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Inside The ABA's Debate On Legal Innovation

By **Sarah Martinson**

Law360 (September 28, 2022, 3:18 PM EDT) -- Before the American Bar Association's House of Delegates votes on resolutions at its annual meeting, delegate members usually have months to review the proposed resolutions.

Resolution 402, a proposal to reaffirm a 22-year-old policy against nonlawyer fee sharing and firm ownership, was submitted July 19, nearly three weeks before the annual meeting held in Chicago, but wasn't docketed until the week beforehand, according to John Thies, an Illinois delegate and representative for the Illinois State Bar Association who introduced the resolution at the meeting.

Reforms Around Law Firm, Atty Models See Uneven Progress

Attempts to change who can perform certain legal work and own law firms have been underway for decades, but while advocates point to successes in places like Utah, most of the U.S. has held on to more traditional ways of delivering legal services. Here, Law360 Pulse examines those reform efforts and where they have fallen short.

- In Utah, This Experimental Firm Helps Convicts Move Forward
- How Calif.'s Political Gauntlet Crushed Legal Industry Reforms

The resolution's late addition to the annual meeting's agenda surprised and concerned some delegate members.

They saw the move as an attempt to discourage states from experimenting with legal innovations, like regulatory sandboxes, that challenge nonlawyer fee sharing and firm ownership and aim to close the access to justice gap in the United States. While the resolution easily passed, their concerns at least led to an amendment making clear that states had room to innovate in those areas.

Some lawyers and legal scholars believe that opening the legal profession to nonlawyers will lower the cost of legal services for many Americans who can't afford to hire a private attorney.

Patricia Lee Refo, a current partner at Arizona-founded law firm Snell & Wilmer LLP and past ABA president, told Law360 Pulse that she was opposed to the unamended Resolution 402 because the ABA decided in 2000 that states should be encouraged to experiment with regulatory reform and collect data on their experiments.

"That's the path forward," Refo said. "Unamended, 402 suggested that was no longer the path forward."

For more than 20 years, debate over whether the ABA should abolish its policy, known officially as Model Rule 5.4, prohibiting attorneys from sharing fees and law firm ownership with nonlawyers, has faded in and out the spotlight, with several of the association's myriad commissions and committees finding themselves at the center of the action.

In May 2000, a now-defunct ABA panel, the Commission on Multidisciplinary Practice, issued slimmed down recommendations that attorneys should be allowed to share fees with nonlawyer professionals and join them in a multidisciplinary practice that delivers both legal and nonlegal professional services, such as consulting and accounting.

But two months later, delegates rejected the commission's recommendations, and instead, adopted Resolution 10F affirming its ban on multidisciplinary practices. The HOD also dissolved the commission and recommended that the ABA's Standing Committee on Ethics and Professional Responsibility review its model rules and recommend amendments to ensure the rules contain safeguards related to attorneys working with nonlawyers.

As a result, a commission formed by the ethics committee recommended in a 2002 report that no changes be made to Model Rule 5.4. Delegates largely adopted the report's findings.

"The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar," the report said.

Nearly 10 years later, another panel, the ABA Commission on Ethics 20/20, **proposed an amendment** to Model Rule 5.4 that would have allowed nonlawyers to have stakes in firms as long as the sole purpose of the firm remained the delivery of legal services and the nonlawyers' services are limited to assisting the attorneys in delivering those services. The proposal **didn't advance** in the ABA though.

In more recent years, the HOD has adopted resolutions that sanction experimenting with legal innovation without amending Model Rule 5.4.

In 2016, the body **adopted Resolution 105**, which offers guidance to states on creating a regulatory framework for nonlawyer legal service providers, and in 2020, it **approved an amended Resolution 115**, which encourages states to explore legal innovation that improves access to justice and collect data on innovations that are implemented.

Meanwhile, individual states and jurisdictions have been charting their own paths to define the future of the legal profession and close gaps in access to justice. They are not required to abide by the ABA's model rules and policies.

More than 30 years ago, Washington, D.C., became the first jurisdiction to allow nonlawyers to have an ownership stake in a firm with caveats, according to the D.C. Bar. These caveats include that nonlawyers provide services to the firm that assist the organization in providing legal services to clients and that they follow the same rules of professional conduct as licensed attorneys.

Since then, states have been slow to follow D.C. on legal regulatory reform. But in 2020, Utah made big strides forward by **launching a regulatory sandbox** to expand the practice of law in the state. The sandbox permits entities to practice law that traditionally would not be allowed under the state's legal rules. These include law firms owned by nonlawyers, companies employing attorneys to provide legal advice to consumers, and technology platforms offering legal advice.

