From: Matthew Walko [mailto:mjwalko@smithduggan.com]
Sent: Monday, April 25, 2016 6:32 PM
To: ABA Issues Paper Comments
Subject: Comment on ABA's Issues Paper Regarding Alternative Business Structures dated April 8, 2016

25 April 2016

Dear Sir/Madam:

Please accept the following comment regarding the American Bar Association’s Issues Paper Regarding Alternative Business Structures dated April 8, 2016 (“Report”):

The Report created by the American Bar Association’s Commission on the Future of Legal Services fails to examine report on, or characterize actual breaches of legal ethics by law firms owned by non-lawyers, or what the report calls Alternative Business Structures. In other words, when ABS firms breached legal ethics, what violations occurred and what were the sanctions? Are there any reported cases where the non-lawyer owners instigated the ethical violation? What role did they play and how were those non-lawyers punished?

Deterrence is one of the main reasons why only lawyers should be allowed to own law firms. An owner who engages in conduct that requires its law firm employees to violate legal ethics as a condition of continued employment will likely suffer permanent disbarment from the practice of law. A breach of legal ethics usually is no crime; nonetheless the severity of the punishment that a licensed attorney can suffer by operating a firm that condones a breach of legal ethics is so significant that most lawyer owners will not risk a potential violation in order to maximize profits.

A non-lawyer who owns a law firm, however, faces no career ending sanction for encouraging a breach of legal ethics that maximizes profits. What then are the sanctions that have been imposed upon ABS firms when a breach of legal ethics has been discovered? The Report does not say. Is there some special law that criminalizes such a breach of legal ethics by the non-lawyer attorneys of ABS firm such that the state (or its judiciary) can punish them by fine, imprisonment or loss of career opportunities? Must non-lawyer owners pass the character assessment that individuals who desire admittance to the bar must? The Report is vague on what punishments the state (or its judiciary) can impose on the non-lawyer owners or on whether these non-lawyers would be entitled to certain types of process before such punishments can be imposed (must there be a full jury trial or is an administrative proceeding supported by substantial evidence enough)?

For example, the Report should examine why lawyers turn over the “smoking gun” email in a civil case when to do so will mean that their client will lose its case and the law firm will lose the potential profits that it would have made from winning it? One can easily imagine a ABS firm hiring non-lawyers who owe their allegiance to their non-lawyer bosses whose job it will be to “collect” documents sought in discovery and turn them over to the lawyer employees. If the boss requires these non-lawyer collectors to make sure only the documents that favor making money on the case are produced, the lawyers who work for the firm will not know what has taken place. The lawyer employees never see the smoking gun email as a result, so are none the wiser when there is no smoking gun email to produce. If one later turns up from third-party discovery, for example, the ignorant lawyers cannot be easily sanctioned, but the non-lawyers who culled the file are perhaps guilty of no crime. A court sanction (such as a spoliation instruction) might be imposed on the clients of the ABS firm or the firm itself might be sanctioned, but the non-lawyer owners cannot (absent some criminal law) be punished individually with the loss of their career as would lawyer owners.

What sanctions can be imposed on ABS non-lawyer owners who create “evidence” that helps maximize profits? Non-lawyer owners of a law firm would have full access to law firm files and when
properly motivated could either manufacture or “lose” evidence that does not help the bottom line, but if they are found out what punishment would they suffer? Disbarment is not one of the sanctions that they will face as they are not members of the bar, yet as owners they will have the power to hire and fire employees who do not at least look the other way when there is money to be made if the facts were just a little bit better for their case. Insurance fraud is a crime punishable by imprisonment, but is litigation fraud? If not, what then are the sanctions that are available to punish non-lawyer owners of law firms for violating legal ethics, and are they sufficiently severe enough to have the same deterrence effect that the threat of disbarment does for lawyers? If mail fraud or wire fraud cannot be proven beyond a reasonable doubt, what administrative-type sanction may be imposed on non-lawyer owners? The Report mentions that the DC rule treats non lawyer participants as if they were lawyers, but does not explain what sanction such non lawyer participants would actually suffer if found responsible for a ethical violation since disbarment is not a punishment that may be imposed on non-lawyers.

The Report mentions that the question should be whether ABS would pose a greater threat to the professional independence of lawyers than those that currently exist (pg 13-14) and cites to a Minnesota Law Review Article, which claims the case has not been made that ABS will pose more threats to professional independence of lawyers than currently exist in everyday practice of lawyers in law firms. Yet, whatever pressures currently exist in the private practice of law, each of those pressures is counter-balanced by the disbarment sanction. That is not, I submit, a mere glorification of form over substance.

Thank you for your consideration.

Sincerely,

Matthew J. Walko
Member of the Massachusetts Bar

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