

SPOTLIGHT ON

1700 WEST WASHINGTON



MarsonMEDIA)))

Election Season is Upon Us



Barrett Marson

The great thing about Arizona's electoral calendar is the general election just kind of sneaks up on us.

The late August primary means there are just 10 weeks until the general election.

Yes, if you have become tired of hearing about Kyrsten Sinema's liberal past or Martha McSally's votes on Obamacare, you only have one more month before you can turn on your TV or open up Facebook without being bombarded with 30-second spots.

California has its primary in June, so general election races begin much earlier and give voters a chance to burn out on hearing about candidates sooner.

Of course, it's not just candidates that will be spending seemingly unlimited amounts of cash to sway your vote. This year, a couple of interesting citizen initiatives made the ballot.

First, a group backed by Realtors are asking voters to put the kibosh on any future attempt to add a sales tax on services, such as legal or real estate. While no serious proposal has been introduced to expand the sales tax base, backers are taking no chances. They collected hundreds of thousands of signatures in a short time to qualify Proposition 126 for the ballot.

Prop. 126 would take much of Arizona's taxing authority off limits without a vote of the people. Already, any attempt to increase taxes at the Legislature requires a two-thirds vote—a Herculean task given the conservative makeup of the House and Senate.

Backers hope voters will read the simple text and agree services shouldn't be taxed. Opponents want cities and the state government to have as much flexibility as possible

when trying to raise money for schools, roads, and other government priorities.

One of the most mundane ballot questions in Prop 306 will be whether to make the Citizens Clean Elections Commission subject to the rule-making authority of the Governor's Regulatory Review Council. If you fell asleep during that sentence, I forgive you. The referral from the Legislature came after a fight between the council and the Clean Elections commission over who exactly controls the rule-making authority in this arena. The Legislature is hoping to strip Clean Elections of some of its powers. Few voters are likely to invest the time to research this issue and, with virtually no campaign funds, look for this to fly under the radar. These types of referrals often end in stinging defeat.

The behemoth of all initiatives—Prop 127—is an eight-figure campaign with Arizona's leading electric companies facing off against billionaire Tom Steyer to determine how much of the state's energy will come from renewables. Steyer and his supporters say 50 percent of the state's electricity should come from wind, solar, and hydro.

Arizona Public Service, Tucson Electric Power, and other providers say that is unreasonable because one of the cleanest forms of energy—nuclear—isn't part of the calculation.

Expect both sides to trot out studies showing the economic benefits or calamities that will befall Arizona if the initiative passes.

During the next month, you will be inundated with TV, radio, and digital ads that will make you curse the fact that you live in a representative democracy. But no fear, all of that comes to an end November 6. For about 18 months anyway. ■

Q&A



LAWYER LIABILITY AND ETHICS

THIS IS A RECORDING – Can Lawyers Record Conversations?



Joseph Brophy

In July, we learned that President Trump's former attorney, Michael Cohen, surreptitiously recorded his former client on multiple occasions. Two thoughts immediately sprang to mind: (1) recording clients without

their knowledge seems problematic from an ethical perspective; and (2) the cast of characters in the Russia investigation are starting to resemble the various lifeforms you would find in the bar scene of a Star Wars movie. On the bright side, the investigation provides a bottomless pit of topics for those of us that write on legal ethics.

In 1974, the ABA Standing Committee on Ethics and Professional Responsibility concluded that a lawyer may not record a client without the client's permission. See ABA Formal Op. 337. The ABA (and some courts) believed that the undisclosed use of a recording device necessarily involved elements of deception and trickery that did not comport with the high standards of candor and fairness to which all attorneys are bound.

In 2001, the ABA withdrew Opinion 337. Its current position, set forth in Formal Opinion 01-422, is that “[a] lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules.” (Emphasis added). Opinion 01-422 further states that a lawyer may not make secret recordings in violation of the law “nor falsely represent that a conversation is not being recorded.” In reaching this new position, the ABA noted that Model Rule 4.4, dealing with “respect for rights of third persons,” proscribes “means that have no substantial purpose other than to embarrass, delay or burden a third person,” and “methods of obtaining evidence that violate the legal rights of such a person.” By implication, the ABA viewed Model Rule 4.4 as allowing conduct, such as recording conversations, that has a valid purpose and does not violate a person's legal rights.

Arizona's Rule 4.4(a) is identical to the ABA rule. And Arizona is a one-party consent state, so it is not illegal for a lawyer to surreptitiously record a conversation. In 1990, the State Bar of Arizona Ethics Committee considered whether an investigator retained by a public defender could surreptitiously tape an interview with a potential witness “to obtain impeachment material on the witness should the testimony of the witness be different at the trial than in the interview.” In reversing an earlier opinion prohibiting secret recordings, the ethics committee in Arizona Opinion 90-02 stated, “The practicalities of the present day criminal justice system seem to be inconsis-

tent with any continued prohibition against surreptitious recordation of a witness.” The Committee later opined that an attorney may advise a client to surreptitiously records a third party under certain circumstances. Ariz. Ethics Op. No. 00-04 (2000) (attorney may ethically advise a client that the client may tape record a telephone conversation in which one party to the conversation has not given consent to its recording, if the attorney concludes that such taping is not prohibited by federal or state law).

There is a limit to what a lawyer may record. For example, a lawyer may not record a conversation with opposing counsel without disclosing that the conversation is being recorded. Ariz. Ethics Op. No. 95-03 (1995) (an attorney may not surreptitiously tape record a telephone conversation with opposing counsel because such conduct involved an element of deceit and misrepresentation). The Committee reasoned that recording conversations between counsel was so highly unusual, that there is a general presumption among lawyers that conversations are not recorded, and therefore failing to disclose the recording is deceitful.

There are a number of legitimate reasons that a lawyer might chose to record a telephone call with a client or third party—to aid in memory/accurate record keeping or to protect the lawyer from false accusations—although often those reasons do not necessarily justify failing to disclose the recording. The case of recording a client without consent is especially fraught with potential peril. As the comments to ABA Formal Opinion No. 01-422 noted: “The Committee is divided as to whether a lawyer may record a client-lawyer conversation without the knowledge of the client, but agrees that it is inadvisable to do so.” ■

Joseph Brophy is a partner with Jennings Haug Cunningham in Phoenix. His practice focuses on professional responsibility, lawyer discipline and complex civil litigation. He can be reached at JAB@JHC.law.

Potential clients can be yours with the MCBA Lawyer Referral Service.

The LRS receives more than 10,000 calls per year from people seeking legal assistance as well as attorneys referring clients outside their practice area.



AMONG THE AREAS NEEDING COVERAGE ARE:

administrative law ■ SSI-SSD/Medicare law ■ workers' compensation ■ immigration

Spanish-speaking and West Valley attorneys are especially needed.

It's easy to join! Call Anjali Patel at apatel@maricopabar.org

STAY SOCIAL WITH THE MCBA

 LIKE US ON
FACEBOOK.COM/
MARICOPABAR

 FOLLOW
US ON
TWITTER @MARICOPABAR