April 29, 2016

American Bar Association
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Attention:

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Re:  Report on “Alternative Business Structures”

Ladies and Gentlemen:

I write to comment on the recent ABA paper concerning Alternative Business Structures (ABS), and in particular, the proposals to allow nonlawyer ownership of private law firms. I strongly oppose these propositions, for the reasons set forth below.

Allowing nonlawyer ownership of law firms would strike at the very heart of the concept of law practice as it has existed in the United States. The practice of law, whether in the context of a solo practice, small or large firm, in-house corporate or even government employment, has at least typically been carried on under the auspices of the supreme courts of the various states. Lawyers are subject to the ethical and disciplinary rules promulgated by the courts of their respective jurisdictions. Admissions to the bar are, again typically, controlled by the criteria set forth by the states' highest courts. The very Oath of Admission to practice, at least in those states with which I am familiar, require support of the federal and state constitutions, as well as respect for the court system and adherence to principles of fair, honest and ethical practice.
The practice of a lawyer in a small or large firm which is owned by nonlawyers or a nonlawyer entity would be controlled by individuals or companies not subject to any regulation by the high court of that particular jurisdiction. In such a situation, the prospects of conflict between the lawyer's duty to the court and our system of justice, and the interests or desires of the individuals or entity owning the firm are inherent and inevitable. For example, the Oath of Admission to the Florida Bar provides, inter alia, that the lawyer will "...never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone’s cause for lucre or malice." Further, the prospective lawyer must swear that "... I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval." I'm certain that the Oaths of at least many states contain similar provisions. If the business or other interests of the nonlawyer owner of the firm demand that, for example, a cause be delayed for reasons which are less than proper, or that the confidences of the client be disclosed to others, the lawyer faced with such a situation has the choice of defying the demands of the firm ownership, with unpleasant employment consequences, or being subject to discipline by the courts. On the other hand, the ownership of the firm, not being a lawyer, would be unaffected by any ethical requirements of the court system.

The ABS paper points to the employment of lawyers by corporations as in-house counsel as support for the proposition that nonlawyer ownership of law firms should be acceptable and can be very beneficial. This comparison is inapposite. When in-house counsel functions as lawyers, their client is clearly the company, and they are subject to the same legal and ethical requirements as outside counsel. The distinction between the roles of in-house and outside counsel is that the in-house counsel has only one client (the company), while outside counsel typically have several or many other clients besides that company. In a firm operating under an ABS type of arrangement, the lawyer would undoubtedly have a number of clients to which the legal and ethical duties are owed, while at the same time being responsible to the nonlawyer firm owner to comply with that owner's demands, whether or not those demands are consonant with the lawyer's ethical duties. This is entirely different from the role played by in-house counsel with a company.

The paper also points to the utilization of various types of ABS in foreign countries. I would respectfully suggest that such comparisons are of extremely limited utility, in the absence of comprehensive data concerning how the legal systems of those countries operate. As I understand it, in countries such as the UK and Australia, the distinction between barristers and solicitors is still maintained, even though those countries have a common law system. The influence of this dichotomy is not referenced in the paper. European countries employ a civil law system, dramatically different from the common law heritage of the United States. The point is that what works well and is beneficial in the context of one society may not be productive at all in the context of another. Further study, or at least further explanation, is needed before attempting to justify an ABS on the basis of its existence in other countries.
The bedrock justification of the proposals to allow nonlawyer ownership of law firms seems to be that such proposals would expand access to the legal system, especially by those disadvantaged and less able to retain a lawyer. This justification is unproven at best, and could be potentially dangerous and counterproductive at worst. Nonlawyer ownership of law firms has the potential, if not the certainty, of enhancing the commercialization of law practice even beyond the extent we see at present. Notwithstanding the ever-present television commercials for lawyers, the practice of law is still a learned profession, with ethical obligations as discussed above. If nonlawyer ownership of law firms is permitted, the "bottom line" may well become the dominant criterion for firms, even more so than at present. The result is likely to be less, not more, opportunities for access to legal help for those of moderate or miniscule means.

These proposals call for a radical reversal of the positions adopted by the ABA years ago, after significant discussion and consideration. In my judgment, they are ill-considered and should be rejected.

I appreciate the opportunity to comment on these issues.

Sincerely,

J. Richard Caldwell, Jr.