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

Re: ABA Commission on the Future of Legal Services/Issue Paper Regarding Alternative Business Structures  

Dear Ms. Englehart:  

I write on behalf of the ABA Tort Trial & Insurance Practice Section (TIPS) in response to the solicitation of comments on the April 8, 2016 Issue Paper Regarding Alternative Business Structures (the Report). Our members have significant concerns about the manner in which comments to the Report were solicited and the substance of the Report.  

TIPS appreciates that one of the goals of the ABA’s mission includes an evaluation of access to the American judicial system and the delivery of legal services. Preserving those particular attributes of our noble profession remains paramount. At the same time, TIPS strongly believes that Goal I of the ABA’s mission to service our members cannot be ignored or marginalized. In substance, the Report seems to stray from the core of ABA Goal I and risks further alienation of our membership.  

Historical Considerations  

Debate of the central issue of whether to permit non-attorney ownership of law practices, and influence on the professional practice of law in the form of Alternate Business Structures (ABS) is already part of the historical columns of topics that were raised, debated, and resolved in the ABA. The prohibition of non-attorney ownership of law practices, and sharing of legal fees has long been embedded as one of the governing principles of the independent practice of law in the United States. This prohibition was  

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1 The comments herein are preliminary and based solely on the Report as issued. TIPS expressly reserves the right to submit additional comments to the Commission, especially if additional relevant information about the Commission or its study is released.
reflected in the pre-Model Rules ABA Canons of Professional Ethics (Canon 33)\(^2\), and carried forward in 1969 in the ABA Model Code of Professional Responsibility (DR 3-103(A)) which prohibited a lawyer from forming “a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.” DR 3-012(A) further noted that lawyers may not “share legal fees with a non-lawyer” except under very narrow circumstances. By 1983, work of the Commission on Evaluation of Professional Standards (Kutak Commission) led to the development of the Model Rules of Professional Conduct. Model Rule 5.4, adopted in 1983, has survived largely intact, except for some minor amendments which do not affect the basic prohibitions of the Canons and Model Code.

In 2000, the ABA House of Delegates rejected a proposal to allow multidisciplinary practice at law firms. The HOD adopted the MacCrate resolution which stated that “[t]he sharing of legal fees with nonlawyers and the ownership or control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession . . . The law governing lawyers that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership of control over entities practicing law should not be revised.”

As recently as 2011, permitting alternative business structures was considered by the ABA Commission on Ethics 20/20. In April, 2012, the Ethics 20/20 Commission announced that “[s]ince its creation in 2009, the commission has undertaken a careful study of alternative law practice structures . . . Based on the commission’s extensive outreach, research, consultation and the response of the profession, there does not appear to be a sufficient basis for recommending a change to ABA policy on nonlawyer ownership of law firms.” Clearly, the Ethics 20/20 Commission considered the same issues addressed in the Report, including the Canadian, Australian and U.K. experiences. See April 5, 2011 Issue Paper Concerning Alternative Business Structure.

Given the exhaustive analysis by prior ABA entities, precisely why the Commission decided to embark on a new study of ABS over a road already well-traveled by the Ethics 20/20 Commission’s work (a short 5 years ago) is unclear.

**Rationale For Amending Model Rule 5.4**

In support of the notion that Model Rule 5.4 be amended to permit nonlawyer ownership of law firms and fee sharing, the Commission offers several arguments in favor, including the following:

- ABS law practices have been adopted outside the U.S.
- There are “Potential” Benefits of permitting an ABS
- The risks of ABS are not that bad

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\(^2\) “Partnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where any part of the partnership’s employment consists of the practice of law.” Canon 33.
ABS Outside the US.

The Report mentions that ABS is permitted in the UK, Australia and Canada. The Australian experience with ABS was discussed in much greater detail in the 2011 Ethics 20/20 issue paper. The proponents suggest that since these countries have not abandoned the ABS model, this means that it can work here, without consideration of the differences between the UK model and our own (solicitor/barrister, winner pays attorney fees, etc.). The suggestion that there is “no evidence that ABS’s have done harm in the UK” is not a ringing endorsement.

