

To: ABA Entities, Courts, Bar Associations (state, local, specialty, and international), Law Schools, Disciplinary Agencies, Individual Clients and Client Entities

From: The ABA Commission on the Future of Legal Services

Re: For Comment: Issues Paper Regarding Alternative Business Structures

Date: April 8, 2016

The ABA Commission on the Future of Legal Services has not decided at this time whether to propose any Resolutions concerning the issues described in this Paper.

I. Background

In August 2014, the American Bar Association created the [Commission on the Future of Legal Services](#)¹ to examine how legal services are delivered in the United States and recommending innovations to improve the delivery of, and the public's access to, those services. To advance this mandate, the Commission has studied a range of issues, which are described in detail on the Commission's [website](#). The Commission also has formed priority project teams that have been focused on concrete projects, such as the facilitation of court-annexed online dispute resolution systems and a proposed ABA Center for Innovation.

In addition to these efforts, the Commission's Regulatory Opportunities Working Group has been studying the extent to which regulatory innovations might enhance the public's access to affordable and competent legal services. The Group's work includes the ABA Model Regulatory Objectives for the Provision of Legal Services, which were adopted by the ABA House of Delegates in February 2016,² an [issues paper](#) on the growing number of court-authorized-and-regulated legal service providers, an issues paper on the extent to which currently unregulated legal service providers should be subject to regulation, and continuing discussion of additional regulatory developments and opportunities.

The Commission believes that any consideration of possible regulatory reforms should include an examination of Alternative Business Structures (ABS). The ABA

¹ The Commission consists of prominent lawyers from a wide range of practice settings as well as judges, academics, and other professionals who have important perspectives and expertise on the delivery and regulation of legal services in the United States. The Commission roster is available [here](#).

² See Model Regulatory Objectives adopted by the ABA House of Delegates in February 2016, available at http://www.americanbar.org/groups/centers_commissions/commission-on-the-future-of-legal-services.html.

Commission on Ethics 20/20 conducted the last ABA review of this issue,³ and decided not to propose any policy changes.⁴ Since that Commission completed its work in 2013, there have been many developments in this area. This document describes those developments and seeks broad feedback and additional factual information regarding ABS. Before deciding whether to proceed with a recommendation on this complex and sensitive topic, the Commission wants to ensure that it has as much information and data as possible.

II. What are Alternative Business Structures?

The Model Rules of Professional Conduct prohibit nonlawyer ownership of law firms, nonlawyer management of law firms, and sharing fees with nonlawyers (except under very limited circumstances).⁵ Almost every U.S. jurisdiction follows this restriction. In this Issues Paper, ABS refers to business models through which legal services are delivered in ways that are currently prohibited by Model Rule 5.4.⁶

A variety of ABS structures exist in other jurisdictions, and they have three principal features that differentiate them from traditional law firms:

- First, ABS structures allow nonlawyers to hold ownership interests in law firms. The percentage of the nonlawyer ownership interest may be restricted (as in Italy, which permits only 33% ownership by nonlawyers) or unlimited (as in Australia).
- Second, ABS structures permit investment by nonlawyers. Some jurisdictions permit passive investment, while other jurisdictions permit nonlawyer owners only to the extent that they are actively involved in the business.
- Third, in some jurisdictions, an ABS can operate as a multidisciplinary practice (MDP), which means that it can provide non-legal services in addition to legal services.

In short, a variety of ABS models exist:

³ Memorandum from the ABA Comm'n on Ethics 20/20, For Comment: Issues Paper Concerning Alternative Business Structures (Apr. 5, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.pdf.

⁴ Press Release, ABA Comm'n on Ethics 20/20, ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms (Apr. 16, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120416_news_release_re_nonlawyer_ownership_law_firms.pdf.

⁵ MODEL RULES OF PROF'L CONDUCT R. 5.4.

⁶ In addition to the prohibitions in the Model Rules of Professional Conduct, longstanding ABA policy opposes ABS. *See, e.g.*, MDP Recommendation 10F (2000), http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom10f.html.

- (1) Entities that deliver only legal services and in which individuals who are not licensed lawyers are permitted to actively participate in the entities' operations and have a minority ownership interest;
- (2) The same as (1), but where there is no limitation on the percentage of nonlawyer ownership;
- (3) Entities that provide both legal and non-legal services and in which individuals who are not licensed lawyers actively participate in the entities' operations and are permitted to have a minority ownership interest;
- (4) Same as (3), but where there is no limitation on the percentage of nonlawyer ownership; and
- (5) Any of the above options but with passive investment by nonlawyers.⁷

III. What Jurisdictions Permit ABS?

A. ABS in the United States

In the United States, two jurisdictions permit forms of ABS: the District of Columbia and Washington State. D.C. Rule 5.4(b) provides:

[a] lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if: (1) The partnership or organization has as its sole purpose providing legal services to clients; (2) All persons having such managerial authority or holding a financial interest undertake to abide by the [D.C. Bar] Rules of Professional Conduct; (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1; [and] (4) The foregoing conditions are set forth in writing.⁸

Thus, D.C. permits the second category of ABS described above.

