I have received a copy of your memo titled “For Comment: Issues Paper Regarding Alternative Business Structures”. These are my “comments”:

1. I think it would have been more honest to a casual reader that you make it clear that all of your proposals would apparently require that the ABA repeal its policy position last restated in an amendment adopted to the Resolution 105 regarding ABA Model Regulatory Objectives for the Provision of Legal Services which reads: “FURTHER RESOLVED, That nothing contained in this Resolution abrogates in any manner existing ABA policy prohibiting non lawyer ownership of law firms or the core value adopted by the House of Delegates.” As you know the “Core Values” reference the position that only lawyers can give legal advice. I would disapprove of change in that policy.

2. As for “available evidence on the impact of ABS”, I would refer you first to the article in the ABA Litigation News referring to a recent Florida Supreme Court Opinion rejecting the idea that Florida Lawyers should be able to accept referrals from non-lawyers. A copy of the article is attached. The historical information in the opinion itself should have to be satisfactorily responded to in detail if this project is to go forward.

3. Of interest, in the same Litigation News is (Spring 2016, Vol 41 No 3) is an article detailing the government plans for crack down on “Outside Litigation Funding”. The examples given should be considered the grave risks to lawyers in dealing in Litigation Funding with non-lawyers. There should be a response to each example of a client or a firm being harmed.

4. In the same Litigation News is an article outlining the grave risks lawyers face when they enter into contracts with their client. I assume the involvement of non-lawyers with law firms that you describe do involve “contracts.” What would be allowed, what would be not allowed, and what solution can a harmed client rely upon when the “contract” is between a client and a non-lawyer owned or controlled “law firm”?

5. Do you suggest that there be any notice given that the “law firm” relied upon by the client is not truly a “law firm”? What will you tell the client they are? Are they entitled to the facts?

6. You request our input on the five forms of ABS that you are considering amending ABA rules to allow. You totally ignore that the answers to the questions which could and should be posed that have a lot to do with other factors that may make risks greater or lesser for clients and even for the lawyers involved. They include: the size of the firms involved; the size of the clients businesses; the size of the businesses providing financial input to the firm; the possible conflicts between such financial providers and the many clients of the firm; how the firm can protect against the firms activities for a client being influenced or even directed by unknown involvement of that firms investors in conflicting matters; if the investor is in a foreign country or has substantial investment in a foreign country how can the firm protect itself and its clients; if the firm has many lawyers around the country, which Bar rules on ethics and conflicts will be applied to protect the client, and by whom; with the limitations if any on the training and experience of the non-lawyers involved and if such training or experience is falsely stated or poorly used in working in the firm, what is the right of the client (or the firm itself) to seek economic recovery, or take action to prevent the offender from later bad action with the firm or other potentially other clients or firms? If these issues are not even acknowledged to possibly
exist, how can any policy making lawyer make an honest statement about your “selected five forms of ABS”? Nevertheless, I will try commenting on the five listed “forms of ABS:.

(1) What is meant by “actively participate”? Does it include giving legal advice? What is considered a “minority interest”? My answer might vary depending on your answer to these and maybe other questions.

(2) Does this mean the firm could be 100% owned, operated, and controlled by non-lawyers and even large non-lawyer businesses. On this I would always vote “no”.

(3) What is meant by “entities”? What is “minority interest”? What “non-legal services” or even “legal services” are referred to, and does the client know and approve of the differences? I can’t vote without more information.

(4) If this includes 100% non-lawyer ownership giving legal advice, I would always vote “no”.

(5) If “passive investment” means someone loans money to a firm and has no contact with clients and no input on what clients’ interests are, I am sure there are banks and other investors that could be called upon to do this with no client risk. That would be OK unless the “security” claimed by the investor included contract terms that might directly affect a client in any way. A “qualified” yes on this one, but not if it is joined with a rejected one in (1) through (4) above.

I look forward to the completeness of your committee’s study of these issues and especially to your report about what I suspect will be many a question raised by the broad sweep of your inquiry. I frankly look forward to responses from the others who will be looking at the postings on your website. Please don’t accept a “we will work it out” as a reply from sponsors of this proposal … especially non-lawyer businesses looking to make money acting like lawyers.

Bill Wagner
Wagner McLaughlin
601 Bayshore Blvd., Suite 910
Tampa, Florida, 33602 USA
URL: www.wagnerlaw.com
Email: billwagner@wagnerlaw.com
Phone: 813-225-4000
FAX: 813-225-4010
“Severe” Lawyer Referral Rules Needed

By Catherine McLeod Chiccine, Litigation News Contributing Editor

In what it termed a “severe” but “necessary” action to protect the public, the Florida Supreme Court ruled that Florida attorneys may accept referrals only from agencies owned by Florida Bar members. The court rejected the Florida Bar’s proposed changes to the bar’s lawyer referral rule, finding that the proposals did not go far enough. The court ordered the bar to rework the rule so as to prohibit lawyers from accepting referrals from agencies not owned by Florida lawyers. Such a change would make Florida the first state to impose such a requirement on its attorneys.

