ILLINOIS STATE
BAR ASSOCIATION

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

Re: Issue Paper Regarding Alternative Business Structures
Request for Comments

Dear Ms. Englehart:

As President of the 34,000 member Illinois State Bar Association, I am pleased to provide comments to you on the ABA Future's Commission April 8, 2016 "Issues Paper Regarding Alternative Business Structures."

The ISBA appreciates the challenges and opportunities facing the legal profession. The impact of the Internet and rapidly evolving technology on the delivery and consumption of legal services, ensuring meaningful access to justice, and high law school graduate unemployment, are but a few on a potentially long list. The ISBA recognizes the hard work provided by the ABA's leadership, volunteers, and staff in bringing many of these issues to the forefront. In addition, the ISBA has formally supported these efforts where appropriate, including recommending to the Illinois Supreme Court many of the ABA's Ethics 20/20 Commission's revisions to the Model Rules of Professional Conduct (which were adopted by the Court and made effective January 1, 2016).

Notwithstanding common ground on many issues, the ISBA has consistently and vocally opposed efforts to weaken existing prohibitions on nonlawyer investment, ownership and management of law practices and the sharing of fees with nonlawyers. On these very significant matters, the ISBA's position has not changed and it continues to oppose efforts to allow nonlawyer investment, ownership or management of law practices and fee sharing with nonlawyers.

In 2000, during debates concerning multidisciplinary practice, the ISBA issued its own Report objecting to fee sharing with nonlawyers as well as any form of nonlawyer ownership or control of law practices. The ISBA also supported the "McCrate Resolution" in the ABA House of Delegates that reads in part "the law governing lawyers that prohibits lawyers from sharing legal fees with non-lawyers and from directly or indirectly transferring to non-lawyers ownership or control over entities practicing law should not be revised." This ABA policy statement remains in effect. In 2012, when the ABA's Ethics 20/20 Commission initially sought reforms to weaken the prohibitions on nonlawyer investment, ownership and management, the ISBA again expressed opposition, resulting in the filing of a formal Resolution in the House of Delegates to reaffirm the McCrate Resolution. That Resolution, ultimately postponed indefinitely, was supported by a number of state bars including Indiana, Iowa, Maryland, Mississippi, North Carolina, New Jersey, Oregon, Nevada,

and South Dakota, as well as the ABA Young Lawyers Division, Senior Lawyers Division, and the National Conference of Women's Bar Associations. At the end of 2012, the ISBA expressed opposition to contemplated changes to the Model Rules of Professional Conduct being considered by the ABA Ethics' 20/20 Commission regarding choice of law issues associated with fee divisions. The opposition was again predicated upon the McCrate Resolution and its rationale. Finally, and most recently, the ISBA opposed the ABA's adoption of a Resolution on Model Regulatory Objectives which could have been interpreted as ABA approval of alternative business structures including nonlawyer investment, ownership or management of law practices. Although this Resolution was approved by the ABA House of Delegates after lengthy and spirited debate, the Resolution was modified to reaffirm that the McCrate Resolution, and its prohibition on nonlawyer investment, ownership or management of law practices, remains the position of the ABA.

Focusing on the "Issues Paper," a primary ISBA concern remains the impact that nonlawyer investment, ownership or management will have on the "core values" of the legal profession. Nonlawyer investment, ownership, or management will bring additional, albeit potentially subtly, pressures to a law practice. The pressure will be to ensure an appropriate return on investment, or generate greater profit, that may not be consistent with a lawyer's best judgment of what may be the most appropriate service for the client. The impact of this pressure may be less individualized care, less professional loyalty to the client, a reluctance to take on unpopular causes on behalf of a client, a reluctance to perform pro bono work, or even the provision of substandard or incomplete service. Finally, nonlawyer investment, ownership, or management may, at some point in the future, bring increased non-Court regulation of the legal profession, further eroding the independence of the legal profession as a whole. As reflected in the Illinois Rules of Professional Conduct, the preservation of professional independence is significant: "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." Ill. S. Ct. Rules of Prof. Conduct, Preamble (2010).

In addition to these "core value" objections, there remains no demonstrated need for permitting nonlawyer investment, ownership or management of law practices. The Issues Paper cites essentially two general benefits from such nonlawyer involvement: an influx of capital to law practices, and an influx of nonlawyer personnel. An influx of capital from nonlawyer investment, it is argued, will increase access to justice, create more flexibility in remunerating nonlawyer employees, and contribute to more effective management and decision-making. The influx of nonlawyer personnel (presumably attracted by an ownership stake in the law practice) will purportedly lead to greater management innovation and efficiency as well as an "integrated approach" to legal services. These arguments, however, appear problematic in a number of respects.