Although D.C. permits nonlawyer ownership, very few ABS firms have organized there. The Commission is aware of at least two possible reasons for the small number of ABS in D.C. First, many lawyers who are licensed in D.C. are also licensed in other U.S. jurisdictions, and because only one other U.S. jurisdiction permits nonlawyer ownership,

⁷ These categories were created in part based on the groupings devised by the National Organization of Bar Counsel. See *Alternative Business Structures: Frequently Asked Questions*, NAT'L ORG. OF BAR COUNSEL 1, <http://www.nobc.org/docs/Global%20Resources/Alternate.Business.Structures.FAQ.Final.pdf>.

⁸ D.C. RULES OF PROF'L CONDUCT R. 5.4.

“an attorney who is dual-licensed in DC and another jurisdiction may be concerned that the formation of or participation in an ABS in DC will constitute a violation of the Rules of Professional Conduct in the other jurisdiction in which the attorney is also licensed.”⁹ Similarly, a D.C. firm that permits nonlawyer ownership could not expand outside of D.C. because of the prohibition on nonlawyer ownership in most other U.S. jurisdictions.¹⁰ Given the limited opportunity for growth, lawyers may decide that an ABS is not an attractive structure.

Washington State also permits a form of nonlawyer ownership.¹¹ The Washington Supreme Court recently created the Limited License Legal Technician (LLLT), “the first independent paraprofessional in the United States that is licensed to give legal advice.”¹² On March 23, 2015, the Washington Supreme Court issued a new rule permitting LLLTs to own a minority interest in law firms.¹³ As a result, Washington State falls into the first category of ABS described above, except that ownership by nonlawyers is limited to LLLTs.

B. ABS Outside the United States

Outside of the United States, more jurisdictions permit ABS.

⁹ *Alternative Business Structures: Frequently Asked Questions*, supra note 7, at 2; see also N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 1038 (2014) (concluding that a New York lawyer practicing primarily in New York may not join a D.C. firm that includes a nonlawyer partner).

¹⁰ *Alternative Business Structures: Frequently Asked Questions*, supra note 7, at 2.

¹¹ *Id.*

¹² Paula Littlewood, *The Practice of Law in Transition*, NW LAW., July-Aug. 2015, at 13, available at http://nwlawyer.wsba.org/nwlawyer/july-august_2015?pg=15#pg15.

¹³ Rule 5.9 of the new Washington Rules of Professional Conduct, titled “Business Structures Involving LLLT and Lawyer Ownership,” provides:

[A] lawyer may (1) share fees with an LLLT who is in the same firm as the lawyer; (2) form a partnership with an LLLT where the activities of the partnership consist of the practice of law; or (3) practice with or in the form of a professional corporation, association, or other business structure authorized to practice law for a profit in which an LLLT owns an interest or serves as a corporate director or officer or occupies a position of similar responsibility.

WASH. RULES OF PROF’L CONDUCT R 5.9(a). Rule 5.9(b) goes on to say that joint ownership is permitted only if:

(1) LLLTs do not direct or regulate any lawyer’s professional judgment in rendering legal services; (2) LLLTs have no direct supervisory authority over any lawyer; (3) LLLTs do not possess a majority ownership interest or exercise controlling managerial authority in the firm; and (4) lawyers with managerial authority in the firm expressly undertake responsibility for the conduct of LLLT partners or owners to the same extent they are responsible for the conduct of lawyers in the firm under Rule 5.1.

WASH. RULES OF PROF’L CONDUCT R 5.9(b). In addition, the New York State Bar Association Committee on Professional Ethics recently issued an opinion concluding that a New York lawyer may enter into a partnership with a Japanese *bennishi* – a professional licensed to practice intellectual property law in Japan who need not have a law school degree – provided that the partnership “would not compromise the New York lawyer’s ability to uphold the ethical requirements of this State” N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 1072 (2015).

- **All Australian Jurisdictions.** In 2001, New South Wales, the most populous state in Australia, became the first Australian jurisdiction to allow ABS when it authorized “incorporated legal practices.”¹⁴ New South Wales permits “legal practices, including multidisciplinary practices (MDPs) to incorporate, share receipts and provide legal services either alone or alongside other legal service providers who may, or may not be legal practitioners.”¹⁵

At the same time that New South Wales introduced ABS, it also launched a number of regulatory changes. First, “[t]he legislation required that on incorporation a legal practice must appoint at least one ‘legal practitioner director’ . . . to ensure that a legal practitioner maintains a direct interest in and accountability for the management of legal services of the practice.”¹⁶ Second, the legislation required that all incorporated law firms “establish and maintain a management framework, legislatively coined ‘appropriate management systems,’ to enable the provision of legal services in accordance with the professional and other obligations of lawyers.”¹⁷ The Office of the Legal Services Commissioner in New South Wales subsequently created ten criteria to measure whether law firms had in place “appropriate management systems.”¹⁸ All of the other Australian jurisdictions have since followed suit.¹⁹