Later that same month, Arizona **took a different approach** by formally changing its legal rules to authorize alternative business

structures, such as law firms owned by nonattorneys, to practice in the state. Utah allows these entities only if they participate in its regulatory sandbox.

In 2021, Minnesota launched a statewide two-year pilot program that permits approved legal paraprofessionals to represent and advise clients in select housing and family court matters under the supervision of an attorney licensed in the state.

Washington state had created a similar program in 2012 for limited-license legal technicians, but the state's Supreme Court **decided in 2020** to end the program, citing cost and low participation as reasons for terminating the effort.

And earlier this year, the Florida Supreme Court **amended its state bar rules** to permit nonlawyers to help govern nonprofit legal service providers, but it **passed on a proposal** for the state to create its own regulatory sandbox.

Other states that have considered or are considering similar regulatory reform to close the access to justice gap in the U.S. include California, Illinois, Oregon, Nevada, New Mexico, Indiana, Connecticut and New York, according to the ABA Center for Innovation's Legal Innovation Regulatory Survey.

Thies, a shareholder at Urbana-based Webber & Thies PC, told Law360 Pulse that the ABA needed to reaffirm its policy against nonlawyer fee sharing and firm ownership in light of several states rethinking their versions of Model Rule 5.4. He also noted that the HOD allows for any of its policies to be reaffirmed after 10 years.

"One of the big problems with what's been happening with this review of 5.4 is that it's taking energy away from the real work we need to be doing to improve access to justice," Thies said, noting that he doesn't think opening up the legal profession to nonlawyers will improve access to justice.

Delegates' reactions to Resolution 402 were mixed with more than a dozen members coming out on either side of the issue.

After the HOD placed Resolution 402 on the agenda for its annual meeting in Chicago, more than 20 members, including representatives from New York, Illinois and New Jersey state bar associations, signed up to speak in favor of the resolution, while 14 members, including three past ABA presidents, volunteered to speak in opposition to the proposal.

More than 20 members also put their names down to speak in favor of a motion to table the resolution indefinitely, while 19 members signed up to voice their opposition to tabling the resolution indefinitely.

The HOD already had **more than 30 resolutions** to vote on over a two-day period at their annual meeting, and if debate had been allowed to take place over Resolution 402, it would have likely lasted hours.

Instead, Refo and other ABA members worked behind-the-scenes to craft an amendment to Resolution 402 to let states know that the association wasn't discouraging them from experimenting with regulatory reform.

Lucian Pera, a partner at Adams and Reese LLP and delegate member for Tennessee, said in an interview with Law360 Pulse that amending Resolution 402 was the best solution at the time because, without the amendment, the HOD would have ended up debating Model Rule 5.4, even though none of its members have submitted a proposal to eliminate it.

"Those proposals, though, never come before the House of Delegates without usually years of study," Pera said.

After Resolution 402 was brought to the floor at the HOD's annual meeting, the vast majority of members orally voted to adopt its

amendment, bypassing debate on Model Rule 5.4. They also **orally voted to adopt** the amended resolution.

Both proponents and opponents of the original Resolution 402 told Law360 Pulse that they are pleased with the amended resolution.

Thies said that he was happy with the amendment and that it shows that the ABA isn't discouraging innovation.

"The addition underscores the point that when groups look at innovation, they should go nowhere near changing 5.4," he said.

Refo said the amendment makes clear that states should keep innovating and the ABA's model rules will follow if necessary.

The ABA's model rules are "supposed to be conservative in the sense of watching what states are doing, learning from what states are doing, and then making judgements about whether the model rules for other states should be changed as well," she said.

However, reactions from members in the legal innovation community to the adopted amended resolution range from confused to frustrated and disappointed.

David Engstrom, a Stanford Law School professor and a member of the California Bar's Closing the Justice Gap Working Group, told Law360 Pulse in a recent interview that the amended Resolution 402 is a cop-out because the ABA is saying that it supports innovation and data collection while staying committed to Model Rule 5.4, and that is a principal barrier to innovation and access to justice.

"You can't both say you're committed to innovation, but also committed to the thing that is one of the primary contributors to the lack of innovation," Engstrom said.

Despite the ABA's influence, states that want to implement regulatory reform will ignore the ABA's resolution, according to Engstrom.

Yousef Kassim, CEO of online legal service provider Easy Expunctions and co-founding member of the Justice Tech Association, said in an interview with Law360 Pulse that who the owner of a law firm is shouldn't matter, as long as policies are in place to protect consumers.

"Whether it's owned by a lawyer [or] whether it's owned by a nonlawyer, we can still judge the actions of that entity and decide whether it's subscribing to the values that we as attorneys want for our profession," Kassim said.

--Editing by Pamela Wilkinson and John Campbell.