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May 4, 2016

Via email: IPcomments@americanbar.org

Ms. Katy Englehart
American Bar Association
Office of the President
321 North Clark Street
Chicago, IL 60610

RE: Issues Paper Regarding Alternative Business Structures

Dear Ms. Englehart:

I am the President of DRI – *The Voice of the Defense Bar* and respond on behalf of our members to the request for comments on the 2016 Issues Paper Regarding Alternative Business Structures provided by the the ABA Commission on the Future of Legal Services. (“ABS Issues Paper”). DRI – *The Voice of the Defense Bar* is the largest professional organization exclusively representing civil defense attorneys in the country.

The issues surrounding this topic are of great significance to the American Civil Justice System and to every one of the 22,000 members of DRI. The ABS Issues Paper states that the ABA Commission has not decided at this time whether to propose any Resolutions concerning the issues identified in this paper. It further states that the Commission “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.”

DRI and its members have a substantial interest in, and resources to devote to, the questions posed in the Commission’s ABS Issues Paper and we would welcome the opportunity to provide meaningful input to the Commission’s process by the submission of a paper on the subject. However the timeline for responding, even with the extension to May 6, prevents DRI from responding in any detailed fashion. Such a brief comment period is inadequate given the complexity of the issues under consideration and the magnitude of their potential effect on the profession as a whole, on each of us as lawyers, and on every American served by our system of justice.

DRI has grave concerns about the impact that non-lawyer ownership of law firms would have on a) the independence of lawyers to provide legal advice to their clients unfettered by corporate incentives for profits, b) the preservation the attorney-

client privilege, and c) a number of other, equally important issues involving our duties as lawyers, both to our clients and to the courts we serve. Within the brief period allowed, we cannot produce a meaningful and comprehensive set of comments to this Commission on all of these profound issues. For now, I will address some of our initial concerns subject to further study and elaboration at a later date.

The ABS Issues Paper does not identify a clear and compelling need to allow non-lawyer ownership of law firms to benefit the American people or to enhance the American civil justice system. If the goal of the Commission is to improve access to justice for those who cannot afford it, there are multiple pathways to improve that access that do not involve non-lawyer ownership of law firms and the radical changes to our profession that will accompany non-lawyer ownership. While the ABS Issues Paper alludes to a potential for greater access to justice, there is no empirical evidence that greater access to justice has been achieved in jurisdictions that allow this form of ownership. The possible benefits suggested in this paper are primarily financial in nature and would appear to benefit the shareholders of newly-created lawyer/non-lawyer firms, as opposed to improving the justice system.

The proposed ABSs would essentially allow for the creation of “law corporations.” Corporations are financial devices set up for the benefit of those who invest in them. When an entity is structured in this way, management’s primary obligation is to return profits to the shareholders, in contrast to a lawyer’s obligations to his or her clients, and to the court. This difference in the fundamental loyalties of a corporation and a lawyer may likely trigger situations in which non-lawyers with an ownership interest in a law firm will exert pressure that potentially may influence a lawyer’s ethical and fiduciary obligations to a client for the sole purpose of maximizing the owners’ return on investment.

The ABS Issues Paper suggests in-house counsel have demonstrated the ability to exercise independent professional judgment in similar settings, stating “[T]he 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.” While it is true that in many instances in-house counsel are well equipped to exercise independent judgment, this statement fails to recognize that it is equally true that in many cases such as investigations and compliance matters, among others, independent outside counsel is necessary in order to ensure there is independent professional judgment that is not viewed as biased and unnecessarily influenced by close business relationships. This is especially true when the matters involve senior management and officers in the corporation.

Perhaps even more importantly, the exercise of independent professional judgment of in-house corporate counsel does nothing to change the inherent nature of the corporate structure and its driving motivation. And while it is true that some law

firms operate in a corporate structure today and many law partnerships create profits for the partners, the critical difference is that these business structures are run by lawyers for lawyers and for the benefit of the lawyers' clients, and not for the pure profit interest of non-lawyer investors.

