

CIVIL JUSTICE RESPONSE

JUNE 2016

IN THIS ISSUE

An ABA Commission recently sought comment on whether to propose a change in ABA policy to permit alternative business structures (ABS) for legal services. ABS structures allow non-lawyers to hold ownership interests in law firms and permit investment by non-lawyers; in some jurisdictions, an ABS can offer legal and non-legal services. In 2012, another ABA Commission studied the issue and concluded that sufficient support did not exist to recommend a change to ABA policy. In response to comments from the IADC and others, the latest ABA Commission likewise decided not to submit a proposal to the House of Delegates to permit ABS.

Controversial ABA Alternative Business Structures Proposal Stalls...Again

ABOUT THE AUTHORS



Mark Behrens co-chairs Shook, Hardy & Bacon L.L.P.'s Washington, D.C.-based Public Policy Group and chairs the IADC's Civil Justice Response Committee. Mark is active in civil justice issues on behalf of business and civil justice organizations, defendants in litigation, and insurers. He can be reached at mbehrens@shb.com.



Christopher Appel is an associate in Shook, Hardy & Bacon L.L.P.'s Public Policy Group. Mr. Appel's work focuses on tort law and civil justice system reform. He can be reached at cappel@shb.com.

ABOUT THE COMMITTEE

The Civil Justice Response Committee works to establish a nationwide information network that promotes the rapid dissemination of information about legislation, rulemaking, judicial selection, and key elections likely to affect civil litigation and liability laws, in order to give IADC members and their clients timely opportunities to participate in these processes armed with information that can affect the outcome of the debate or controversy. If prompt, concerted action is taken. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



Pat Long-Weaver
Vice Chair of Publications
Long-Weaver, Manning, Antus & Antus LLP
plweaver@wmafirm.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

In April 2016, an American Bar Association (ABA) Commission on the Future of Legal Services sought comments from the legal community to explore potential support for alternative business structures (ABS) – business models through which legal services are delivered in ways that are currently prohibited by the Model Rules of Professional Conduct. Presently, the Model Rules “prohibit nonlawyer ownership of law firms, nonlawyer management of law firms, and sharing fees with nonlawyers (except under very limited circumstances).”¹

As recently as 2012, an ABA Commission on Ethics 20/20² concluded after “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.”³ “The response was extremely negative, and categorically so,” according to working group co-chair Ted Schneyer, a legal ethics professor at the University of Arizona.⁴

“[O]pponents wanted the Model Rules to continue to bar lawyers from practicing law in any firm owned in any form and to any degree by non-lawyers,” Professor Schneyer said.⁵

The latest Commission’s attempt to revive consideration of ABS triggered immediate criticism from lawyer organizations such as the IADC, state bars, prominent members of the plaintiff and defense bars, and even key segments of the ABA itself. In response to overwhelmingly negative feedback, again, the Commission has decided not to bring a resolution to the House of Delegates to change existing ABA policy on ABS at the ABA’s 2016 Annual Meeting in August. The Commission is expected to issue a final report with findings and recommendations on ABS before disbanding.

ABS Proposal

The Commission on the Future of Legal Services was created in August 2014 to

¹ Memorandum from ABA Commission on the Future of Legal Services to ABA Entities, Courts, Bar Associations, Law Schools, Disciplinary Agencies, Individual Clients and Client Entities (Apr. 8, 2016), at 2, available at http://www.americanbar.org/content/dam/aba/images/office_president/alternative_business_issues_paper.pdf.

² See Memorandum from ABA Commission on Ethics 20/20 Working Group on Alternative Business Structures to ABA Entities, Bar Associations, Law Schools, and Individuals (Apr. 5, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf.

³ James Podgers, *Ethics 20/20 Commission Suspends Campaign to Draft a Proposal on Nonlawyer Ownership of Law Firms*, ABA J., Apr. 16, 2012, available at http://www.abajournal.com/news/article/ethics_20_20_commission_suspends_campaign_to_draft_a_proposal_on_nonlawyer/.

⁴ Ted Schneyer, “Professionalism” as Pathology: The ABA’s Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities, 40 Fordham Urb. L.J. 75, 82 (2012).

