

May 3, 2016

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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 – Alternative Business Structures

Dear Ms. Englehart:

I am writing on behalf of the approximately 2,500 members of the International Association of Defense Counsel (IADC) regarding the ABA Commission on the Future of Legal Services April 2016 issue paper on alternative business structures (ABS). We have significant concerns about both the process and substance of the report.

The adoption of ABS structures would have a critical impact on the future of the legal profession and the manner in which attorneys – plaintiff and defense – practice law. There should be much more study, both within and outside the ABA, before such radical changes to the legal profession are advanced. We and others have had less than a month to review the report. That is plainly insufficient for the Commission's proposal to be fully vetted, as it should be.

As to substance, ABS structures were discussed within the ABA, and rejected, not that long ago. As the 2016 issue paper acknowledges, the ABA Commission on Ethics 20/20 conducted the last ABA review on this issue in 2011, and it decided not to propose any policy changes. Nothing has materially changed since that review to merit a fundamental change in ABA policy.

We are also concerned that ABS structures could diminish, not improve, access to justice and the quality of legal services. Capital from nonlawyer investors and owners will inevitably flow to practice areas (and even geographic areas) that are profitable. Pro bono, an important part of the profession from the IADC's perspective, would be threatened. Further, ABS structures could erode reputational incentives that exist today to encourage lawyers to perform their best work, while simultaneously reducing the effectiveness of sanctions for misconduct. The ultimate sanction of disbarment would be hollow to a nonlawyer.

Other purported benefits offered in the report are speculative. The studies cited in the report do not appear to provide proof as to the alleged benefits of ABS structures. For instance, the evidence appears to be lacking that ABS structures would, in fact, improve access to justice, provide financial flexibility beyond traditional bank and other borrowing methods, or increase the quality of legal services, among other stated goals.

Rather, it appears that the studies cited in the report generally establish that ABS structures have been embraced to some extent in other countries and have not been abandoned. There are, of course, a number of exceptional features of the United States civil justice system that

make comparisons to those other systems suspect, such our 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. ABS structures may provide a role elsewhere that is unnecessary in the United States with respect to creating access to justice.

Finally, it should be remembered that independence is not only important for a lawyer’s judgment, but also for professional satisfaction. As business owners, lawyers have a lot of flexibility in deciding what clients they want to represent, how much they want to charge for their services, what hours they want to work, where they want to work, and even what they want to wear to work. If the legal profession were to go to the model of physicians working for medical corporations, with lawyers becoming salaried employees of legal services corporations, lawyers would become mere revenue producing units for outside business owners. On balance, we believe fewer lawyers would prefer that system over the current system. The ABA should carefully weigh whether such changes could cause membership in the profession (including the ABA) to shrink, creating new problems with respect to reduced access to legal services.

For these reasons, among others, we urge the ABA not to adopt any policy changes with respect to ABS structures.

A handwritten signature in black ink, appearing to read "JEO", with a large, stylized flourish on the left side.

Joe O'Neil
President