Likewise, while the attorney-client privilege and attorney work product doctrine can apply to the work of in-house attorneys, a quick look at case law around the country reveals that courts have routinely applied stricter standards to in-house counsel in determining whether materials are protected. The work of in-house counsel is more likely to be viewed as "business" in nature. Courts are less likely to find a business purpose when the primary purpose is to seek strictly legal advice as opposed to advice on other aspects of the client's business. Involvement of non-lawyers in the discussion mix may further undermine the protections now accorded confidential communications of client secrets and legal advice.

Additionally, the potential for conflict of interest in these type of structures is very high. For instance, one proffered benefit of ABS is "Enhanced Financial Flexibility" and the ability for a firm to finance "risky but potentially lucrative business." A strong argument can be made that the current system acts as a safeguard against frivolous lawsuits, and providing this type of "flexible financing" will lead to more frivolous actions being filed. Rule 3.1 of the Model Rules of Professional Conduct states a "lawyer will not bring or defend a matter unless there is a basis in law or fact for doing so that is not frivolous." Imagine a matter that has the potential to be very lucrative, but at the same time is judged by the lawyer to be frivolous, is presented to an ABS firm. Are the non-lawyer owners of the firm going to allow the lawyer to turn that business away because of ethical considerations? The same is true under Model Rule 1.7 that governs conflicts of interest with current clients. The more "services" available at these "one stop shops," the more potential there is for conflicts among clients. In these situations, the desire to benefit the investors will inevitably come into conflict with the lawyer's duty to protect his or her clients from conflicts of interest.

The ABS Issues Paper characterizes the "cons" of ABS as threats to lawyers' core values. It identifies the primary "core values" as professional independent judgment and loyalty to clients. These are two fundamental values that must be protected. But our core values are even deeper than that. As lawyers we not only have a duty to our clients, but we are also officers of the court and we have a responsibility to advance the rule of law in everything we do.

What is most disturbing in this regard is the ABS Issues Paper's characterization of the basis of the lawyer's ethical responsibility. According to the authors,

Even if measures are put in place to ensure that non-lawyer owners will obey the rules of professional conduct, critics of ABS point out that this is 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.

As lawyers, our understanding of the need to obey the rules of ethical conduct does not merely arise because we went to law school, passed the bar and took an ethics exam. It comes from the oath we took to the highest court in our state to support the Constitution of the United States and the constitution of the state in which we practice, and to practice our profession to the best of our skill and ability. A violation of that oath and the canons of ethics can result in one's license being revoked and one's ability to practice law taken away. A non-lawyer is not subject to this type of regulation. While one can attempt to put measures in place to have non-lawyers be subject to the rules of professional conduct, they have no duty to the legal system and lose nothing if they choose to ignore the rules that were designed to protect our clients, the courts and the judicial system as a whole.

While Commission's report points to the use of ABS in other countries, the report ignores that the manner in which lawyers and law firms are regulated are far different than in the United States. England, for instance, follows a compliance-based approach to lawyer regulation with Compliance Officers for Legal Practice (COLPs) and Compliance Officers for Finance and Administration (COFA) playing a key role in the Solicitors Regulatory Authority's regulatory regimen.

The importance of a lawyer's professional independence and ability to self-regulate is best described in paragraphs 10 through 12 of the Preamble to the Model Rules of Professional Conduct:

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] 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. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Allowing non-lawyer ownership of law firms would put our ability to self-govern at risk. Once the legal profession is no longer viewed as independent, we will no longer be allowed the privilege of self-governing.

DRI plans to study this issue in more detail. We look forward to providing you with the results of that study in the near future. We trust the Commission will provide appropriate time for DRI and other organizations to comment meaningfully the profound issues raised by this important topic. In the meantime, DRI urges the ABA not to adopt any policy changes with respect to ABS structures.

Very truly yours,



Laura E. Proctor
President of DRI – *The Voice of the
Defense Bar*