⁵ *Id.*

examine the delivery of legal services in the United States and to recommend innovations to improve the delivery of those services and the public's access to justice. In April 2016, the Commission released an Issues Paper that included an examination of ABS and solicited comments on various forms of ABS, including:

- 1) Permitting non-lawyers to actively participate in the management of entities that deliver legal services and to have a minority ownership interest;
- 2) Permitting non-lawyers to actively participate in the management of entities that deliver legal services and to have an ownership interest (with no limitation on the percentage of non-lawyer ownership);
- 3) Permitting non-lawyers to actively participate in the management of entities that deliver both legal and non-legal services and to have a minority ownership interest;
- 4) Permitting non-lawyers to actively participate in the management of entities that deliver both legal and non-legal services and to have an ownership interest (with no limitation on the percentage of non-lawyer ownership);
- 5) Allowing any of the above options, but with passive investment by non-lawyers.

The Commission noted that a potential benefit of ABS could be increased access to justice achieved through greater cost-effectiveness at firms with more financial and operational flexibility. The Commission

pointed to the existence of types of ABS authorized in the District of Columbia and the State of Washington, as well as in foreign countries such as Australia, England, and Wales, as support for the potential viability of ABS.

The Commission also acknowledged potential risks of ABS, including a threat to lawyers' "core values" of independent professional judgment, the attorney-client privilege, and decreased pro bono work performed by lawyers focused on maximizing a return on investment. The Commission attempted to mute these concerns by asserting that there "is no evidence that ABS has caused harm" in other countries.⁶

Criticisms of ABS Flood ABA

The Commission's Issues Paper generated substantial criticism from significant ABA contingencies. For example, the State Bars of Illinois, Missouri, New Jersey, New York, and Texas filed comments opposing regulatory reforms that would allow ABS. They were joined by defense lawyer groups including the IADC, DRI – The Voice of the Defense Bar, Association of Defense Trial Attorneys, and Federation of Defense & Corporate Counsel. A number of ABA groups, including the Litigation Section, Tort Trial & Insurance Practice Section (TIPS), Family Law Section, and Solo, Small Firm and General Practice Division also submitted

⁶ Memorandum from ABA Commission on the Future of Legal Services to ABA Entities, Courts, Bar Associations, Law Schools, Disciplinary Agencies,

Individual Clients and Client Entities, *supra*, note 1, at 12.

comments opposing adoption of ABS. The Family Law Section filed a particularly colorful comment, posing to the Commission “the following question: WHAT PART OF ‘NO!’ DO YOU NOT UNDERSTAND?”⁷

Criticisms regarding the Commission’s proposal included both procedural and substantive issues.

A number of commenters cited the “short notice”⁸ and “rushed” nature of the proposal and comment period, stating that the comment period was “inadequate given the complexity of the issues.”⁹ The Commission issued its proposal on April 8, 2016, and closed the comment period on May 6, 2016, leaving interested parties with little time to learn of the proposal and formulate and submit written responses. The immediate past section chair of the ABA’s TIPS section said that the highly abbreviated comment period “on something this significant is problematic and sends a clear message that

comments are not particularly welcomed by the Commission.”¹⁰

Opponents also noted that the same issues were raised just a few years ago by the ABA’s Commission on Ethics 20/20 and were strongly criticized. Opponents of the 2016 proposal, including the IADC, said that circumstances had not materially changed since the last review to merit a fundamental change in ABA policy. An ABA leader questioned why the Commission would propose practices or policies that the ABA’s “members oppose or have opposed in the past” when the ABA has been hemorrhaging members and is “in the midst of a membership crisis.”¹¹

In addition, opponents challenged the Commission’s principal justification that introducing ABS would increase access to justice. Specifically, opponents argued that the Issues Paper provided no empirical evidence indicating that greater access to

⁷ Email from Marshall J. Wolf, Section Delegate, ABA Family Law Section, to ABA Commission on the Future of Legal Services (May 3, 2016), *available at* http://www.americanbar.org/content/dam/aba/images/office_president/family_law_abs.pdf.