- **England and Wales** now permit ABS as a result of the passage of the Legal Services Act of 2007 (LSA). The LSA permits lawyers to form an ABS that allows external ownership of legal businesses and multidisciplinary practices (providing legal and other services), but with two significant regulatory requirements. First, under the LSA, nonlawyers who want to be owners of law firms must pass a fitness-to-own test.²⁰ Second, the Solicitors Regulation Authority (SRA) and the Legal Services Board overhauled the regulation of law firms. Among other things, the new SRA Code of Conduct requires that firms “have effective systems and

¹⁴ *Alternative Business Structures: Frequently Asked Questions*, *supra* note 7 at 2.; see *Legal Profession Amendment (Incorporated Legal Practices) Act 2000* (NSW); see also *Legal Profession Amendment (Incorporated Legal Practices) Regulation 2001* (NSW). New South Wales has permitted MDPs since 1994.

¹⁵ Andrew Grech & Tahlia Gordon, *Should Non-Lawyer Ownership of Law Firms Be Endorsed and Encouraged?*, GEO. L. CENTER FOR THE STUDY OF THE LEGAL PROF. 2 (May 2015), <http://www.law.georgetown.edu/academics/centers-institutes/legal-profession/upload/Grech-Gordon-Non-Lawyer-Ownership-Paper-Final.pdf>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 3.

¹⁹ *Legal Profession Act 2006* (ACT) pt 2.6; *Legal Profession Act 2004* (NSW) pt 2.6; *Legal Practitioners Act 2006* (NT) pt 2.6; *Legal Profession Act 2004* (Vic) pt 2.7; *Legal Practice Act 2003* (WA) pt 6; *Legal Profession Act 2007* (Qld) pt 2.7; *Legal Profession Act 2007* (Tas) pt 2.5; *Legal Practitioners Act 1981* (SA), sch 1.

²⁰ Grech & Gordon, *supra* note 15, at 4.

controls in place to achieve and comply with all the [p]rinciples, rules and outcomes and other requirements of the [SRA] Handbook”²¹ and to “identify, monitor and manage risks to compliance.”²²

- **Other European countries.** While England and Wales permit law firms to be owned entirely by nonlawyers, other European countries permit ABS on a more limited scale. For example, **Scotland** (up to 49% nonlawyer ownership), **Italy** (33%), **Spain** (25%), and **Denmark** (10%) all require lawyers to have majority control of the ABS.²³ **Germany**, the **Netherlands**, **Poland**, **Spain**, and **Belgium** permit various forms of MDPs.²⁴
- **Some Canadian provinces** also have permitted nonlawyer ownership and/or MDP for some time.²⁵ In **Quebec**, nonlawyers may own up to 50% of law practices, and law firms may engage in multidisciplinary practice.²⁶ **British Columbia** permits MDPs.²⁷ An **Ontario** working group examining nonlawyer ownership has decided against recommending majority ownership by nonlawyers, but is continuing to consider minority ownership by nonlawyers.²⁸
- **Singapore** now also permits nonlawyer ownership. The *Legal Profession (Amendment) Bill 2014*,²⁹ will permit lawyers to own businesses called Legal Disciplinary Practices (LDPs) in which nonlawyers may own up to

²¹ *SRA Code of Conduct 2011* in SOLICITORS REGULATION AUTHORITY HANDBOOK cl. 7.2 (Nov. 1, 2015), available at

<http://www.sra.org.uk/solicitors/handbook/code/content.page>.

²² *Id.* at cl. 7.3; see also *SRA Authorisation Rules 2011* in SOLICITORS REGULATION AUTHORITY HANDBOOK (Nov. 1, 2015), available at

<http://www.sra.org.uk/solicitors/handbook/authorisationrules/content.page>.

²³ S.J.F.J CLASSENS ET AL., EVALUATION OF THE LEGAL FRAMEWORK FOR THE FREE MOVEMENT OF LAWYERS, FINAL REPORT 205-06 (2012), available at

http://ec.europa.eu/internal_market/qualifications/docs/studies/2013-lawyers/report_en.pdf.

²⁴ *Id.* at 205-06.

²⁵ CANADA BAR ASS’N, FUTURES: TRANSFORMING THE DELIVERY OF LEGAL SERVICES IN CANADA (2014), available at

http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Futures-Final-eng.pdf.

²⁶ THE LAW SOCIETY OF UPPER CANADA, ALTERNATIVE BUSINESS STRUCTURES AND THE LEGAL PROFESSION IN ONTARIO: A DISCUSSION PAPER (2014), 27, available at

<https://www.lsuc.on.ca/uploadedFiles/abs-discussion-paper.pdf> .

