

## Q&amp;A

## LAWYER LIABILITY AND ETHICS



## Feds Order a Hit on the ABA



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The beginning of Donald Trump's second term is playing out like the climatic scene in the Godfather where Michael Corleone organizes the murder of heads of the Five Families and poor Moe Greene. On Febru-

ary 11, 2025, the American Bar Association (ABA) issued a statement decrying remarks by certain Trump administration officials questioning the legitimacy of judicial rulings enjoining the administration's efforts to curb wasteful government spending and extract revenge on its political enemies. There is some disagreement on which description applies, but both are probably accurate.

The ABA's February 11th statement is reminiscent of when Moe Greene refused to sell his interest in his casino to the Corleone Family because, as he told Michael Corleone, the Corleone Family was washed up and Moe was backed by the Barzini Family. This did not work out well for Moe Greene. It has not gone well for the ABA either.

On February 14, 2025, Federal Trade Commission Chairman Andrew Ferguson announced a new policy prohibiting FTC political appointees from holding leadership roles in the, participating in ABA events, or renewing their ABA memberships. Additionally, the FTC will no longer use its resources to support any employee's ABA membership or participation in ABA activities.

Mr. Ferguson expressed concern over what he called the "cozy relationship" between federal antitrust enforcers and the private antitrust bar, which he accused the ABA of facilitating. However, also included in Mr. Ferguson's list of grievances, which included the ABA's "long his-

tory of leftist advocacy," was what he called "[t]he imposition of unlawful DEI [diversity, equity and inclusion] requirements on American law schools as a condition of accreditation."

The FTC's ostensible reason for this shift was its concern that the desire of FTC regulators for future employment at law firms that defend antitrust lawsuits negatively affects the FTC's enforcement responsibilities. And there is no reason to believe that the FTC is immune from the regulatory capture (read: corruption) that plagues many, if not all, federal government agencies, so this concern is valid. But Mr. Ferguson's passing reference to the ABA's commitment to DEI was a preview of coming attractions.

On the same day that the FTC changed its policy, Craig Trainor, the Acting Assistant Secretary for Civil Rights for the Department of Education, wrote a "Dear Colleague" letter clarifying the Department's interpretation of the United States Supreme Court's Students for Fair Admissions v. Harvard case as prohibiting the treatment of students differently based on race to achieve diversity, racial balancing or social justice. The significance of this change in position is ABA Standard 206, which provides: "Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity."

The problem here is obvious. If a law school does not comply with the ABA's DEI standards, the law school can lose ABA accreditation, and the law school can lose feder-

al funding. If a law school does not comply with federal law, which the executive branch interprets as prohibiting ABA-type DEI standards, the law school can lose federal funding.

For all the criticisms levelled at the ABA, illiteracy is not one of them. On February 21, 2025, the ABA temporarily suspended enforcement of its DEI standards for law schools through August of this year pending a review of that policy. Coming one week after the Ferguson and Trainor letters, the ABA correctly interpreted those letters as unveiled threats.

On February 28, 2025, Attorney General Pamela Bondi accused the ABA of "subject[ing] law faculties and law students to unlawful race and sex discrimination under the guise of 'diversity' mandates" and demanding immediate repeal of that policy. Ms. Bondi further noted that "[t]he [ABA's] status as the sole accrediting body of American law schools is a privilege, and mandatory diversity objectives are an abuse of that privilege, which is subject to revocation." Notably for state bars, Ms. Bondi explained that "it is unclear how state bars can lawfully continue to require prospective lawyers to attend ABA-accredited law schools if the Council continues to abuse its privilege in this way."

While all this occurred, the State Department froze millions of dollars in USAID funding for the ABA. When it rains it pours.

At least the ABA has company. On March 6, 2025, President Trump issued an executive order stripping the lawyers for Perkins Coie of their security clearances. Media reports focused on President Trump's fury at Perkins

Coie's alleged misdeeds relating to the infamous Steele Dossier. However, less noticed was that the executive order also cites as a justification the Trump Administration's commitment to "ending discrimination under diversity, equity and inclusion policies" and targeting "[t]hose who engage in blatant race-based and sex-based discrimination, including quotas..." This issue is not going away.

The writing is on the wall. The odds are slim that at the end of this year the ABA will have the authority to accredit American law schools. If that happens, there is no obvious successor or alternative to the ABA for uniform accrediting standards. State bars that require graduation from ABA-accredited law schools (which is most of them including Arizona), will have to move quickly to establish alternative criteria for bar eligibility. Because federal funding for law schools is tied to ABA accreditation, Congress would have to act to address that issue. Depending on what various states decide to do, there may be problems with lawyers from State A getting admitted to practice in State B.

The state jurisdictions would do well to prepare for this contingency. Regardless, law schools and the legal profession will soldier on, even if the ABA ends up getting euthanized by the Trump administration. After all, Las Vegas casinos did just fine despite Moe Greene's untimely death. ■

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