⁸ Memorandum from Fred D. Raschke, President of Association of Defense Trial Attorneys, to ABA Commission on the Future of Legal Services (May 4, 2016), at 1, *available at* http://www.americanbar.org/content/dam/aba/images/office_president/association_of_defense_trial_counsel_abs.pdf.

⁹ Memorandum from Laura E. Proctor, President of Defense Research Institute, to ABA Commission on the Future of Legal Services (May 4, 2016), at 1, *available at* http://www.americanbar.org/content/dam/aba/images/office_president/entertainment_and_sports_abs.pdf.

[ges/office_president/dri_the_voice_of_the_defense_bar_abs.pdf](http://www.americanbar.org/content/dam/aba/images/office_president/dri_the_voice_of_the_defense_bar_abs.pdf).

¹⁰ Email from Michael Drumke to ABA Commission on the Future of Legal Services (Apr. 28, 2016), *available at* http://www.americanbar.org/content/dam/aba/images/office_president/entertainment_and_sports_abs.pdf; Email from Janine Small, Forum on the Entertainment and Sports Law Industries, to ABA Commission on the Future of Legal Services (Apr. 28, 2016), *available at* http://www.americanbar.org/content/dam/aba/images/office_president/entertainment_and_sports_abs.pdf.

¹¹ *Id.*

justice has been achieved in any of the jurisdictions that allow law firm ownership by non-lawyers.

The suggestion in the Issues Paper that ABS has been embraced to some extent in other countries, in part because it has not been abandoned, also failed to analyze any of the exceptional features of the United States civil justice system that may make ABS unwarranted. For example, the United States system of contingency-fee financing of litigation, rejection of Euro-style “loser pays,” opt-out class actions, and the availability of punitive damages in areas such as personal injury litigation appear to undercut the Commission’s purported benefits of introducing ABS to improve access to justice.¹²

In addition, the Issues Paper provided no evidence that ABS would achieve any other stated goals, such as improving financial flexibility beyond traditional bank and other borrowing methods or increasing the quality of legal services. Rather, the studies cited by

the Commission appeared intended to show that adoption of ABS in the United States would likely “do no harm.”

Contrary to the speculative benefits raised in the Commission’s Issues Paper, opponents raised “real and not hypothetical”¹³ risks to lawyers’ “core values.” For example, Texas bar groups said that “ABS reflects an effort to meld a profession with business,”¹⁴ which would effectively require lawyers to serve two masters – the non-lawyer corporate owner and the client – and impair lawyers’ independent professional judgment in providing legal services.¹⁵

Others raised the concern that if non-lawyer invested in or owned law firms, the focus on maximizing profit might force lawyers to perform less pro bono work, which would harm the public’s access to justice. As the ABA’s Business Law Section Working Group on these issues added, the full impact on the future delivery of legal services is “impossible to predict and must be studied over a longer time frame.”¹⁶

¹² See Memorandum from Joe O’Neil, President of International Association of Defense Counsel, to ABA Commission on the Future of Legal Services (May 3, 2016), at 2, available at http://www.americanbar.org/content/dam/aba/images/office_president/international_association_of_defense_counsel_abs.pdf.

¹³ Memorandum from G. Glennon Troublefield, Chair of ABA Tort Trial & Insurance Practice Section, to ABA Commission on the Future of Legal Services (May 6, 2016), at 3, available at http://www.americanbar.org/content/dam/aba/images/office_president/tips_abs.pdf.

¹⁴ Memorandum from Texas Association of Defense Counsel, Texas Trial Lawyers Association, and Texas

Chapters of the American Board of Trial Advocates to ABA Commission on the Future of Legal Services (May 4, 2016), at 2, available at http://www.americanbar.org/content/dam/aba/images/office_president/texas_association_of_defense_counsel_abs.pdf.

¹⁵ See Memorandum from ABA Business Law Section Ad Hoc Working Group on the Future of the Delivery of Legal Services to ABA Commission on the Future of Legal Services (Apr. 26, 2016), at 1-2, available at http://www.americanbar.org/content/dam/aba/images/office_president/aba_business_law_section_ad_hoc_working_group_abs.pdf.