²⁷ CANADA BAR ASS’N, *supra* note 25, at 41.

²⁸ THE L. SOC’Y OF UPPER CANADA ALTERNATIVE BUS. STRUCTURES WORKING GRP, ALTERNATIVE BUSINESS STRUCTURES WORKING GROUP REPORT 17 (2015), available at

<https://www.lsuc.on.ca/uploadedFiles/ABS-full-report.pdf> .

²⁹ *Legal Profession (Amendment) Bill 2014*, available at

[http://www.parliament.gov.sg/sites/default/files/Legal%20Profession%20\(Amendment\)%20Bill%2036-2014.pdf](http://www.parliament.gov.sg/sites/default/files/Legal%20Profession%20(Amendment)%20Bill%2036-2014.pdf).

25% of the entity.³⁰ The bill does not permit MDPs, however; Singapore's LDPs may only provide legal services.³¹

- **New Zealand** also permits limited nonlawyer ownership: the nonlawyer owners must be relatives of the actively involved lawyers (or a qualifying trust) and are only permitted to own non-voting shares.³²

IV. Analyzing the Potential Benefits and Risks of ABS

A. Potential Benefits of ABS

Proponents of ABS argue that it offers a number of potential benefits.

1. Increased Access to Justice

Proponents of ABS believe that it will increase access to justice. As one commentator has explained:

First, [limits on nonlawyer funding] constrain the supply of capital for law firms, thereby increasing the cost which the firms must pay for it. To the extent that this cost of doing business is passed along to consumers, it will increase the price of legal services. Second, bigger firms might be better for access to justice, due to risk-spreading opportunities and economies of scale and scope. Individual clients . . . must currently rely on small partnerships and solo practitioners, and allowing non-lawyer capital and management into the market might facilitate the emergence of large consumer law firms. Large firms would plausibly find it easier than small ones to expand access through flat rate billing, reputational branding, and investment in technology. Finally, insulating lawyers from non-lawyers precludes potentially innovative inter-professional collaborations, which might bring the benefits of legal services to more people even if firms stay small.³³

³⁰ Press Release, Singapore Ministry of L., New Legal Services Regulatory Authority to Oversee All Law Practices in Singapore (Nov. 18, 2015), available at <https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/new-legal-services-regulatory-authority-to-oversee-all-law-pract.html>.

³¹ *Id.*

³² New Zealand Law Society, <https://www.lawsociety.org.nz/for-lawyers/legal-practice/incorporated-law-firms/directors-and-shareholding>.

³³ NOEL SEMPLE, LEGAL SERVICES REGULATION AT THE CROSSROADS: JUSTITIA'S LEGIONS 158 (2015); see Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law* 38 INT'L REV. L. & ECON. 43 (2014); see also Tahlia Gordon & Steve Mark *Access to Justice: Can You Invest In It?*, CREATIVE CONSEQUENCES P/L L., BUS. & REG. ADVISORY 38 (Apr. 2015), <http://legal.opaxweb.biz/wp-content/uploads/2015/05/Access-to-Justice-ABS-GordonMark-Final.pdf> (“[A]dditional funds as a result of external ownership can better enable law firms to acquire existing offices and open new offices in areas where the demand for legal services are being unmet; expand practice areas

In short, it is said that ABS may improve consumer choice and value because additional sources of capital may encourage legal service providers to “take greater risks in improving their services.”³⁴ That innovation in turn, may allow lawyers to deliver better services at lower prices.

2. Enhanced Financial Flexibility

Proponents also argue that ABS may offer law firms significant and needed financial flexibility. The Queensland (Australia) Law Society suggests that those benefits include asset protection, greater flexibility for raising and retaining capital, greater flexibility for remunerating employees, possible tax advantages, and opportunities to introduce more effective management and decision-making arrangements.³⁵ The traditional law firm relies on law partners and banks for funding, but a proponent of nonlawyer ownership has suggested that this limitation is a disadvantage:

This is a rather primitive, pre-industrial model of financing the firm The owners bear significant risk, which effectively increases their cost of capital and restricts available funding. Part of the risk is from a mismatch of revenues and expenses. Even a fundamentally viable firm may face a liquidity crunch when its bank loans come due and its only assets are accounts receivable and pending cases.³⁶

The traditional financial model “potentially prevents law firms from expanding their scale and scope to engage in risky but potentially lucrative businesses.”³⁷ Permitting nonlawyer investment might also help young lawyers who would be able to afford, for example, to partner with skilled information technology professionals to develop innovative ways to deliver legal services.

3. Enhanced Operational Flexibility

to offer clients assistance in a wider range of legal areas; introduce alternative billing arrangements such as fixed fees for all retainers (not just for personal injury matters); develop online services thereby facilitating greater access for clients; and, provide pro bono and other non-legal services clients often require.”)