Addressing a need for reform, the Florida Bar submitted amendments to Florida Bar Rule 4-7.22 regarding regulation of attorney referral services. The proposed amendments would not allow attorneys to accept referrals from services with misleading names, that do not tell potential clients the lawyer’s location, or that pressure lawyers to refer clients to other professionals.

The Florida Supreme Court rejected the proposed amendments, concluding that “much stricter regulations upon lawyer referral services are required.” It noted “the dangers that non-lawyer-owned, for-profit referral services pose to members of the public—who may be especially vulnerable after they suffer an injury, or when they face a legal matter that they never anticipated.”

The court instructed the bar to propose amendments to Rule 4-7.22 that would preclude Florida lawyers from accepting referrals from any service not owned or operated by a member of the bar. It also instructed the bar to review any other rules that address lawyer referral services to determine whether new rules are necessary to implement the court’s order.

The court emphasized that, while its directives might be viewed as severe, it is “absolutely necessary to protect the public from referral services that improperly utilize lawyers to direct clients to undesired, unnecessary, or even harmful treatment or services.” It also stated that its directives would prevent conflicts of interest, such as where a lawyer feels pressured to refer a client to another business controlled by the referral service so that the lawyer may continue to receive referrals from the service.

In rejecting the Florida Bar’s proposal, the court observed that the bar had ignored the recommendations contained in the July 2012 Report of the Special Committee on Lawyer Referral Services. Because of the growth in for-profit referral services and the corresponding public concern, the Florida Bar created the Special Committee in 2011 to review the practices and rules regarding lawyer referrals. The committee conducted an investigation and issued seven recommendations in its 2012 report. The Florida Supreme Court agreed with the committee’s recommendations that greater regulation of attorneys who participate in for-profit referral services was needed to best serve the public interest.

The court noted that trends in the personal injury sector were especially concerning. The committee found that some referral services used advertising to disguise direct solicitations. Other times, when filling out medical paperwork, patients unknowingly filled out undisclosed and unexplained law firm retainers. Most troubling to the court, some law firms affiliated with for-profit referral services steered clients toward other businesses owned by the referral service, sometimes to the detriment of the client.

Before submitting its proposed amendments to the rule, the Florida Bar also reviewed the Special Committee’s report. Rather than follow the committee’s recommendations, the bar’s proposal sought less restrictive rules. For example, the proposal allowed lawyers to accept referrals from for-profit referral services that also referred clients to other businesses for services arising from the same incident. The court determined that, in doing so, the bar “disregarded the potential harm to the public that non-lawyer-owned, for-profit referral services present.”

“Many states and the ABA limit lawyer referral services to non-profit entities or entities approved by an appropriate regulatory agency, such as the state bar,” explains Keith Swisher, Scottsdale, AZ, cochair of the Attorney Advertising Subcommittee of the ABA Section of Litigation’s Ethics & Professionalism Committee. While 25 other states limit lawyer referral services to non-profit entities, the Florida Supreme Court is the first to limit for-profit referral ownership to its state’s attorneys.

The court had good reason to change the rule, according to Section of Litigation leaders. “The public is at significant risk from for-profit referral services who also refer other services,” cautions Scott E. Reiser, Roseland, NJ, cochair of the Section’s Ethics & Professionalism Committee. “One worries that for-profit referral services do not take an individualized focus on each case. There was a potential for abuse and I think the supreme court recognized it,” he adds, noting that it appears the court is seeking a “workable solution.”

Some Florida attorneys, however, may feel the squeeze of not being able to use for-profit referral services. “The decision will obviously impact lawyers who have been affiliated with for-profit services that refer callers to both lawyers and medical facilities,” says Swisher. “It will also impact those services’ ability to recruit Florida lawyers,” he states.

But the inability to use for-profit referral services is not a business death knell for Florida attorneys. “There are still plenty of ways to market without hiring a non-lawyer-owned referral service,” Reiser explains. “For example, social media, television ads, print ads, networking with doctors who can validly refer you to plaintiffs. Florida even passed a regulation that allows lawyers to text potential clients,” he adds. Moreover, “lawyers are generally free to advertise in for-profit lawyer directories, and non-profit and lawyer-owned referral services will continue their operation,” Swisher concludes.

An expanded version of this story, including links to resources and authorities, is available at http://bit.ly/LN413-Chiccine.