¹⁶ *Id.* at 2.

A final concern voiced related to the loss of self-governance that could occur if non-lawyer ownership of law firms is permitted. As DRI – The Voice of the Defense Bar explained, “Once the legal profession is no longer viewed as independent, we will no longer be allowed the privilege of self-governing.”¹⁷

Proponents of ABS

In its Issues Paper, the Commission attempted to address potential concerns about ABS. The Commission relied principally on a few studies from foreign jurisdictions adopting types of ABS to conclude that there is no evidence ABS undermines lawyers’ professional judgment or impairs the attorney-client privilege. The Commission also cited the existence of ABS in jurisdictions such as the District of Columbia (which has allowed ABS since 1991), as well as the existence of safeguards in foreign jurisdictions such a “fitness-to-own” test for non-lawyers to invest in law firms, to support the proposition that ABS could be viable if adopted more broadly in the United States.

Opponents challenged these arguments. They contended that the limited studies and other purported evidence cited by the Commission did nothing to quell concerns

about ABS. As the Chair of the ABA’s TIPS Section stated, “The suggestion that there is ‘no evidence that ABS’s have done harm in the UK’ is not a ringing endorsement” for wholesale adoption of ABS in the United States.¹⁸ In addition, opponents noted that the claim of the District of Columbia as a working example of ABS is misleading given that, in practice, few firms use ABS because lawyers barred in the District often practice elsewhere and do not want to risk running afoul of other states’ rules of professional conduct. Opponents also rejected the notion of a non-lawyer “fitness-to-own” test or agreement by a non-lawyer to be subject to lawyer rules of professional conduct. Such “safeguards,” opponents argued, were effectively meaningless because they entail non-lawyers agreeing to conform to rules of a profession of which they are not a part.

Comments supporting adoption of ABS came mostly from entities such as Burford Capital, LegalZoom.com, and Avvo, Inc., and the Association of Legal Administrators. Burford noted that “[i]n the past few years, law firms have increasingly looked to Burford to provide financing on a portfolio basis, in no small part because this structure provides them great flexibility in how they may use capital on behalf of clients and their own businesses – flexibility that an ABS structure would also provide.”¹⁹

¹⁷ Proctor, *supra*, note 9.

¹⁸ Troublefield, *supra*, note 13, at 1.

¹⁹ Memorandum from Christopher P. Bogart, Chief Executive Officer, Burford Capital, to ABA

Commission on the Future of Legal Services (May 5, 2016), 1-2, available at http://www.americanbar.org/content/dam/aba/images/office_president/burford_capital_abs.pdf.

Conclusion

A common theme in the responses to the Commission's proposal on ABS was why the ABA would consider any proposal that "risks further alienation of [ABA] membership."²⁰ Some opponents, such as the ABA's Solo, Small Firm and General Practice Division, believed the proposal represented "an effort by the proponents of ABS to further see the diminishment or elimination of solo and small firm competition."²¹

Ultimately, the Commission seems to have appreciated the overwhelmingly lack of support for ABS within the ABA. The Commission decided not to submit a policy for consideration by the House of Delegates at the ABA's upcoming Annual Meeting in August 2016. The Commission will, nevertheless, submit a final report with findings and recommendations on ABS.

²⁰ Troublefield, *supra*, note 13, at 1.

²¹ Memorandum from Stephen B. Rosales, Chair of ABA Solo, Small Firm and General Practice Division, to ABA Commission on the Future of Legal Services (May

6, 2016), at 1, available at http://www.americanbar.org/content/dam/aba/images/office_president/gpsolo_abs.pdf.

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

APRIL 2016

It is Time to Amend Federal Rule of Evidence 702

David E. Bernstein and Eric G. Lasker

MARCH 2016

Reptile Mediation? Washington Federal Court Considers, Then Rejects, Proposal to Disadvantage Insurers in Mediation

Mark Behrens and Cary Silverman

FEBRUARY 2014

Federal Rules Revisions - Make Your Voice Heard

J. Mitchell Smith and Pat Long-Weaver