With respect to the influx of capital to law practices, and as a preliminary point, the Issues Paper does not address the availability of other sources of capital currently available to law practices such as partner contributions, retention of earnings on fees, or commercial bank loans. With respect to access to justice issues, there appears to be little support that increased availability of capital to law practices results in improvements to access to justice. Access to justice is a serious issue, and its roots are found in many broader societal concerns, as well as the public's perceptions of the courts, the legal profession, and its own legal needs. *See* Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study*, American Bar Foundation (2014).

The influx of capital to a law practice will likely have little effect on these underlying concerns and perceptions. Certainly, none has been identified to date. As noted in the May 2014 Report from the (UK) Solicitors Regulation Authority on ABSs, cited in the Issues Paper, it remains too early to be able to assess the impacts of ABSs (alternative business structures) in any number of aspects, including its impact on access to justice. On a related point, one benefit referenced in the Issues Paper from the influx of capital is to "facilitate the emergence of large consumer law firms" does find some support in the UK study. That Report notes that the ABSs' "have achieved a significant share of the overall market in certain areas of legal work" such as personal injury, mental health, consumer, and social welfare. The reasonable question, not posed in the Issues Paper, is whether the concentration of legal providers in fewer and fewer practices is good for the bar or the public. The ISBA does not believe it is.

With respect to the remuneration of nonlawyer employees, while there are current well-reasoned restrictions on some forms of nonlawyer compensation within a law practice, there is no evidence that those restrictions have impacted the ability of law practices to attract qualified nonlawyer employees or to appropriately compensate them.

Finally, with respect to the argument that an influx of capital may lead to more effective management and decision-making, the question needs to be asked "to what end will this influx of capital generate more effective management or decision-making." Is it to maximize profit while minimizing expense? That is certainly a reasonable goal for investors, but it may not, nor should it be, the goal of a law practice. Will the influx of capital result in better quality of service? The May 2014 (UK) Solicitors Regulation Authority Report says it hasn't. Will the influx of capital result in better ethical compliance by the bar? Here too, the 2014 (UK) Consumer Impact Report, cited in the Issues Paper, says professionalism of the bar has remained steady since 2011. This is in sharp contrast to the consumer experience in Illinois which demonstrates that 2015 was the third year in a row that disciplinary charges decreased (even though the lawyer population is increasing), and that formal disciplinary complaints against Illinois lawyers have reached a 27 year low. *See* Illinois Attorney Registration & Disciplinary Commission Highlights, Annual Report (2015).

The second general argument is that nonlawyer investment or control of law practices will generate an influx of nonlawyer personnel into law practices which in turn will foster greater management innovation and efficiency. As noted above, there is no evidence that law practices are not capitalizing on innovation and efficiencies, or finding it difficult to hire employees at competitive compensation packages. The same is true with respect to concerns that law practices are inefficient because they cannot offer an "integrated" approach to their clients. There has been no demonstration that clients are being disadvantaged by an inability to hire a lawyer and an engineer from the same professional practice. In addition, for many clients, there are clear benefits to having independent professional voices working together to achieve a client's objectives.

The Issues Paper, in addition to a description of the pros and cons of nonlawyer involvement in law practices, cites a few Reports, primarily from the UK (those referenced above), that nonlawyer investment, ownership or management of law practices has not caused any of the harms feared by opponents. As an initial point, these Reports are very limited and likely not particularly useful as a guide to how nonlawyer investment, ownership or management may impact the US market. More significantly, the Reports do not demonstrate that the purported benefits of nonlawyer investment, ownership or management have been realized. This is particularly true with respect to any impact on

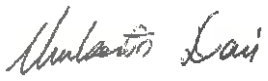
the access to justice. Also, a few recent high profile UK ABS failures should be examined carefully in order to better understand the still evolving impact of ABSs on legal services. *See*, http://www.lawgazette.co.uk/analysis/comment-and-opinion/abs-failures-show-law-is-no-easy-ride/5052368.fullarticle. With such a clear lack of demonstrated benefit, embracing nonlawyer investment, ownership or management remains inappropriate.

As noted at the beginning of these comments, no one disputes that the legal marketplace is changing, primarily driven by technological advances. However, no one should also dispute that the legal profession is participating in those market and technological changes. Lawyers are, voluntarily or otherwise, embracing innovation and technological change. Granted, the pace of that embrace may vary widely, but it is happening. In addition, lawyers and public and private institutions are engaged in addressing the larger concerns of access to justice. It remains to be seen, however, that nonlawyer ownership or control of legal practices is necessary, or even beneficial, to accelerate that engagement or provide solutions to those problems. The nonlawyer investment, ownership and management reforms adopted by our common law cousins were put into place many years ago. Given the quick pace of technological change, those reforms, in addition to the concerns raised above, may simply no longer be applicable or appropriate for the current American experience.

Given the ISBA's longstanding and serious concerns with respect to the effect of nonlawyer investment, ownership or control of law practices on the profession and the public, and the absence at this time of any demonstrated benefit attributable to such ownership or control, the ISBA remains opposed to eliminating the prohibitions on such ownership or control.

I appreciate the opportunity to provide these written comments.

Very truly yours,



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