³⁴ CANADA BAR ASS’N, FUTURES: TRANSFORMING THE DELIVERY OF LEGAL SERVICES IN CANADA 33 (2014), available at

http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Futures-Final-eng.pdf.

³⁵ *Practice Structures Fact Sheet*, QUEENSLAND L. SOC’Y (June 23, 2011),

http://www.qls.com.au/files/ee967b45-6263-4b63-bf5d-a08500f2efad/qls_factsheet_-_practice_structures.pdf.

³⁶ LARRY E. RIBSTEIN, REGULATING THE EVOLVING LAW FIRM 9 (2008), available at www.americanbar.org/content/dam/aba/migrated/cpr/regulation/lawfirm.pdf.

³⁷ *Id.*; see also Hadfield, *supra* note 33, at 53 (“Expanded scale is necessary to accommodate branding, to support investment in the research and development of products and processes, and to increase significantly the scope for specialization in the component elements of legal service delivery and across different market segments. Innovation and specialization need to extend the many non-legal dimensions involved in ultimately producing the benefits of legal assistance for an individual facing a legal situation.”).

ABS is promoted as offering firms flexibility in how they structure and run their businesses. ABS may permit firms to strengthen their management teams through the increased use of nonlawyers.³⁸ Although some firms already employ nonlawyers in leadership roles, it might be easier for firms to attract and keep talented nonlawyers to help in firm management if firms can offer them a share of the firm's ownership.³⁹ Those nonlawyer professionals may offer firms distinct insight that can improve those firms' delivery of legal services to their clients.

4. Increased Cost-Effectiveness and Quality of Services

Proponents of ABS also argue that MDPs offer benefits to both law firms and consumers. The "major benefit of multidisciplinary services is the delivery of an integrated team approach to serving client interests – in other words, providing clients with a 'one-stop shopping' approach for problems requiring services in different fields."⁴⁰ This results in an "efficiency that translates into savings of time or money, and ensures the delivery of a higher quality product to the client with lower transaction costs."⁴¹

B. Potential Risks of ABS

Critics of ABS raise a number of concerns.

1. Threat to Lawyers' Core Values

The primary argument against ABS is that any form of nonlawyer ownership or management threatens lawyers' "core values," particularly, professional independent judgment and loyalty to clients.⁴² Specifically, opponents of ABS fear that lawyers will act in the financial interests of the firm's nonlawyer owners rather than in the best interests of their clients. Even if measures are put in place to ensure that nonlawyer owners will obey the rules of professional conduct, critics of ABS point out that this is

³⁸ SOLICITORS REGULATION AUTH., EXECUTIVE REPORT (2014), available at <http://www.sra.org.uk/sra/how-we-work/reports/research-abs-executive-report.page> ("Our research also shows that firms viewed the adoption of an ABS model as an opportunity to strengthen their management teams through the introduction of non-legal managers.").

³⁹ *Practice Note on Alternative Business Structures*, THE L. SOC'Y (July 22, 2013), <http://www.lawsociety.org.uk/support-services/advice/practice-notes/alternative-business-structures/> ("Non-solicitor employees may be rewarded by partner, member or director status, with a direct stake in the firm, thus enabling a practice to both: retain high-performing non-solicitor employees [and] attract outside legal talent.").

⁴⁰ John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 *FORDHAM L. REV.* 83, 117 (2000).

⁴¹ *Id.* at 118.

⁴² Memorandum from the Ontario Trial Law Ass'n to the L. Soc'y of Ontario Alternative Business Structures Working Group on Alternative Business Structures 2, 34 (Dec. 15, 2014), available at <https://www.lsuc.on.ca/uploadedFiles/Ontario%20Trial%20Lawyers%20Association.pdf> (expressing concern that nonlawyer ownership threatens "core values" of the profession).

insufficient: after all, lawyers must demonstrate their understanding of the rules by graduating from law school and passing the bar examination and the multistate professional responsibility examination.⁴³ Relatedly, nonlawyer ownership could pose a threat to the quality of legal services, particularly if lawyers feel beholden to investors rather than their clients.⁴⁴

2. Decreased Pro Bono Work

Another concern about ABS is that if nonlawyer ownership causes lawyers to focus on maximizing return on their investment, lawyers may perform less pro bono work. Thus, nonlawyer ownership may actually harm both clients and the public.⁴⁵

3. Threat to Attorney-Client Privilege

Opponents of ABS also argue that nonlawyer ownership may threaten the attorney-client privilege. If nonlawyer partners are privy to privileged conversations between attorneys and clients, courts might refuse to uphold the attorney-client privilege. For example, courts have generally declined to uphold the privilege when lawyers (particularly in-house lawyers) are involved in offering business – as opposed to legal – advice.⁴⁶

