

Comments on: **Issues Paper Regarding Alternative Business Structures**

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Responsive Law thanks the Commission for the opportunity to present these comments. Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to its consumers.

Responsive Law has testified to this Commission and to the Ethics 20/20 Commission numerous times to urge the bar to allow the broadest possible range of alternative business structures (ABS). We renew that recommendation today.

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Marginal Changes to ABS Restrictions Will Have Only Marginal Effects on the Access to Justice Crisis

Among the five types of ABS that the Commission is examining, four require active involvement by non-lawyer investors, rather than passive investment. ABS that require active involvement by non-lawyers may be helpful on the margins, as it could allow professionals ranging from accountants to social workers to more easily provide services in combination with lawyers. However, it will do little to address one of the fundamental reasons for the lack of affordable access to the legal system.

As Responsive Law and numerous others have pointed out, the American access to justice crisis is vast. Gillian Hadfield has calculated that, under current regulatory restrictions, it would take at least \$50 billion per year to secure just one hour of legal assistance each for those whose legal needs have gone unmet. With the average American household facing two problems per year that could benefit from legal assistance, conventional methods of

providing legal services will not be sufficient to meet the need for help.¹

Allowing outside investment would allow a new model of legal service provision to arise: the mass-market consumer law firm. Just as H&R Block has made navigating the tax code widely accessible and affordable on a national scale, a mass-market law firm could allow millions of Americans to affordably and accessibly navigate the legal system.

The economies of scale that can only be achieved by outside investment would bring the costs of legal services down. Almost every law firm providing services to middle-income individuals is a small business of no more than a dozen attorneys. A large national firm specializing in these issues could provide standardized training to the attorneys it works with, perform quality control on services offered to clients, and let lawyers focus on practicing law rather than finding clients and running a business.

In addition, mass-market consumer law can be the solution to one of the paradoxes of the modern legal market: too many out-of-work lawyers, yet too many consumers unable to afford a lawyer. Mass-market consumer law firms could provide the training ground for many of the thousands of newly minted lawyers who have no visible path to entering the profession. Many recent law school graduates would welcome the ability to work at a national, regional, or state based firm with a steady paycheck, internal training on lawyering skills, and opportunities for internal advancement.

Current Restrictions on Outside Investment Have Hindered Companies Trying to Offer Mass-Market Lawyer Services

We have seen some attempts within the current system to approximate a mass-market consumer law firm. For example, Avvo recently launched Avvo Legal Services, offering fixed-fee legal services in 18 states. The company charges lawyers a marketing fee to participating lawyers based on a percentage of the fee charged to

¹Gillian, K. Hadfield, "The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law" 38 Int'l Rev. L. & Econ. 43 (2014); USC Law Legal Studies Paper No. 13-16. Available at <http://ssrn.com/abstract=2333990>, pp 4-8.

clients. This practice has come under fire as an unethical fee-sharing agreement; Avvo has defended the fee arrangement as consistent with ethics rules.² It is conceivable that Avvo's financial arrangements could be challenged in one or more jurisdictions and found in violation of fee-sharing restrictions. Even if challenges were unsuccessful, it would be wasteful for Avvo to have to defend itself against these challenges, in addition to already having to contort the structure of these transactions to avoid restrictions on fee sharing.

For smaller companies and startups, the restriction on passive investment is even more onerous. Startups bring innovation to markets. However, due to restrictions on non-lawyer investment, legal service startups that employ lawyers to provide services to the public cannot seek the investor funding that allows innovation in other fields to flourish. Even if they were able to creatively work within the existing regulatory framework, a cash-strapped startup would have to spend a significant portion of its budget on creating, maintaining, and legally defending its financial practices against accusations of unethical fee-sharing. These resources would be better spent on driving innovation, lowering prices, and improving customer satisfaction than on compliance with an anachronistic regulation.

The Risks to Consumers from ABS are Overstated

The Commission describes several risks from ABS implementation that others have cautioned against. The first of these, a threat to lawyers' core values, is the most common argument against ABS. The fear expressed by proponents of this argument is that lawyers in an ABS may place the financial concerns of ownership ahead of the interests of their clients.

