

The impact that Alternative Business Structures (“ABS”) would have on the legal industry cannot be understated. For 108 years, the American Bar Association has promulgated ethical guidance to its members, and indeed to all American lawyers. The ABA published its original Canons of Professional Ethics in 1908, in response to a commencement address given to the 1905 graduating class of Harvard University by President Theodore Roosevelt, in which the President disparaged lawyers as “hired cunning” who were out for personal enrichment in service of corporations and wealthy individuals.<sup>1</sup> These Canons, intended to ensure “the conduct and the motives of the members of our profession are such as to merit the approval of all just men,”<sup>2</sup> formalized such basic and enduring values as undivided loyalty to the client,<sup>3</sup> client confidentiality,<sup>4</sup> and a prohibition against acquiring an interest in the cause of action.<sup>5</sup> ABS poses a grave threat to all three of these fundamental values.

**1) ABS threatens to erode ethical protections ensuring client loyalty and confidentiality.**

Permitting non-lawyers to take ownership stakes in law firms – even majority stakes – raises the specter of captive law firms whose loyalties cannot be determined or guaranteed. Statistics show that ABS is most likely to drive investment in areas of law that are easy to commoditize – in the UK and Australia a great deal of ABS investment has focused on personal injury firms.<sup>6</sup> Personal injury law is particularly, though not uniquely, vulnerable to the kind of conflicts of interest generated by ABS. Nick Robinson raises an excellent point in his paper

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<sup>1</sup> James M. Altman, *Considering the A.B.A.’s 1908 Canons of Ethics*, 71 Fordham L. Rev. 2395, 2399 (2003), available at: <http://ir.lawnet.fordham.edu/flr/vol71/iss6/3>.

<sup>2</sup> Vol. 33, REPORTS OF THE AMERICAN BAR ASSOCIATION (1908) (“1908 Canons of Ethics”).

<sup>3</sup> 1908 Canons of Ethics, Canon 6; ABA Model Rules of Professional Ethics, Rule 1.7.

<sup>4</sup> 1908 Canons of Ethics, Canon 6; ABA Model Rules of Professional Ethics, Rule 1.6.

<sup>5</sup> 1908 Canons of Ethics, Canon 10; ABA Model Rules of Professional Ethics, Rule 1.8(i).

<sup>6</sup> 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](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487878) (manuscript at 21, 30).

analyzing ABS: what happens when insurance companies purchase personal injury firms?<sup>7</sup>

Robinson questions whether this presents an inherent conflict, even if the firms don't bring claims against the insurance company that owns them, because of industry-wide pressures to reduce awards against insurance companies.

Furthermore, while the Commission highlights the fact that ABS may threaten the attorney-client privilege, it devotes a mere six lines to this threat. It is imperative that the ABA conduct more investigation into this vital issue, and ensure that it protects privilege if ABS is ultimately approved. Other jurisdictions are still struggling with this issue: in 2013, the Supreme Court of the United Kingdom declined to extend common law attorney-client privilege to communications between a client and an accountant, when the accountant was providing legal advice through a firm employing ABS.<sup>8</sup>

## **2) There is no proof that ABS increases access to justice.**

Finally, the ABA has identified no evidence for the proposition that ABS will actually increase access to justice for the general public, let alone underserved communities. The Commission relies heavily on a number of empirical studies to justify its apparent support for the widespread adoption of ABS in the United States, and specifically notes that “there is no evidence that ABS has caused harm.” Despite this emphasis on empirical data, the Issues Paper does not cite a single study showing that ABS, in practice, actually increases access to justice. In the face of empirical studies showing that “the access benefits of non-lawyer ownership so far seem questionable,”<sup>9</sup> the ABA should think twice before approving any form of ABS.

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<sup>7</sup> *Id.* at 24.

<sup>8</sup> *Prudential PLC and another v. Special Commissioner of Income Tax and another*, [2013] UKSC 1, available at <https://www.supremecourt.uk/cases/docs/uksc-2010-0215-judgment.pdf>.

<sup>9</sup> Robinson, *supra* note 6, at 53.