4. Failure to Deliver Identified Benefits

Critics also contend that nonlawyer ownership will not deliver the benefits that proponents of ABS identify. For example, critics say that nonlawyer ownership is not necessary to attract talented nonlawyers to work in law firms because firms can already offer generous compensation other than a share in the firm's profits. Similarly, critics say that ABS may not improve access to justice for poor and moderate income populations. A

⁴³ Washington has addressed this issue by requiring limited license practitioners, Limited Practice Officers and Limited License Legal Technicians to follow rules of professional conduct specific to each group. See Limited Practice Officer Rules of Professional Conduct, available at http://www.wsba.org/~media/Files/Licensing_Lawyer%20Conduct/LPO/Part%203%20-%20LPO%20Rules%20of%20Professional%20Conduct.ashx; http://www.wsba.org/~media/Files/Legal%20Community/Committees_Boards_Panels/Committee%20on%20Professional%20Ethics/25700-A-1096.ashx.

⁴⁴ Nick Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism*, 29 GEO. J. L. ETHICS (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487878 (manuscript at 14) (“At the same time, while some have claimed that non-lawyer ownership will lead to an increase in quality of legal services, it is not obvious this will be the result and pressure for investors for profits may actually undercut standards in the profession.”).

⁴⁵ *Id.* at 11 (arguing that nonlawyer ownership may “undermine the public-spirited ideals of the profession, making it less likely lawyers in these firms will engage in pro bono or take on riskier cases that may have a broader social benefit”).

⁴⁶ *Lindley v. Life Investors Ins. Co. of America*, 267 F.R.D. 382 (N.D. Okla. 2010) (“If the attorney is providing business advice to the client, even if resulting from a confidential request, no attorney-client privilege attaches to the communication.”).

study commissioned by the Ontario Trial Lawyers Association concluded that there is “no empirical data to support the argument that [nonlawyer ownership] has improved access to justice” in England or Australia.⁴⁷ Another critic of ABS argues that investment is likely to go to sectors that are easy to commoditize and where expected returns are high like personal injury, while “many other areas of legal work may be difficult to scale or commoditize, meaning non-lawyer ownership will be less likely to occur in these areas or bring unclear access benefits.”⁴⁸

V. Analyzing the Evidence Regarding ABS

To date, many of the arguments concerning ABS have been based on predictions about the future. Now, however, there are several empirical studies of ABS, primarily of ABS in Australia and England and Wales. Most of these studies were completed after the ABA Commission on Ethics 20/20 decided that it would not propose any policy changes regarding ABS. The major studies of ABS include:

- Recent studies from the Legal Services Board on the impact of the Legal Services Act and ABS:
 - SOLICITORS REGULATION AUTH., RESEARCH ON ALTERNATIVE BUSINESS STRUCTURES (ABSS) FINDINGS FROM SURVEYS WITH ABSS AND APPLICANTS THAT WITHDREW FROM THE LICENSING PROCESS (2014), available at <http://www.sra.org.uk/documents/SRA/research/abs-quantitative-research-may-2014.pdf>.
 - SOLICITORS REGULATION AUTH., QUALITATIVE RESEARCH INTO ALTERNATIVE BUSINESS STRUCTURES (ABSS) (2014) available at <http://www.sra.org.uk/documents/SRA/research/abs-qualitative-research-may-2014.pdf>.
- Andrew Grech & Tahlia Gordon, *Should Non-Lawyer Ownership of Law Firms Be Endorsed and Encouraged?*, GEO. L. CENTER FOR THE STUDY OF THE LEGAL PROF. 2 (May 2015), <http://www.law.georgetown.edu/academics/centers-institutes/legal-profession/upload/Grech-Gordon-Non-Lawyer-Ownership-Paper-Final.pdf>.
- Tahlia Gordon & Steve Mark, *Access to Justice: Can You Invest In It?*, CREATIVE CONSEQUENCES P/L L., BUS. & REG. ADVISORY 38 (Apr. 2015), <http://legal.opaxweb.biz/wp-content/uploads/2015/05/Access-to-Justice-ABS-GordonMark-Final.pdf>.

⁴⁷ Memorandum from Jasminka Kalajdzic to Linda Langston of Ontario Trial Law. Ass’n on ABS Research 1 (Dec. 1, 2014), available at http://www.canadianlawyermag.com/legalfeeds/index.php?option=com_k2&Itemid=101&id=47&lang=en&task=download&view=item.

⁴⁸ Robinson, *supra* note 44, at 14.

- Nick Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism*, 29 GEO. J. L. ETHICS (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487878.
- Discussion Paper by the L. Soc'y of Upper Canada Alternative Business Structures Working Group, *Alternative Business Structures and the Legal Profession in Ontario* (2014), available at <http://lsuc.on.ca/uploadedFiles/abs-discussion-paper.pdf>.
- L. SOC'Y OF UPPER CANADA PROF'L REG. COMM., *REPORT TO CONVOCATION* (2015), available at [http://www.lsuc.on.ca/uploadedFiles/For the Public/About the Law Society/Convocation Decisions/2015/convocation-september-2015-prc.pdf](http://www.lsuc.on.ca/uploadedFiles/For%20the%20Public/About%20the%20Law%20Society/Convocation%20Decisions/2015/convocation-september-2015-prc.pdf).
- CANADA BAR ASS'N, *FUTURES: TRANSFORMING THE DELIVERY OF LEGAL SERVICES IN CANADA* 33 (2014), available at http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Futures-Final-eng.pdf.