It is certainly instructive to note the broader implications presented by nonlawyer ownership of law firms. In 2007, Slater & Gordon, a major personal injury firm in Australia filed a public stock offering and in 2012 a publicly traded U.K. company, Quindall Portfolio, announced the purchase of a personal injury law firm. These two examples demonstrate that management of a publicly traded law firm would be beholden to its shareholders, and be subject to, at least in the United States, other laws and regulations that could conflict with the primary purpose of the legal practice, namely, client service.

“Potential” Benefits of ABS

The Report outlines four “Potential” benefits, three of which are merely economic “conveniences.” The cited benefits of financial flexibility, operational flexibility and cost-effectiveness can be boiled down into one simple mantra: With an ABS, the practice of law can become easier and, by implication, could be more profitable. The convenience of running a law practice should in no way be measured against ethical concerns implicit in relinquishing control of professional responsibility to non-lawyers.

The only cited “potential” benefit which merits any consideration is the “Increased Access to Justice.” This reasoning is flawed because it represents an unproven hypothesis that less well-off clients might find legal services more affordable if non-lawyer capital could be invested in law firms. In fact, the counter hypotheses would suggest otherwise. Nonlawyer investors in a law practice would be more likely to want to enhance the return on investment, resulting in increased costs to clients (who the hypotheses suggests are already unable to afford legal services). The charitable investor who expects no return already has an outlet for her charitable contributions (e.g., Legal Services Corporation).

Frankly, the foundation for the suggestion that ABS will promote access to the American judicial system lacks substance in the Report and seems contrary to the realities of the practice of law in the United States. The fact that the District of Columbia and Washington State have permitted ABS does not signal a groundswell of support.

Potential “Risks of ABS

The Report cites to the following risks:

- Threat to Lawyer’s Core Values
- Decreased Pro Bono Work
• Threat to Attorney-Client Privilege
• Failure to Deliver Identified Benefits

Unlike the potential benefits, the core value and risks to the practice of law by the greater amount of members of the ABA are real and not hypothetical. The core value of the independence of the profession would be severely challenged by the dual allegiances owed to clients and demanded by investors, shareholders and managers. No man/woman can serve two masters. The Model Rules and ethics rules of any jurisdiction apply to the licensed professional, who is ultimately responsible for the conduct of non-professional under her control. The ABS model could turn this on its head. The availability of professional liability insurance that would cover malpractice by nonlawyers is not a certainty.

The inability of the bar to discipline nonlawyers is obvious. The existence of even the smallest chance that a compromise of the lawyer’s professional independence and loyalty to her client first outweighs any “potential” benefit that might be derived from a global change in policy resulting from the proposed ABS model.

The threat to the foundation of the attorney-client privilege is also at risk. While the attorney-client privilege (including work product privilege) extends to law firm employees working under the control of a lawyer, it does not necessarily extend to nonlawyer managers supervising the lawyer. A single instance where the privilege is waived by conduct outside the control of the lawyer working for an ABS, especially when a court permits disclosure of the confidences thought to be privileged, would cause a precedential cascade that could cripple the ABS and lead to exposure to untold malpractice liability.

The Process

The timing of this new effort to secure ABA approval of the ABS model is odd, given the recent (2011) rejection of essentially the same proposals after much more thorough review. Nothing new has been presented in support of the proposal, and the short timeline for comments from entities has been unnecessarily burdensome.

Although the Commission graciously extended by four (4) days the deadline by which members and entities within the ABA may submit comments to the Report, additional time to allow a fair opportunity for members of the Association to be heard is required. It is difficult to formulate any argument that a study of the feasibility of the ABS model, which strikes at the core of the practice of law in the United States, should be rushed.

Conclusion

Respectfully, TIPS opposes efforts to either promote ABS or to revitalize what is believed to be an issue already resolved by the Ethics 20/20 Commission. Nothing cited in the Report as a “benefit” would enhance the profession or support the core values embraced by members of the Association. The members of TIPS are opposed to any proposal to modify Model Rule 5.4 to allow nonlawyer ownership of law firms.
TIPS expressly reserves the right to submit further comments to the Commission and welcomes the opportunity to highlight the objections expressed by its members.

Very truly yours,

G. GLENNON TROUBLEFIELD
Chair, ABA Tort Trial & Insurance Practice Section

cc: Mary Ann Peter, TIPS Section Director