirming the existing ABA policy will strongly make this point.

Why is it Important to Reaffirm the Current Policy?

First, as various state supreme courts and bar associations consider how best to address the current important legal services questions, it is imperative that the House of Delegates reaffirm policy to provide its guidance and unambiguous direction as to how these courts and associations should most productively proceed.

Second, a reaffirmation of the existing policy will make clear to all ABA-related entities that are or may be considering the issues addressed in the Resolution that any forthcoming proposals should meet the test of the policy reaffirmed and that any existing measures in conflict with this policy be revised.

Third, ABA proposals that are offered for consideration are often given great public distribution. Reaffirming the policy articulated in Resolution 00A10F will help prevent any confusion about the Association's stance on such issues.

The American concept and practice of lawyer independence is as important to proclaim and advocate in the United States and throughout the world as are the importance of due process and the rule of law.

It bears repeating why non-lawyer involvement in the practice of law is such a threat to clients and our system of justice. These reasons include:

Regulation. Non-lawyer involvement may invite, or at least open the door to, regulation of the practice of law and the legal profession by others besides the courts. Such involvement would have potentially significant negative consequences and conflict with the exclusive authority of courts in many state constitutions.⁶ As the ABA's Model Rules explain, the near exclusive regulation of the legal profession by the courts is necessary "because of the close relationship between the profession and the process of government and law enforcement." (ABA MRPC, Preamble [10]). Furthermore, the independence of the profession from non-court sources is critical: "Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice." (ABA MRPC, Preamble [11].) The threat of outside regulation is real. See e.g., *Oklahoma State Senate Resolution Calls for Sweeping Changes in District Judge Elections, Licensing for Some Lawyers*, Bar Leader Weekly, Issue 297; *New Law: If State Bar of Arizona Loses Disciplinary Case, It Must Pay Attorney Fees, Other Costs*, Bar Leader Weekly, Issue 298.

⁶ See, e.g., Fla. Const. art. V, § 15; *Preston v. Stoops*, 373 Ark. 591, 594, 285 S.W.3d 606, 609 (2008) *People v. Coria*, 937 P.2d 386, 390 (Colo. 1997); *Daily Gazette Co. v. Comm. on Legal Ethics of the W. Virginia State Bar*, 326 S.E.2d 705, 708 (1984).

Training. Lawyers are subject to rigorous training in the law, not so for those outside the profession.

Ethics and Accountability. Lawyers are subject to the highest ethical standards and are accountable when they do not meet them. These requirements are not true of non-lawyers. Courts have repeatedly held that Rules of Professional Conduct not only control the conduct of bar members, but also express an important public policy protective of society. See, e.g., *Fields v. Ratfield*, No. A132766, 2012 WL 5359775 at *9 (Cal. App. 2012) (“The Rules of Professional Conduct are not only ethical standards to guide the conduct of members of the bar; but they also serve as an expression of public policy to protect the public.”) (internal quotation marks omitted); *Cruse v. O’Quinn*, 273 S.W.3d 766, 776 (Tex. App. 2008) (finding that disciplinary rules constitute an expression of Texas public policy on issue of fee-sharing agreements); *Evans & Luptak, PLC v. Lizza*, 251 Mich. App. 187, 650 N.W.2d 364, 370 (2002) (recognizing “fundamental principle that contracts that violate our ethical rules violate our public policy and therefore are unenforceable”); *Albert Brooks Friedman, Ltd. v. Malevitis*, 304 Ill.App.3d 797 [979], 710 N.E.2d 843, 846 (1999) (“Supreme court rules have the force of law and are indicative of public policy in the area of attorney conduct.”). Among other things, these rules oblige a lawyer to use supervisory authority over non-lawyers in the law firm to assure compliance with ethical constraints because bar authorities have no jurisdiction over non-lawyers.⁷ Where the non-lawyers are not subject to a lawyer’s management authority but share in the fee, there is no way to assure that the twin pillars of confidentiality and conflicts of interest are observed by the non-lawyer. Any state rules of professional conduct will not have the salutary effect of protecting the public to the extent they are inapplicable to a participant in the provision of legal services not required to follow them.

Impact on the Justice System. Adherence to the profession’s core values such as undivided loyalty to the client, competence, and confidentiality have been key to the success of our justice system – the envy of the world. Non-lawyers do not have this focus.