These studies are helpful in several respects:

- **There is no evidence that ABS has caused harm.** There is currently no evidence that the introduction of ABS has resulted in a deterioration of the legal profession's "core values." In its 2014 Consumer Impact Report, the UK Legal Consumer Panel concluded that "the dire predictions about a collapse in ethics and reduction in access to justice as a result of ABS have not materialised."⁴⁹ Despite the creation of hundreds of ABS firms in recent years, the UK report found that "[t]here have been no major disciplinary failings by ABS firms or unusual levels of complaints in the Legal Ombudsman's published data."⁵⁰ Moreover, "overall consumer confidence in the quality of work and professionalism of lawyers has held steady since 2011."⁵¹ Australia also has not experienced an increase in complaints against lawyers. Of course, these findings in England and Australia do not necessarily prove that ABS is not a threat to the legal profession's core values, but the evidence is nevertheless useful. In sum, the Commission found no studies indicating the erosion of core values or harm to clients in jurisdictions that permit ABS.

⁴⁹ LEGAL SERVICES CONSUMER PANEL, 2014 CONSUMER IMPACT REPORT 15 (2014), available at http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/Consumer%20Impact%20Report%203.pdf.

⁵⁰ *Id.*; see also Andrew Grech & Tahlia Gordon, *Should Non-Lawyer Ownership of Law Firms Be Endorsed and Encouraged?*, *supra* note 15 at 6 (concluding that jurisdictions that permit ABS have not experienced a rise in complaints against lawyers).

⁵¹ *Id.* at 4.

The U.S. experience with in-house counsel also supports this conclusion. Since the late 19th century, it has been common practice for corporations to employ lawyers in-house.⁵² Working in-house for a client in some circumstances may place pressure on a lawyer's ability to exercise independent professional judgment. After all, within some corporations, in-house lawyers are "business employees, report to corporate officers who are agents of the client but not the client itself, and are often thought to be more beholden to those officers than are the company's outside counsel..."⁵³ Although this relationship in some circumstances arguably poses the same threat as ABS to the lawyer's exercise of independent professional judgment⁵⁴ -- indeed, the ABA once espoused this view⁵⁵ -- the practice of lawyers working in-house is not only well accepted but in-house counsel time and time again have demonstrated their ability to exercise independent professional judgment.

Similarly, although critics of ABS express concern that nonlawyer ownership will place excessive financial pressure on lawyers to act for the benefit of nonlawyer owners rather than the client, it is undeniable that U.S. lawyers already face significant financial pressures. As one commentator described those tensions during the ABA's debate over MDP in 1999: "Any and all forms of professional practice are subject to pressures, constraints and temptations -- pressures from hierarchical superiors or peers, payment systems or fee arrangements, incentives to career advancement or financial reward inside firms or in the profession generally -- that may to a greater or lesser extent compromise the exercise of a lawyer's independent judgment."⁵⁶ The question is whether ABS

⁵² See James W. Jones & Bayless Manning, *Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159, 1171 (2000).

⁵³ Ted Schneyer, *'Professionalism' as Pathology: The ABA's Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities*, 40 FORD. URB. L. J. 75, 95 (2012).

⁵⁴ Jones & Manning, *supra* note 52 at 1196-97 (arguing that if the aim of Model Rule 5.4 is to maintain professional independence in any context where lawyers are supervised by, paid by, or report to nonlawyers, then the rule "must be dismissed as either grossly ineffective or cynically biased" because there are many arbitrary exceptions, including in-house counsel in corporations and government agencies, and staff attorneys whom liability insurers use to defend their insureds).

⁵⁵ ABA Formal Opinion 10 (1926) concluded that "a salaried trust officer of a bank may not ethically accept employment to represent the bank in proceedings involving the bank as trustee for minor heirs." The Opinion suggested that there is a "conflict between [the lawyer's] duty to his employer as an employee, and the professional duty which he may owe to the Court and to the profession."