This argument makes the unwarranted assumption that external financial pressure on lawyers would be greater than the financial pressure they face from themselves or other lawyers. As any associate at a large firm would point out, the pressure from partners

² Robert J. Ambrogi, "Is Avvo's fixed-cost service a fee-sharing violation?", http://www.abajournal.com/magazine/article/is_avvos_fixed_cost_legal_service_a_fee_sharing_violation, May 1, 2016.

to bill over 2000 hours per year provides an incentive to overbilling that is as great as any pressure from a non-lawyer owner might be.

The Australian model, nevertheless, has devised an effective system to counteract unethical behavior for firms who have outside investment. The Australian model has protected professional independence by requiring that such firms designate one of their lawyers as a Legal Practitioner Director who is responsible and liable for any violations of lawyers' ethical duties.³

Another risk mentioned by the Commission is that pro bono hours might decrease in a firm with outside investment. The average lawyer provides just over an hour per week in pro bono services⁴, so one should not exaggerate the scope of a potential diminution of pro bono services. More to the point, there's no reason to expect that the current reasons for taking pro bono cases would cease to exist in a firm run by non-lawyers. Corporations other than law firms value the public relations value of performing pro bono work, as well as its appeal to their employees, and even its value to society. A world in which pro bono service dries up under ABS is a counterfactual world in which no corporations engage in charitable work of any kind.

The Commission also raises the issue of a threat to attorney-client privilege that could arise if lawyers share information with non-lawyers in an ABS. This appears to be an issue that would only occur in an ABS with active co-ownership by non-lawyers, such as a partnership between accountants and lawyers. In the case of passive investment, there's neither reason nor opportunity for a lawyer to share confidential information with corporate ownership, and safeguards could be enacted legislatively or through ethics rules to prevent such breaches of the attorney-client privilege.

Finally, the Commission addresses the "risk" that ABS will not deliver its identified benefits.⁵ The Commission's own analysis of this

³ For an overview of Australia's legislation/policies that governs incorporated legal practices and mandates a Legal Practitioner Director, see http://www.americanbar.org/content/dam/aba/events/international_law/2013/08/section-of-international-law-at-the-aba-s-2013-annual-meeting/AlternativeBusinessStructures.authcheckdam.pdf.

⁴ http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_Supporting_Justice_III_final.authcheckdam.pdf, p. vi

⁵ The idea that a lack of benefits could be considered a "risk" is a bit of logical and linguistic gymnastics. In this context, "risk" properly refers to harm that

issue puts to rest the idea that this is an actual risk. Studies of the implementation of ABS in the UK have shown that, while it is still too early to measure an impact of ABS on access to justice, ABS has given firms the opportunity to leverage outside investment into improved technology and methods of service delivery.⁶

In analyzing whether to proceed with allowing ABS, it may be useful to look at the issue from another perspective: Suppose that we were setting out today to regulate the form of lawyers' businesses *de novo*. Would we put restrictions on the business relationships between lawyers and non-lawyers? Perhaps. For example, we might put in place safeguards akin to those in the UK and Australia to reinforce lawyers' professional independence.

But a requirement that only lawyers can own legal practices? It would be hard to imagine a reason to justify such a broad restriction. It requires a belief that lawyers are the only people who can protect the public from the possibility of their own unethical conduct. Unless proponents of the status quo can meet that burden of proof, then the only reason for the current restrictions is inertia.

Conclusion: The Commission Should Recommend Allowing A Full Range of ABS, Including Passive Investment

The Commission has also analyzed multiple studies of ABS in the UK and Australia and found no evidence of harm to consumers or to lawyers' professional values. Perhaps the most convincing evidence for allowing ABS is that no jurisdiction that has adopted ABS has reversed course to once again ban it. We urge the Commission to recommend that the ABA follow its international colleagues and endorse a full range of ABS, including passive investment, so that American lawyers can experiment with more efficient models of service delivery that will benefit the profession and the American public.

could come from permitting ABS. Not delivering promised benefits would bring no harm to anyone, as it would merely maintain the status quo.

⁶ Issues Paper at 14.