Conflicts of Interest. When non-lawyer owners are involved in the practice of law (as is now permitted in the U.K. and Australia), there are competing duties to the client on the one hand, and to the shareholder, on the other. Even attempting to prioritize these duties (placing the client first), there is an unavoidable tension which is contrary to the client interest. The practice of law is a profession and not a business—it is an entirely different set of values.

Independence and Control. As officers of the court, lawyers must be independent and free from the influence of those who would compromise our ethics and the client interest. Non-lawyer involvement (including through fee-splitting) would negatively influence this independence and control.

⁷ Notably, the District of Columbia, which allows lawyers and nonlawyers to jointly own law firms that provide only legal services and nothing else and has been described as the most lenient in the country on that issue, nevertheless requires that the non-lawyers members of the firm abide by the DC Rules of Professional Conduct and imposes an obligation on the lawyer members of that firm to “be responsible for the nonlawyer participants.” DC R. Prof. Cond. 5.4(2) & (3).

IV. Conclusion

The Illinois State Bar Association, The New York State Bar Association, The New Jersey State Bar Association, The ABA Tort, Trial & Insurance Practice Section and The ABA Solo, Small Firm and General Practice Division respectfully urge the House of Delegates to reaffirm the referenced portions of its 2000 policy on the core principles and values of the legal profession as reflected in the Resolution filed herewith.

Respectfully submitted,

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Stephen J. Curley
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August 2022

GENERAL INFORMATION FORM

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New York State Bar Association
New Jersey State Bar Association
Tort Trial & Insurance Practice Section
Solo, Small Firm and General Practice Division

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1. Summary of Resolution.

The Resolution urges the American Bar Association House of Delegates to reaffirm portions of existing ABA policy adopted in July, 2000 (00A10F) that urged jurisdictions to implement and preserve certain core values of the profession developed to protect the public interest. Specifically, that policy recognized that: (1) sharing legal fees with non-lawyers and the ownership and control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession; and (2) prohibitions against lawyers 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.

2. Approval by Submitting Entity.

The Resolution was approved as follows:

By the Illinois State Bar Association (“ISBA”) Board of Governors at its May 20, 2022 meeting.

By the New York State Bar Association (“NYSBA”) by its Executive Committee on June 16, 2022.

By the New Jersey State Bar Association (“NJSBA”) by its Executive Committee on June 30, 2022.

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By the ABA Tort Trial & Insurance Practice Section Council (“TIPS”) at its June 17, 2022 meeting.

By the ABA Solo, Small Firm and General Practice Division (“GPSOLO”) by its Council on June 8, 2022.

3. Has this or a similar resolution been submitted to the House or Board previously?

Yes, A0010F and 12A10A which was postponed.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

00A10F which is sought to be reaffirmed by this resolution.

5. If this is a late Report, what urgency exists which requires action at this meeting of the House?

N/A

6. Status of Legislation. (If applicable)

N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The policy is self-implementing on the adoption of the resolution as it would reaffirm existing policy.

8. Cost to the Association. (Both direct and indirect costs)

N/A

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

The Report with Resolution was referred to:
Illinois State Bar Association
New York State Bar Association
New Jersey State Bar Association
Tort Trial & Insurance Practice Section
Solo, Small Firm and General Practice Division

11. Contact Name and Address Information. (Prior to the meeting. Please include name, telephone number and e-mail address)

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12. Name and Contact Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting.)

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EXECUTIVE SUMMARY**A. Summary of Resolution.**

The resolution urges the American Bar Association (“ABA”) to reaffirm existing ABA policy 00A10F adopted in July, 2000 that: (1) sharing legal fees with non-lawyers and the ownership and control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession; and (2) prohibitions against lawyers 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.

B. Summary of the issue that the Resolution Addresses.

Should the ABA reaffirm and re-adopt its policy adopted in 2000 that the sharing of legal fees with non-lawyers and ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession.

C. Please explain how the proposed policy position will address the issue.

The resolution will address the issue by reaffirming existing ABA policy providing that sharing legal fees with non-lawyers and/or allowing non-lawyer ownership and control of law firms is inconsistent with core principles of the legal profession.

D. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

The resolution will be opposed by the ABA Standing Committee on Professional Regulation, the ABA Center for Innovation, the ABA Standing Committee on Ethics and Professional Responsibility and the ABA Standing Committee on Lawyer Referral and Information Services. These groups have asserted that the reaffirmation is premature under the House’s 10-year rule, was not vetted by all relevant entities, that it is complex and divisive so that it should be the subject of more debate than can occur at the Annual Meeting, and that they have substantive concerns with statements made in the report.