⁵⁶ Letter from Robert W. Gordon, Fred A. Johnston Professor of Law at Yale Law School, to the Commission on Multidisciplinary Practice (May 21, 1999), *available at* http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/gordon.html. See also Jones and Manning, *supra* note 52 at 1198-99 (arguing that the "threats to the independence of professional judgment from 'within' the profession may be just as serious as any from 'without'" and discussing "innumerable examples" of such pressures, including the "use of the hourly billing system," "[t]he widespread practice of lawyers holding an interest in a client's business or serving on the client's board of directors," and "the pressure that a lawyer often feels to refer a client to another lawyer in her own firm, regardless of whether she judges the second lawyer to be the 'best' person to handle the client matter").

would pose a greater threat to the professional independence of lawyers than “those that currently exist in the everyday practices of lawyers in law firms, corporate law departments, government agencies, and nonprofit organizations.”⁵⁷

- **ABS has increased funding for innovation.** ABS has made additional money available to law firms.⁵⁸ In a 2014 SRA study, two thirds of respondents “stated they had provided or attracted new investment into the firm.”⁵⁹ Firms have used that money to make long term investment in technology and delivering legal services in new ways.⁶⁰ While it may be too early to say whether this investment has improved access to justice,⁶¹ the available evidence demonstrates that a diverse group of firms have organized as ABS. For example, in the UK, a 2014 SRA report concluded that the firms selected to operate as an ABS had a “range of different sizes and varied geographical focus, from local to international”⁶² These firms also practiced in a variety of areas. ABS are most prevalent in the personal injury arena, but ABS also exist in the fields of mental health, transactional work (e.g. mergers and acquisitions and probate), consumer law, and social welfare law.⁶³ Similarly, in Australia, firms of all sizes have chosen ABS.⁶⁴
- **Jurisdictions have stayed with ABS.** Finally, those jurisdictions that have adopted ABS have not abandoned it. New South Wales, Australia has now had ABS for 15 years. And seeing the positive experience in New South Wales, all of the other jurisdictions in Australia decided to permit ABS.⁶⁵ Although there have been some instances in which,

⁵⁷ Jones and Manning, *supra* note 52 at 1201.

⁵⁸ SOLICITORS REGULATION AUTH., RESEARCH ON ALTERNATIVE BUSINESS STRUCTURES (ABSs) FINDINGS FROM SURVEYS WITH ABSs AND APPLICANTS THAT WITHDREW FROM THE LICENSING PROCESS 3 (2014), available at <http://www.sra.org.uk/documents/SRA/research/abs-quantitative-research-may-2014.pdf> (“[T]he most significant changes that ABSs have made, as a result of their new business model, relate to how the business is financed and the attraction of new investment.”).

⁵⁹ *Id.* at 4.

⁶⁰ SOLICITORS REGULATION AUTH., EXECUTIVE REPORT (2014), available at <http://www.sra.org.uk/sra/how-we-work/reports/research-abs-executive-report.page> (“Access to investment is shown to be a key motivator for many ABSs. It appears that this investment is typically being used in three distinct ways: technology, marketing, [and] delivering legal services in new ways.”).

⁶¹ *Id.* (“It is still too early to understand how [ABSs] will affect the development of the wider legal services market and further research and monitoring is needed to explore the extent that ABSs will deliver benefits in terms of access to justice and the affordability of legal services.”).

⁶² *Id.*

⁶³ *Id.* at 3.

⁶⁴ Grech & Gordon, *supra* note 15 at 6 (May 2015).

⁶⁵ *Id.*

particular ABS have discontinued operations,⁶⁶ the authorizing jurisdictions have not retreated from affording ABS as an entity option.

VI. Conclusion

The Commission seeks the following input:

A. Comments on the potential benefits and risks associated with ABS, including whether there is any other available evidence on the impact of allowing ABS.

B. Evidence or other input on the relative advantages and disadvantages of the five forms of ABS:

- (1) Entities that deliver only legal services and in which individuals who are not licensed lawyers are permitted to actively participate in the entities' operations and have a minority ownership interest;
- (2) The same as (1), but where there is no limitation on the percentage of nonlawyer ownership;
- (3) Entities that provide both legal and non-legal services and in which individuals who are not licensed lawyers actively participate in the entities' operations and are permitted to have a minority ownership interest;
- (4) Same as (3), but where there is no limitation on the percentage of nonlawyer ownership; and
- (5) Any of the above options but with passive investment by nonlawyers.

The Co-Chairs of the Regulatory Opportunities Project Team, Paula Littlewood and Chief Justice Barbara Madsen, welcome your feedback. Should you have questions, please contact Paula Littlewood at paulal@wsba.org; the Commission's Chair, Judy Perry Martinez, jpmartinez6@gmail.com; and the Commission's Vice Chair, Andrew Perlman, aperlman@suffolk.edu. We are eager to receive and incorporate your input. Any responses to the questions posed in this paper, as well as any comments on related issues, should be directed by **Monday, May 2, 2016**:

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⁶⁶ Thomas Connelly, "Another ABS Fails: AA joins Co-op, Parabis, Slater & Gordon and Stobart Barristers on the list of legal innovator disappointments," <http://www.legalcheek.com/2016/01/another-abs-fails-aa-joins-co-op-parabis-slater-gordon-and-stobart-barristers-on-the-list-of-legal-innovator-disappointments/>.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

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Comments received may be posted to the Commission's website.